Firestop Contractors International Association
Industry Conference and Trade Show

November 9, 2012
Orlando, FL
Election 2012
Do You Elect to Take the Job?
(and if so under what terms-How Long Are you Willing to be Liable?)

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The Most Important Decision You Make on a Job is the First One: Whether to Take the Job and Under What Terms

1. What Governs the Length of Time You are Liable for Your Work?
   1. Statute of Limitation
   2. Statute of Repose
   3. Warranties

2. Insurance

3. Licensed Applicator Agreements

4. Trade Association Model Specification

5. Contract Negotiations
   1. Spearin Doctrine
   2. UCC
Statute of Limitations

- A time established by statute after which the right to file suit is extinguished.
- Differs from state to state
- Differs based on the type of claim within a state.
  - Examples
    - Georgia Breach of:
      - Written contract-6 years (O.C.G.A § 9-3-24)
      - Verbal contract-4 years (O.C.G.A. § 9-3-25)
      - Contract under seal-20 years (O.C.G.A. § 9-3-23)
Statute of Limitations Apply to More than Just Contract Claims

- Statutes Limitations Apply to Torts, or wrongs done against a person or their property which do not arise out of contract.

- Example:
  - Georgia: Damage to Personal Property and Trespass/Damage to Real Property-4 years (O.C.G.A. § 9-3-30 and § 9-3-31)
When Does the Clock Start Ticking?

• Breach of Contract usually starts from when the work was done-substantial completion?
  – However, other courts have recently ruled “the statute of limitations runs from the time of the breach, which is not always substantial completion.” Facility Constr. Mgmt. Inc. v. Ahrens Concrete Floors, Inc., 1:08-CV-01600-JOF, 2010 WL 1265184 (N.D. Ga. Mar. 24, 2010).
Potential Liability-Try to Make It Jive Up Stream and Down

FROM UP STREAM

- Breach of Contract
- Privity of Contract
  - Only between you and your contracting party
- Contractual Obligation
  - Typically to Build per the plans and specs and free from defects not inherent in Contract Docs.
    - AIA A201 Para. 3.5
      - Often incorporate ASTM, UL, FM standards.
  - Contracts construed against the drafter
Breach of Contract Traps and Tips

– Trap:

– Conflict between warranty obligation in boilerplate contract T’s and C’s and the Specification for Firestopping System.

– Typically, a contract will be construed against the drafter

– However, commonly we see contracts that make you agree to waive this element and:
  
  • “Review Contract Documents: . . . it shall be the duty of the Contractor to notify the Architect of such omissions, errors, or discrepancies, and in no case proceed in uncertainty.”
• “No Presumption Against Drafter: This Agreement has been drafted through a cooperative effort of the Parties, and no individual party shall be considered the drafter of this Agreement so as to give rise to any presumption or convention regarding construction of this document.

• Tip:
  – Use AIA Documents or similar language
  • AIA A101 9.1.2 states that the obligation of the Contractor to carefully study the contract documents is to facilitate coordination and construction and not to discover errors or omissions or inconsistencies therein.
Potential Liability-Try to Make It Jive Up Stream and Down

FROM UP STREAM

• Breach of Contract cont.
  – Express Warranty-Can approach negligence standard in service contracts-workmanlike, good, free from defects
  • Duration vs Statute of Limitations for contract
Potential Liability-Try to Make It Jive Up Stream and Down

- Breach of Contract cont.
  - Implied Warranties-Habitability, Fit for Intended Purpose, Workmanlike

  - protects purchasers from structural defects that are nearly impossible to ascertain by inspection after the home is built, and imposes the burden of repairing latent defects on the person with the opportunity to notice, avoid, or correct them during the construction process. **A home that is unsafe because it deviates from fundamental aspects of the applicable building codes or fails to keep out the elements because of defects in construction breaches the implied warranty of habitability.** However, the implied warranty “does not make the builder an insurer against any and all defects in a home, impose on the builder an obligation to deliver a perfect house, or protect against mere defects in workmanship, minor or procedural violations of the applicable building codes, or defects that are trivial or aesthetic.” *Berish v. Bornstein*, 2006 WL 2221924 (2006) (citations omitted) (Emphasis added)
Potential Liability-Try to Make It Jive Up Stream and Down

• Negligence
  – Duty
  – Breach
  – Damages (proximately cased by the breach-foreseeable)

• What Duty Must You Comply With?
  – Where the plaintiff brings a claim for negligent construction of a building, the plaintiff must provide the standard of care expected of a person engaged in construction of a building. If the defendant is, for example, an aerospace company, the plaintiff need not prove the standard of care expected of an aerospace company constructing an office building as opposed to an independent contractor. Both are expected to follow the standard of care expected of someone engaged in the construction of a building. *Miller v. Los Angeles County Flood Control Dist.*, 8 Cal.3d 689, 702-3, 106 Cal. Rptr. 1, 505 P.2d 193 (1973).
Potential Liability-Try to Make It Jive Up Stream and Down

- Negligence
- Standard of Care for Subcontractor:
  - Standard to Which Subcontractors are held:
    - Reasonable subcontractor standard (probably in your specific trade)
    - Negligence *Per Se*
      - Code violation in some states *(see e.g. GA and OH; but see New York)*
Potential Liability-Try to Make It Jive Up Stream and Down

FROM UP STREAM

HOW DOES COMPLYING WITH THE UL, ASTM OR FM STANDARDS AFFECT YOUR LIABILITY?

• Not a Code-Will Not Be Considered Negligence *Per Se*
• Will be Considered as Probative Evidence (tends to make fact more or less probable) to Establish the Industry Standard
  – *Id.*
• Meeting the Standard May Not be Enough
  – *See e.g. WATCO v. Pickering Environmental Consultants, Inc.*, 2007 WL 1610093 (2007)
Potential Liability-Try to Make It Jive Up Stream and Down

But Compare

Uniform Commercial Code (UCC) ARTICLE 2- SALES
2-314 Implied Warranty: Merchantability; Usage of Trade.

GOOD FOR BALANCE WITH UP STREAM LIABILITY.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Statute of Limitations???
Potential Liability-Try to Make It Jive Up Stream and Down

But Compare

Uniform Commercial Code (UCC) ARTICLE 2- SALES

2-316. Exclusion or Modification of Warranties-May Cause Gap in Coverage!-Imbalance

- To exclude or modify the implied warranty of merchantability-must mention merchantability and in case of a writing must be conspicuous
- To exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude implied warranty of fitness sufficient if it states: “There are no warranties which extend beyond the description on the face hereof.”
- Other Examples of Enforceable limits:
  (a) “as is”, “with all faults” or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
  (b) when the buyer before entering into the contract has examined the goods or the sample or model- no implied warranty with regard to defects which an examination ought to reveal; and
Potential Liability-Try to Make It Jive Up Stream and Down

But Compare

Uniform Commercial Code (UCC) ARTICLE 2- SALES

• 2-316. Exclusion or Modification of Warranties-
   Imbalance Cont.-Might Not Be Enforceable But You
   Don’t Want to Have to Find Out

• However Some Courts Will Read express warranty
  and limitations thereto as consistent if possible,
  otherwise negation or limitation is inoperative
  
  – See Ohio Sav. Bank v. H.L. Vokes Co., 54 Ohio
    App.3d 68, 560 N.E.2d 1328 (1989)(disclaim a/c
    units’ cooling capacity) (A/C manufacturer’s attempt
    to disclaim product data in submittal via warranty
    disclaimer held ineffective)
Potential Liability-Try to Make It Jive Up Stream and Down

- AS S.O.P. Manufacturers Exclude or Limit UCC Warranties
  - By Exculpatory Language-examples to follow
  - By Distributorships Arrangements
TERMS AND CONDITIONS OF SALE

PAYMENT TERMS:
Net 30 days from date of invoice. Customer agrees to pay all costs incurred by Hilti in collecting any delinquent amounts, including attorney’s fees.

WARRANTY:
Hilti warrants that for a period of 12 months from the date it sells a product it will, at its sole option and discretion, refund the purchase price, repair, or replace such product if it contains a defect in material or workmanship. Absence of Hilti's receipt of notification of any such defect within this 12-month period shall constitute a waiver of all claims with regard to such product.

THE FOREGOING WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Hilti shall in no event be liable for, and Customer hereby agrees to indemnify Hilti against, all claims related to special, direct, indirect, incidental, consequential, and any other damages arising out of or related to the sale, use, or inability to use the product, including costs and attorney's fees.

ORDER ACCEPTANCE:
Acceptance is limited to the express terms contained herein, and terms are subject to change by Hilti without notice. Additional or different terms proposed by Customer are deemed material and are objected to and rejected, but such
rejection shall not operate as a rejection of the offer unless it contains variances in the terms of the description, quantity, price or delivery schedule of the goods. Orders are not deemed "accepted" by Hilti unless and until it ships the associated items.

DOMESTIC ORIGIN:
Origin information may be obtained by written request to Hilti, Inc., Contract Compliance, P. O. Box 21148, Tulsa, Oklahoma 74121. Hilti's Quality Department personnel are the only individuals authorized to warrant the country of origin of Hilti products.

BUSINESS SIZE:
Hilti is a large business.

PRICES:
Prices are those stated on the order, and unless otherwise noted are based on...

CONSENT TO JURISDICTION:
All transactions made pursuant hereto shall be deemed to have been made and entered into in Tulsa, Oklahoma. Any and all disputes arising directly or indirectly from such transactions shall be resolved in the courts of the County of Tulsa, State of Oklahoma, to the exclusion of any other court, and any resulting judgment may be enforced by any court having jurisdiction of such an action. All transactions shall be governed by and construed in accordance with the laws of the State of Oklahoma.

INDEMNIFICATION:
Customer hereby agrees to indemnify Hilti for any costs, including attorney’s fees, incurred by Hilti as a result, in whole or in part, of any violation by Customer of any Federal, State or Local statute or regulation, or of any nationally accepted standard. It shall be Customer’s sole responsibility to comply with all applicable laws and regulations regarding the handling, use, transportation, or disposal of products upon taking possession of same.

CONVERT CHECK TO EFT:
When you provide a check as payment, you authorize Hilti to use information from your check to make a one time electronic fund transfer from your checking account or to process the payment as a check transaction. When we use information from your check to make an electronic fund transfer, funds may be withdrawn from your account as soon as the same day we receive your payment, and you will not receive your check back from your financial institution.
AUTHORIZATION:
HILTI LEGAL DEPARTMENT PERSONNEL ARE THE ONLY INDIVIDUALS AUTHORIZED TO MODIFY THESE TERMS AND CONDITIONS, WARRANT PRODUCT SUITABILITY FOR SPECIFIC APPLICATIONS, ACCEPT INFORMATION ON THE POTENTIAL FOR CONSEQUENTIAL DAMAGES, OR EXECUTE CUSTOMER DOCUMENTS, AND ANY SUCH ACTION IS NULL AND VOID UNLESS IN WRITTEN FORM SIGNED BY SUCH INDIVIDUAL. HILTI SALES REPRESENTATIVES (INCLUDING ACCOUNT MANAGERS, REGIONAL MANAGERS, AND CUSTOMER SERVICE REPRESENTATIVES) HAVE NO SUCH AUTHORITY.

Rev 6/10
2. Applications  High-performance 3M™ Fire Barrier Sealant CP 25WB+ is ideal for sealing single or multiple through penetrations in fire-rated construction. 3M™ Fire Barrier Sealant CP 25WB+ is typically used in mechanical, electrical and plumbing applications to firestop openings created by the following penetrations in fire-rated floors, floor/ceilings or walls: metallic pipe, plastic pipe (excluding CPVC), conduit, power and communication cable, cable trays, busways, combos, insulated pipe and HVAC duct penetrations. 3M™ Fire Barrier Sealant CP 25WB+ is also used to firestop blank openings and static construction joints.

3. Specifications  3M™ Fire Barrier Sealant CP 25WB+ shall be a one component, ready-to-use, gun-grade, latex-based, intumescent firestop sealant capable of expanding a minimum of 3 times its dried volume when exposed to temperatures above 1000°F (538°C). The material shall be thixotropic and shall be applicable to overhead, vertical and horizontal firestops. The sealant shall be listed by independent test agencies such as UL, Intertek or FM. 3M™ Fire Barrier Sealant CP 25WB+ shall be tested to and pass the criteria of ASTM E 814 (UL 1479) Standard Test Method for Fire Tests of Penetration Firestop Systems, ASTM E 1966 (UL 2079) Standard Test Method for Fire Resistive Joint Systems and CAN/ULC S115 Standard Method of Fire Tests of Firestop Systems. 3M™ Fire Barrier Sealant CP 25WB+ meets the requirements of the IBC, IRC, IFC, IPC, IMC, NFPA 5000, NEC (NFPA 70) and NFPA 101.
4. Physical Properties

<table>
<thead>
<tr>
<th>Property</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Color</td>
<td>Red</td>
</tr>
<tr>
<td>Application Temperature Range</td>
<td>40°F to 122°F (4°C to 50°C)</td>
</tr>
<tr>
<td>Service Temperature Range</td>
<td>-20°F to 180°F (-28°C to 82°C)</td>
</tr>
<tr>
<td>STC (ASTM E 90 and ASTM E 413)</td>
<td>54 when tested in STC 54-rated wall assembly</td>
</tr>
<tr>
<td>Surface Burning (ASTM E 84)</td>
<td>Flame Spread 0, Smoke Development 0</td>
</tr>
<tr>
<td>Hardness (ASTM D 2240 Shore A)</td>
<td>45</td>
</tr>
<tr>
<td>Tensile Strength</td>
<td>85 psi (0.59 MPa)</td>
</tr>
<tr>
<td>Volume Shrinkage</td>
<td>28%</td>
</tr>
<tr>
<td>VOC Less H₂O and Exempt Solvents</td>
<td>&lt;1 g/L</td>
</tr>
<tr>
<td>Dry: Under typical conditions of 75°F (23°C) and 50% R.H., sealant becomes tack-free in about ten minutes and dry-to-touch in 30 to 60 minutes. Full dry depends upon ambient conditions and volume of sealant. Typical dry rate is approximately 1/8 inch (3 mm) per day.</td>
<td></td>
</tr>
<tr>
<td>Unit Volume</td>
<td>10.1 fl. oz. tube (298.7 mL, 18.2 in³), 20 fl. oz. sausage (591.5 mL, 36.1 in³), 27 fl. oz. tube (798.5 mL, 48.7 in³), 2 gal. pail (7.57 L, 462 in³), 5 gal. pail (18.9 L, 1155 in³)</td>
</tr>
</tbody>
</table>

5. Packaging, Storage, Shelf Life

Packaging

Product packaged in cartridge or pail is encased in HDPE plastic containers, sausage is packaged in aluminum foil wrap, 3M Fire Barrier Sealant CP 25WB+ should be stored indoors in dry conditions between 40°F and 90°F (4°C and 32°C) in the original unopened package. Avoid repeated freeze / thaw exposures of the 3M Fire Barrier Sealant CP 25WB+ prior to installation.

Important Notice to User:

Technical Information: The technical information, recommendations and other statements contained in this document are based upon tests or experience that 3M believes are reliable, but the accuracy or completeness of such information is not guaranteed.

Product Use: Many factors beyond 3M's control and unique within user's knowledge and control can affect the use and performance of a 3M product in a particular application. Given the variety of factors that can affect the use and performance of a 3M product, user is solely responsible for evaluating the 3M product and determining whether it is fit for a particular purpose and suitable for user's method of application.

Warranty and Limited Remedy: 3M warrants that each 3M Fire Protection Product will be free from defects in material and manufacture for 90 days from the date of purchase from 3M's authorized distributor. 3M MAKES NO OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. If a 3M product does not conform to this warranty, the sole and exclusive remedy is, at 3M's option, replacement of the 3M product or refund of the purchase price.

Limitation of Liability: Except where prohibited by law, 3M will not be liable for any loss or damage arising from the 3M product, whether direct, indirect, special, incidental or consequential, regardless of the legal theory asserted.

Building and Commercial Services Division
3M Center, Building 223-2N-21
St. Paul, MN 55144-1000 USA
1-800-328-1687
www.3M.com/firestop

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Limitation of Liability: Except where prohibited by law, 3M will not be liable for any loss or damage arising from the 3M product, whether direct, indirect, special, incidental or consequential, regardless of the legal theory asserted.

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PERFORMANCE

SpecSeal® LCI Sealant is the basis for systems that meet the exacting criteria of ASTM E814 (UL1479) and ASTM E1966 (UL2079) as well as to the time-temperature requirements of ASTM E119 (UL263). LCI provides up to a 2-hour fire rating for typical service penetrations through concrete or wood floors, concrete or masonry walls, as well as gypsum board walls (3-hour for metallic pipe, conduit and tubing). SpecSeal® LCI Sealant meets Class A finish requirements for Flame Spread and Smoke Development when tested in accordance with ASTM E84 (UL723). SpecSeal® LCI Sealant is also acoustically tested, demonstrating excellent sound attenuation properties.

The firestopping sealant shall be a water-resistant, intumescent latex sealant. The sealant when exposed to high heat or flame shall exhibit a free expansion of up to 8 times its original volume. The firestopping sealant shall contain no water soluble nor hygroscopic ingredients and shall be acoustically tested. The sealant shall be UL Classified and/or FM approved and tested to the requirements of ASTM E814 (UL1479) and shall meet Class A finish requirements when tested in accordance with ASTM E84 (UL723).
**INSTALLATION INSTRUCTIONS**

**GENERAL:** Areas to be protected must be clean and free of oil, loose dirt, rust or scale. Installation temperatures must be between 59°F (15°C) and 86°F (30°C). Allow product to dry a minimum of 24 hours before exposure to moisture.

**SYSTEM SELECTION:** Selection of an appropriate firestop system design is critical to the fire protection process. Space limitations preclude highly detailed information pertaining to individual application systems. Please consult the Product & Application Guide as well as the UL Fire Resistance Directory for additional information.

**FORMING:** Some installations may require forming as an additional part of the system or as an option to facilitate installation. In systems where forming is required, minimum wall build-ups with a maximum nominal density of 4 PCF (64 kg/m³) are generally required. Cutting forming material over to allow for light ceiling. Position forming material to allow for proper depth of fill material.

**FILL MATERIAL:** SpeckSeal® LCI Sealant may be installed by caulking using a standard caulking gun or from bulk containers using a bulk loading caulking gun or by manually injecting using a manual injection tool or putty knife. If the sealant tends to pull back from a surface, clean the surface with a damp rag or sponge and reapply. Work sealant into all areas exercising care to eliminate voids or seams. The surface of the sealant can be smoothed using a putty knife dipped in water. Adding water to the sealant itself is not recommended. Sealant (when dry) may be painted using most non-volatile based paints.

In gypsum wallboard penetrations, apply a minimum cover bead of 1/4" (6 mm) at the interface of the penetrant with both exterior wall surfaces.

**SMOKE SEALING:** In some applications including firestop collars, SpeckSeal® LCI Sealant is recommended as a smoke seal. It is suggested in these applications that the sealant be applied to both sides of walls. In floor applications, a sealing bead is suggested top and bottom.

**LIMITATIONS:** SpeckSeal® LCI Sealant is water-based and cures through the evaporation of water. Low temperatures as well as high humidity may retard curing. Non-porous or impermeable backing materials, plans, or coatings may retard the drying process. Do not paint or seal in any way that prevents contact with air until sealant has set through completely. This product has been designed to be used with plastics and has been evaluated extensively and successfully with a variety of different types of plastic pipes, tubes, and plastic cable installations. Variations in these materials however, make it impossible to guarantee compatibility. STI strongly recommends that the user consult the manufacturer of the pipe, tubing, or cable in question regarding any known sensibilities or potential restrictions before applying this product.

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**Fig. 4: BARE & INSULATED METALLIC PIPES - Wood Floor Assemblies**

**UL System No. F-C-1074**
- F-Rating: 1, 2 hr + 1 rating of 1 hr
- Steel, iron or copper: 4" + Chase wall optional
- Appliance: 0" to 1" - Sealant: J-B Bond, top, bottom

**UL System No. F-C-5043**
- F-Rating: 1, 2 hr + 1 hr
- Steel, iron or copper: 4" + Chase wall optional
- Appliance: 0" to 1" - Sealant: J-B Bond, top, bottom

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**Fig. 5: BARE & INSULATED METALLIC PIPES - Gypsum Walls**

**UL System No. W-L-1222**
- F-Rating: 1, 2 hr + 1 hr
- Steel or iron pipe: 4" + Copper pipe: 4"
- Appliance: 0" to 1" - Sealant: J-B Bond

**UL System No. W-L-5121, W-L-5122**
- F-Rating: 1, 2 hr + 1 hr
- Steel or iron pipe: 8" + Copper pipe: 4"
- Appliance: 0" to 1" - Sealant: J-B Bond

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IMPORTANT NOTICE: All statements, technical information, and recommendations contained herein are based upon testing believed to be reliable, but the accuracy and completeness thereof is not guaranteed.

WARRANTY

Specified Technologies Inc. manufactures its goods in a manner to be free of defects. Should any defect occur in its goods (within one year), Specified Technologies Inc., upon prompt notification, will at its option, exchange or repair the goods or refund the purchase price.

LIMITATIONS AND EXCLUSIONS:

This warranty is in lieu of all other representations expressed or implied (including the implied warranties of merchantability or fitness for use) and under no circumstances shall Specified Technologies Inc. be responsible for any incidental or consequential property damage or losses. Prior to use, the user shall determine the suitability of the product for its intended use, and the user assumes all risks and liability for subsequent use. No statement or recommendation not contained herein shall have any force or effect unless in an agreement signed by officers of seller and manufacturer.

MADE IN THE USA - COPYRIGHT © 2008 SPECIFIED TECHNOLOGIES, INC.
1. Product Name
Specslope® Firestop Products
E-Fast® Fire Rated Pathway
• Pellet® Silicostix
• Water Based Firestop and Joint Sealants and Strips
• Firestop Putty and Putty Pads
• Firestop Mortar
• Firestop Flows
• Firestop Collars and Flameless Wrap Shims

2. Manufacturer
Specified Technologies, Inc. (STI)
20 Evans Way
Somerville, NJ 08876
(908) 592-1088
Fax: (908) 592-8000
Email: specsales@firedstop.com
www.firedstop.com

3. Product Description
BASIC USE
These products are used solely or in combination to construct firestop systems effective in
sealing through penetrations, conductor joints and high traffic openings against the spread of
fire, smoke or hot gases. A wide range of test-to-
ical or combustible) sealers are available for standard
constructions and penetrations with ratings up to 4 hours. These products and systems are suitable for
for sealing electrical, plumbing, mechanical or
cable, communication penetrations, including:
Pipe, Conduits or Ducts
• Metallic
• Nonmetallic
• Insulated
Cables
• Telephone
• Power
• Data and Control
Cable Trays and Bus Ducts
Steel
• Aluminum and Copper
Construction Joints

COVCOMPOSITION & MATERIALS
STI Firestop Products are a unique combination of passive and intumescent (expands when heated) materials. Together, the composite mechanism exhibits unusually fast
and aggressive, highly directional expansion.
Water Based Sealants
Series 555, LC, LC and ES Sealants are latex
based, water-resistant, flexible sealants. These
products are available in a multi-viscosity
grades that are suitable for outlining, tracing,
marking or bulk loading.
• Series ES is a highly intumescent product
suitable for a wide range of combustible
and noncombustible penetrations.
• Series LC is an intumescent product custom
suggested for a range of combustible
and noncombustible penetrations.

Series LC is a nonintumescent sealant
specified as an economical and effective
solution for noncombustible penetrants.
• Series ES is a highly elastomeric and
non-hardenable, latex based material
suitable for providing positive smoke
and/or fire protection and reduces sound transmission
in construction joints.
Firestop Putty (Series 555) and Putty Pads
Fireproofing putty is based upon a
highly water-resistant liquid rubber matrix. Its unique
combination of filler yields a product that is both soft and stable yet extremely adhesive.

| TABLE 1: FIRESTOP PRODUCT SIZES & CATALOG NUMBERS |
| Water Based Sealants & Spray | SS100 | LC100 | LC1250 | ES125 |
| S.S. (10 cu. in.) | SS125 | LC1250 | LC1250 | ES125 |
| 20 oz. (30 cu. in.) | SS125 | LC1250 | LC1250 | ES125 |
| 20 oz. (30 cu. in.) | SS125 | LC1250 | LC1250 | ES125 |
| 5 Gal. (155 cu. in.) | SS105 | LC1250 | LC1250 | ES125 |

Silicone Sealants
10.3 oz. (155 cu. in.) | SS100 | LC1250 | LC1250 | ES125 |
5 Gal. (155 cu. in.) | SS105 | LC1250 | LC1250 | ES125 |

Firestop Putty
2 lb. (35 cu. in.) | SSA50 | SSA50 | SSA50 | SSA50 |
2 lb. (35 cu. in.) | SSA50 | SSA50 | SSA50 | SSA50 |

Firestop Mortar
25 lb. (45 cu. in.) | SSA50 | SSA50 | SSA50 | SSA50 |
25 lb. (45 cu. in.) | SSA50 | SSA50 | SSA50 | SSA50 |

Fireproofing Putties
1/2 (24 cu. in.) | SSA50 | SSA50 | SSA50 | SSA50 |
1/4 (12 cu. in.) | SSA50 | SSA50 | SSA50 | SSA50 |

2 Part Silicone Foam
160 lb. Kit (50% Part A, 50% Part B) | SSA50 | SSA50 | SSA50 | SSA50 |

Wrap Strips
Red 4 ft. X 1/2 X 12 Roll | SSA50 | SSA50 | SSA50 | SSA50 |
Blue 3/4" X 2 X 12 Roll | SSA50 | SSA50 | SSA50 | SSA50 |

Fire Retardant Collars
25 Roll (25 gauge galvanized steel) | SSA50 | SSA50 | SSA50 | SSA50 |

Fireproofing Collars
For 1 1/2 Trade Size Pipe or Conduit | SSA50 | SSA50 | SSA50 | SSA50 |
For 2" Trade Size Pipe or Conduit | SSA50 | SSA50 | SSA50 | SSA50 |
For 3" Trade Size Pipe or Conduit | SSA50 | SSA50 | SSA50 | SSA50 |
For 4" Trade Size Pipe or Conduit | SSA50 | SSA50 | SSA50 | SSA50 |
For 5" Trade Size Pipe or Conduit | SSA50 | SSA50 | SSA50 | SSA50 |

E-Z Patch Fire Rated Pathway and Accessories
Single Device, Retrofit Kit includes wall plates & labels | SSA50 | SSA50 | SSA50 | SSA50 |
Single Device, Retrofit Kit includes wall plates & labels | SSA50 | SSA50 | SSA50 | SSA50 |
Fire Rated Pathway Device
One (1) single wall plate with wall labels | SSA50 | SSA50 | SSA50 | SSA50 |
One (1) double wall plate with wall labels | SSA50 | SSA50 | SSA50 | SSA50 |
One (1) double wall plate with wall labels | SSA50 | SSA50 | SSA50 | SSA50 |
One (1) positioning clamps | SSA50 | SSA50 | SSA50 | SSA50 |

© 2011 HPSF
**WATER-BASED SEALANTS**

**PRIMARY USES:**
- SSS Intumescent Firestop Sealant
  - Through-Penetration Firestops. Combustible and noncombustible. All constructions. UL Classified & FM Approved.
- LCI Intumescent Firestop Sealant
  - Through-Penetration Firestops. Combustible and noncombustible. Most Constructions. UL Classified & FM Approved.
- LC Endothemic Firestop Sealant
  - Through-Penetration Firestops. Primarily noncombustible. Most Constructions. UL Classified.
- ES Botanomic Joint Sealant
  - Construction Joints – UL Classified

**PHYSICAL PROPERTIES**

<table>
<thead>
<tr>
<th>Property</th>
<th>SSS</th>
<th>LCI</th>
<th>LC</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Color</td>
<td>Red</td>
<td>Red</td>
<td>Blue</td>
<td>Blue</td>
</tr>
<tr>
<td>Density (Lbs./Gal)</td>
<td>9.4 ± 4</td>
<td>9.0 ± 4</td>
<td>9.4 ± 4</td>
<td>9.0 ± 4</td>
</tr>
<tr>
<td>% Solids</td>
<td>80 ± 2</td>
<td>80 ± 2</td>
<td>80 ± 2</td>
<td>80 ± 2</td>
</tr>
<tr>
<td>pH</td>
<td>8.3 ± 5</td>
<td>9.0</td>
<td>8.3 ± 5</td>
<td>7.5 ± 5</td>
</tr>
<tr>
<td>Flame spread</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Smoke Development</td>
<td>10</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Water Resistance</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
<td>Excellent</td>
</tr>
<tr>
<td>Sag/Slump (ASTM C630)</td>
<td>&lt;0.1</td>
<td>&lt;0.1</td>
<td>&lt;0.1</td>
<td>&lt;0.1</td>
</tr>
<tr>
<td>In-Service Temp.</td>
<td>≤130°F</td>
<td>≤130°F</td>
<td>≤130°F</td>
<td>≤129°F</td>
</tr>
<tr>
<td>Storage Warranty Period</td>
<td>1 Year</td>
<td>1 Year</td>
<td>1 Year</td>
<td>1 Year</td>
</tr>
<tr>
<td>Expanded Volume</td>
<td>&gt;100%</td>
<td>&gt;100%</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Expansion Begins</td>
<td>230°F</td>
<td>230°F</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Expansion Ends</td>
<td>&gt;1000°F</td>
<td>&gt;1000°F</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Joint Movement Capability</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>≤10%</td>
</tr>
<tr>
<td>Acoustical Testing</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**FIRESTOP PUTTY**

**PRIMARY USES:**
- Application requiring easy retrofit through steel or medium openings – all constructions.

**PENETRANTS:**
- Steel Pipe Or Conduit up 8"
- Electrical Or Telephone Cable
- Protection of Electrical Boxes
- In Hollow Walls

**PHYSICAL PROPERTIES:**

<table>
<thead>
<tr>
<th>Property</th>
<th>Red</th>
<th>1.45</th>
</tr>
</thead>
<tbody>
<tr>
<td>Color</td>
<td>Red</td>
<td>1.45</td>
</tr>
<tr>
<td>Density</td>
<td>100%</td>
<td></td>
</tr>
<tr>
<td>Expanded Volume</td>
<td>&gt;500%</td>
<td></td>
</tr>
<tr>
<td>Expansion Begins</td>
<td>238°F</td>
<td></td>
</tr>
<tr>
<td>Expansion Ends</td>
<td>&gt;1000°F</td>
<td></td>
</tr>
<tr>
<td>Acoustical Testing</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>

Penell® (Penell) Silicone Sealants
Penell® silicone sealants are 2-part neutral curing premium silicone sealants providing an unrivalled combination of strength and flexibility for firestopping through penetrations and on steel construction gaps.

FN300C is available in both self-leveling and non-sag grades, is a low modulus sealant designed and tested for the dynamic requirements of construction joints.

FN200C-2 part silicone foam is designed for sealing large penetrations and is typically used for cables or cable tray installations where easy installation or removal of cables is a vital consideration.

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### PENSIL® 300 SEALANT

**Primary Uses:**
- Construction Joints
- Through Penetrations

**Joint Types:**
- Expansion
- Seismic
- Control
- Head-of-Wall
- Sizing or Perimeter

**Color:**
- Concrete: 5
- Smoke Development: 45
- Hardness Shore: 25

**Tensile Strength:**
- 270

**Peel Strength ASTM C794-99:**
- 55 psi

**Movement Capability ASTM C799:**
- ±50%

**Dries @ 50% Extension:**
- 35 days

**Curing Time:**
- 1 hour

**Tack Free Time ASTM C619:**
- 5 hours

**Sag (Slump @ 5 hr Grade) ASTM C689:**
- 0.1

**Concrete and UV Resistance:**
- Excellent

**Storage Warranty Period:**
- 12 months

**Applications:**
- G14% coverage, ASTM E84
- 7/8" x 48" sheet
- Exposure: 1/tile
- From date of shipment from stock in original shrink-wrap container at ASTM (38°C).

### ELASTOMERIC SPRAY

**Primary Uses:**
- Construction Joints
- Through Penetrations

**Joint Types:**
- Expansion
- Seismic
- Control
- Head-of-Wall
- Sizing or Perimeter

**Color:**
- Pale Blue

**Odor:**
- Mild Latex

**Lbs/Gal:**
- 12

**Coverage:**
- 12.9 sq ft / gal @ 1/8" thickness
- 6.39 sq ft / gal @ 1/4" thickness

**pH:**
- 7.5

**Solvent Content:**
- None

**Flame Spread:**
- 0

**Smoke Development:**
- 25

**Movement Capability:**
- ±18.75%

**Drying Time - Tack Free:**
- 2 hours

**Drying Time - Dry Through:**
- 24-48 hours

**Service Temperature:**
- ≤120°F (49°C)

**Storage Warranty Period:**
- 12 months

**Acoustical Testing:**
- Yes

**Applications:**
- G14% coverage, ASTM E84
- 7/8" x 48" sheet
- Exposure: 1/tile
- From date of shipment from stock in original shrink-wrap container at ASTM (38°C).

**Aralkyltryl butadiene styrene (ABS) both solid and foam core**

**Intumescent Wipe Strips (Series SSW)**

**Series SSC:**
- Single ply Type I intumescent strips designed for high performance, fire-rated applications.

**Series LCC:**
- For use in field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars and for field manufactured collars.

**Elastomeric Spray (Series AS):**

**Applications:**
- A highly elastomeric coating is a non-darkened, latex-based material designed to provide passive smoke and fire protection in construction joints.

**EZ-Path**

**Applications:**
- EZ-Path is designed for easy installation in walls and fibers.

**EF-Path Fire Rated Pathway**

**Applications:**
- EZ-Path Fire Rated Pathway is a raceway device designed to allow cables to penetrate fire-rated walls without the need for firestopping.

**Specifications:**
- 0.05" Gal. Steel
- Cable Loading Area: 8 sq ft (10 ft)
- Allowable Cable Fill: 100% Visual
- Fire Resistance Rating: 1, 2 and 4 Hour
- Expansion Begins: 350°F
- Volume Expansion: 600%
- Sample Cable Volume (Cut 5): 120 cubic ft
- In-Servo Temp: ≤120°F (49°C)

**Use:**
- See Table 1.

**Limitations:**
- The following conditions should be adhered to:
  - Product use and installation must conform to the manufacturer's written installation instructions.

---

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## Firestop Collars

**Primary Uses:**
- Plastic Pipes up to 8" Through All Constructions.

**Fire-Rating:**
- PVC, CPMV Up To 8".
- FR Polyurethane Up To 8".
- ABS & PVC Foam Core Up To 4".
- Two Wall Thicknesses For Smaller & Larger Annuluses.

**Physical Properties:**

<table>
<thead>
<tr>
<th>Property</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shell Construction</td>
<td>22 Gauge</td>
</tr>
<tr>
<td>Intereant Insert</td>
<td>Galvanized</td>
</tr>
<tr>
<td>Expanded Volume</td>
<td>6.54X</td>
</tr>
<tr>
<td>Expansion Begins</td>
<td>355°F</td>
</tr>
<tr>
<td>Expansion Ends</td>
<td>&gt;1,000°F</td>
</tr>
<tr>
<td>Moisture Resistance</td>
<td>Excellent</td>
</tr>
</tbody>
</table>

### 5. Installation

**Preparatory Work:**
Prepare surfaces by broad sheeting, bonding, or other methods to secure that all contact surfaces are free of oil, loose dirt, dust or scale. A bonding agent may be required in some cases to install all materials and may contribute to fire ratings.

**Application:**
Consult product data sheets for individual products for more complete details concerning the suggested installation methods and limitations of these products.

**Sealing:**
Seals can be applied by injecting a standard cement into the area, followed by a common putty knife. A single pass can be made in place using a blade to remove any excess putty knife. A single pass can be made in place using a blade to remove any excess putty knife. A single pass can be made in place using a blade to remove any excess putty knife.

**Retaining Collars:**
Retaining collars are designed to be installed.

**Basecoats:**
Basecoats are applied to construction surfaces using a high volume, airless spray equipment. Consult manufacturer for equipment recommendations and full installation instructions.

**Puts:**
Standard method of application is by broad sheeting. The material can be successfully installed on corded or cordless systems to allow penetration of putty into intumescent is required to ensure a tight smoke seal.

**Mastic:**
Mastic can be placed using standard mastic techniques and tools. Mastic is pumped using an air-operated double diaphragm pump or a plugging pump. Contact surfaces can be protected using a mastic that can be used for protecting the mastic (see installation instructions). Contact surfaces should be coated with clean water to enhance cohesion.

**Protective Collars:**
Protective collars are designed to be installed on the external surface of walls or floors. Collars provide appropriate retention for closure around the pipe. Insert moves provide appropriate features for attaching to the wall or floor surface. Collars are required on the underside of them and on both sides of the wall.

**Wrap Strips:**
Wrap strips are designed to be installed by manually wrapping around the pipe surface being protected. In “buried” applications, wrap strips are secured to the perimeter using a flexible wire or bollard. A blackened steel retaining collar is available from the manufacturer for surface mounted applications.

**Installation Methods:**
Installation methods have been developed for steel deck floors or for steel beams in structures that allow the collars to be installed. Collars are designed to be installed on the surface of the floor and suspended down into the floor. A 4" (100 mm) plastic pipe, individually sized, retaining collars are used. A 22 gauge galvanized steel retaining collar is available from the manufacturer in 25 (8 m) long rolls for applications up to and including 4" (100 mm) plastic pipe. Individually sized retaining collars are also available.
7. Warranty

Specified Technologies, Inc., manufactures its goods in a manner to be free of defects. All such products delivered to the Buyer are warranted to comply with physical and chemical specifications and description for a period of 1 year or such other as stated in the product data sheet. Specified Technologies, Inc., does not warrant the workmanship with which its products are applied by others and obligates itself to the Buyer only to replace or, at its option, refund the purchase price of any such product found to be defective. The liability of Specified Technologies, Inc., whether based on its warranties, contract or otherwise, shall in no case exceed the purchase price for the Specified Technologies, Inc., product and does not include incidental or consequential damages.

LIMITATIONS & EXCLUSIONS

The foregoing shall constitute the sole and exclusive remedy of the buyer and the sole and exclusive liability of Specified Technologies, Inc. The warranties stated in this paragraph are in lieu of all other warranties written or oral, expressed or implied, including any warranties of merchantability or fitness of purpose.
Potential Liability-Try to Make It Jive Up Stream and Down

• How Are These Terms “Accepted” by the Subcontractor?
  – Signature-using the manufacturer’s purchase order
  – Battle of the Forms
    • Some terms may be included if not objected to
      – UCC 2-207
    • Courts consistently have held that adding a disclaimer or warranty or limit of liability is materially altering the agreement and not enforceable.
Potential Liability-Try to Make It Jive Up Stream and Down

Distributor Liability-Buffer for Manufacturer

- Implied Warranties may require privity of contract
- Express Warranty contractual but may be transferred or designed to run to subsequent purchasers
  - Example of transferred language:

- Authorized installer agreement directly with manufacturer may be an opportunity to make end run around this problem.
- Deep pockets are important in poor economy. Where applicable, try to have both manufacturer and distributor liable.
C. WARRANTY POLICY

1. LIMITED WARRANTY.

ALL PRODUCTS SOLD ARE WARRANTED BY GRAINGER ONLY TO CUSTOMERS FOR: (i) RESALE; OR (ii) USE IN BUSINESS, GOVERNMENT OR ORIGINAL EQUIPMENT MANUFACTURE. GRAINGER WARRANTS PRODUCTS AGAINST DEFECTS IN MATERIALS AND WORKMANSHIP UNDER NORMAL USE FOR A PERIOD OF ONE (1) YEAR AFTER THE DATE OF PURCHASE FROM GRAINGER, UNLESS OTHERWISE STATED. PROVIDED THAT GRAINGER ACCEPTS THE PRODUCT FOR RETURN DURING THE LIMITED WARRANTY PERIOD. GRAINGER MAY, AT ITS OPTION: (i) REPAIR; (ii) REPLACE; OR (iii) REFUND THE AMOUNT PAID BY CUSTOMER. CUSTOMER MUST RETURN THE PRODUCT TO THE APPROPRIATE GRAINGER BRANCH OR AUTHORIZED SERVICE LOCATION, AS DESIGNATED BY GRAINGER, SHIPPING COSTS PREPAID. GRAINGER’S REPAIR, REPLACEMENT, OR REFUND OF AMOUNTS PAID BY CUSTOMER FOR THE PRODUCT, SHALL BE CUSTOMER’S SOLE AND EXCLUSIVE REMEDY.

2. WARRANTY DISCLAIMER.

a. NO WARRANTY OR AFFIRMATION OF FACT, EXPRESS OR IMPLIED, OTHER THAN AS SET FORTH IN THE LIMITED WARRANTY STATEMENT ABOVE, IS MADE OR AUTHORIZED BY GRAINGER. GRAINGER DISCLAIMS ANY LIABILITY FOR CLAIMS ARISING OUT OF PRODUCT MISUSE, IMPROPER PRODUCT SELECTION, IMPROPER INSTALLATION, PRODUCT MODIFICATION, MISREPAIR OR MISAPPLICATION. GRAINGER EXPRESSLY DISCLAIMS ANY WARRANTY THAT THE PRODUCTS: (i) ARE MERCHANTABILITY; (ii) FIT FOR A PARTICULAR PURPOSE; OR (iii) DO NOT AND WILL NOT INFRINGE UPON OTHER’S INTELLECTUAL PROPERTY RIGHTS.

b. GRAINGER MAKES NO WARRANTIES TO THOSE DEFINED AS CONSUMERS IN THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT.

3. LIMITATION OF LIABILITY.

GRAINGER EXPRESSLY DISCLAIMS ANY LIABILITY FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, EXEMPLARY, OR PUNITIVE DAMAGES. GRAINGER’S LIABILITY IN ALL CIRCUMSTANCES IS LIMITED TO, AND SHALL NOT EXCEED, THE PURCHASE PRICE PAID FOR THE PRODUCT THAT GIVES RISE TO ANY LIABILITY.
TERMS AND CONDITIONS OF SALE

WARRANTY

INTEK CONSTRUCTION PRODUCTS, INC. (SELLER) HEREBY ASSIGNS TO THE BUYER ANY MANUFACTURER’S STANDARD PRODUCT WARRANTIES RELATING TO THE PRODUCTS UPON DELIVERY AND ACCEPTANCE OF SAID PRODUCTS. SELLER MAKES NO WARRANTIES INDEPENDENT OF SUCH MANUFACTURER’S STANDARD PRODUCT WARRANTIES. SELLER SHALL NOT BE RESPONSIBLE FOR ANY LIABILITIES OR DAMAGES OF ANY NATURE ARISING OUT OF OR RELATING TO THE MANUFACTURER’S INSTRUCTIONS OR RECOMMENDATIONS FOR USAGE OF ANY PRODUCTS. NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THE WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE PRODUCTS WHICH EXCEED THE MANUFACTURER’S/ SUPPLIER’S WARRANTIES SHALL BE DEEMED TO HAVE BEEN MADE BY THE SELLER AND ARE HEREBY DISCLAIMED BY THE SELLER AND EXCLUDED FROM THIS AGREEMENT. SELLER SHALL NOT BE LIABLE TO BUYER OR ANY THIRD PARTY FOR ANY LOSS, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR SPECIAL DAMAGES, OR INJURY, EITHER PERSONAL OR BUSINESS OF ANY KIND TO ANY PREMISES OR PROPERTY OR PERSON ARISING FROM THE USE OF THE PRODUCTS.

TECHNICAL INFORMATION

Any recommendation relating to the use of a particular product distributed by the seller either in technical literature or in response to specific inquiry is given in good faith. It is the Buyer’s responsibility to satisfy itself as to the suitability of the product for its own particular purpose and it will be deemed to have done so and acknowledges that it has no right to rely on any representations of the Seller.

MSDS

INTEK strives to comply with all OSHA standards. Material Safety Data Sheets and other product literature are available and offered for all of our products. We encourage our customers to request information for the products they purchase.

PAYMENT

Terms are net 30 days from the date of invoice. All taxes, assessments or any other charges imposed by any Governmental authority shall be paid by the customer. A 1-1/2% Interest Charge per month (18% per year) on all balances 30 days from date of invoice will be assessed.

RETURNS

Material may only be returned after obtaining a Return Authorization Number. Product returns must be made within 30 days of the date shipment, and will be accepted only after the material has been verified undamaged and in resalable condition. There are no returns on special order or custom merchandise. A minimum 20% Handling Charge will be imposed on all materials returned. Credit Memos will be issued for all material returns and will be applied against future purchases. Credit Memos expire one year from date issued.

CLAIMS

Shipments or deliveries will be F.O.B. shipping point unless otherwise stated. Any and all claims for shortages, defective, or improper materials must be made in writing within ten days of receipt of shipment, so that they can be investigated promptly; otherwise any and all such claims are to be deemed waived and released.

MODIFICATIONS

This Agreement may be modified only by a written instrument signed by the parties hereto or by their duly authorized agents prior to the acceptance of any order. Waiver by the Seller of any provision hereof in one instance shall not constitute a waiver in any other instance.
WARRANTY. All goods sold by Seller are warranted to be free from defects in material and workmanship.

THE FOREGOING WARRANTY IS IN LIEU OF AND EXCLUDES ALL OTHER WARRANTIES NOT EXPRESSLY SET FORTH HEREBIN, WHETHER EXPRESS OR IMPLIED BY OPERATION OF LAW OR OTHERWISE, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OF FITNESS.

Seller shall not be liable for incidental or consequential losses, damages, or expenses, directly or indirectly arising from the sale, handling, or use of the goods, or from any other cause relating thereto, and Seller's liability in any case is expressly limited to replacement (in the form originally shipped) of goods not complying with this agreement, or, at Seller's election to the repayment of, or crediting Buyer with, an amount equal to the purchase price of such goods, whether such claims are for breach of warranty or negligence.

Any claimed defect in material or workmanship shall be deemed waived by Buyer unless submitted to Seller in writing within thirty (30) days from the date it was, or by reasonable inspection should have been, discovered by Buyer.

Seller shall not be liable under the foregoing warranty if any loss or damage is caused by improper application or use of the goods, or if goods are not applied, and used according to Seller's current printed directions and specifications, free copies of which are available on request.

CANCELLATIONS. Seller reserves the right to require payment for the goods in advance, or satisfactory security if the financial responsibility of Buyer becomes unsatisfactory to Seller. If Buyer fails to make payment in accordance with the terms of the agreement, or any collateral agreement, or fails to comply with any provisions hereof, Seller may, at its option (and in addition to other remedies) cancel any unshipped portion of this order. Buyer to remain liable for all unpaid accounts.

Goods cannot be returned and orders, once accepted, cannot be canceled without Seller's prior written consent. In the case of special or non-stock goods, Buyer's cancellation will be accepted only upon Buyer's acceptance and payment in full for finished items within 10 days of completion, and on other items in process of manufacture, the cancellation charge shall be on the percentage of completion as applied to the purchase price. A restocking charge will be assessed on all returned materials.

Seller shall not be liable under the foregoing warranty if any loss is caused by improper application or use of the goods, or if goods are not applied, and used according to Seller's current printed directions and specifications, free copies of which are available on request.

CANCELLATIONS. Seller reserves the right to require payment for the goods in advance, or satisfactory security if the financial responsibility of Buyer becomes unsatisfactory to Seller. If Buyer fails to make payment in accordance with the terms of the agreement, or any collateral agreement, or fails to comply with any provisions hereof, Seller may, at its option (and in addition to other remedies) cancel any unshipped portion of this order. Buyer to remain liable for all unpaid accounts.

Goods cannot be returned and orders, once accepted, cannot be canceled without Seller's prior written consent. In the case of special or non-stock goods, Buyer's cancellation will be accepted only upon Buyer's acceptance and payment in full for finished items within 10 days of completion, and on other items in process of manufacture, the cancellation charge shall be on the percentage of completion as applied to the purchase price. A restocking charge will be assessed on all returned materials.
Potential Liability - Try to Make It Jive Up Stream and Down

FROM UP STREAM

- Fraud
  - Payment to lower tiers
    - Through the date of the last of pay period for which payment was received
      - Example: AIA G702
    - However, it could state through the date of the pay app
      - List of Suppliers or Subcontractors
Potential Liability-Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

• When Are Liens In Play?
  
  – Lien Rights Typically May Not Be Asserted Against “Public” Property.
    • Otherwise, Federal Miller Act and Little Miller Acts
    • Sometimes a lien may be asserted against funds of the general contractor
      – E.g. Kentucky
  
  – Lien Rights Are in Addition to Payment Bond Rights, if any, on Private Projects.
Potential Liability-Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

• What to Do To Take Liens Out of Play?
  – Lien Waiver Embedded in Purchase Order/Subcontract
    • In many states this is unenforceable
  – Lien Waiver as Exhibit to Purchase Order/Subcontract
    • Ensures proper form will be used
  – Comply With Any Preliminary Notice Regime in Lien Law
    • File Notice of Commencement/Notice to Owner on Contractor for example
INTERIM WAIVER AND RELEASE
UPON PAYMENT

STATE OF GEORGIA
COUNTY OF __________

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN
EMPLOYED BY ____________________________ (NAME OF CONTRACTOR) TO
FURNISH ____________________________ (DESCRIBE MATERIALS AND/OR
LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS
(TITLE OF THE PROJECT OR BUILDING) WHICH
IS LOCATED IN THE CITY OF ____________, COUNTY OF ____________,
AND IS OWNED BY ____________________________ (NAME OF OWNER) AND MORE
PARTICULARLY DESCRIBED AS FOLLOWS:

__________________________________________________________________

(DESCRIPTION OF PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE
BY USING EITHER A METES AND BOUNDS DESCRIPTION, THE LAND LOT
DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE
PROJECT.)

UPON THE RECEIPT OF THE SUM OF $__________, THE MECHANIC AND/OR
MATERIALMAN WAIVES AND RELEASES ANY AND ALL LIENS OR CLAIMS OF
LIENS IT HAS UPON THE FOREGOING DESCRIBED PROPERTY OR ANY RIGHTS
AGAINST ANY LABOR AND/OR MATERIAL BOND THROUGH THE DATE OF
(DATE) AND EXCEPTING THOSE RIGHTS AND LIENS
THAT THE MECHANIC AND/OR MATERIALMAN MIGHT HAVE IN ANY
RETAINED AMOUNTS, ON ACCOUNT OF LABOR OR MATERIALS, OR BOTH,
FURNISHED BY THE UNDERSIGNED TO OR ON ACCOUNT OF SAID
CONTRACTOR FOR SAID BUILDING OR PREMISES.

GIVEN UNDER HAND AND SEAL THIS ____ DAY OF ____________, ___.

____________________________________ (SEAL)

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE
CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT STATED
ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH PAYMENT, 60
DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE EITHER AN
AFFIDAVIT OF NONPAYMENT OR A CLAIM OF LIEN PRIOR TO THE
EXPIRATION OF SUCH 60 DAY PERIOD. THE FAILURE TO INCLUDE THIS
NOTICE LANGUAGE ON THE FACE OF THE FORM SHALL RENDER THE FORM
UNEFFECTIVE AND INVALID AS A WAIVER AND RELEASE UNDER O.C.G.A.
SECTION 44-14-366.
Potential Liability-Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

• Comply with Preliminary Notices

• EXAMPLE: NOTICE OF COMMENCEMENT
  – To be used when you contract with the owner
  – Establishes the Shield
  – Provides owners with additional protection against lien claimants that are not in privity with the contractor.
  – Knocks-Out potential lienors who fail to comply with notice requirements.
NOTICE OF COMMENCEMENT

THE UNDERSIGNED hereby gives notice that improvements will be made to certain real property, as described below, and in accordance with the Official Code Georgia Annotated Section 44-14-361.5, Section 10-7-31, Section 13-10-62, and/or Section 36-91-92, relating to mechanics and materialmen's liens and/or payment bond claims, the following information is provided in this Notice of Commencement.

1. Prime Contractor Information:
   a. Name: [insert prime contractor's name]
   b. Address: [insert prime contractor's address]
   c. Telephone Number: [insert prime contractor's home office telephone number]

2. Name of the Project: [insert name of project]

3. Location of the Project: [insert street address of the project]

4. Legal Description of the Project: [insert legal description of the property]

5. True Owner of Property:
   a. Name: [insert name of the true owner of the property]
   b. Address: [insert address of the true owner of the property]

6. Party Contracting with Prime Contractor, if not True Owner (e.g., tenant of leased property, agent of the owner, etc.):
   a. Name: [insert name of party]
   b. Address: [insert address of the party]

7. Payment Bond, if any:
   a. Surety: [insert surety's name]
   b. Address: [insert surety's address]

8. Performance Bond, if any:
   a. Surety: [insert surety's name]
   b. Address: [insert surety's address]

9. Construction Lender, if any:
   a. Name: [insert name of construction lender]
   b. Address: [insert address of construction lender]

10. Holder of "security deposit" provided, if any:
    a. Name: [insert name]
    b. Address: [insert address]
NOTICE TO CONTRACTOR

In order to preserve our lien and/or bond rights to perfect a claim of lien and/or claim against the bond, and subsequent foreclosure in the event we are not fully paid for labor, materials or services provided to this project, and pursuant to statutory requirements O.C.G.A. §44-14-361.5, §13-10-63, §36-91-93 and/or §10-7-31, and within the allotted time, we hereby give this Notice to Contractor to you as follows:

1. [Insert Subcontractor or Supplier Name] has furnished or is furnishing labor, services, and/or material as follows: [insert general description of labor, materials, services and/or material being provided];

2. The contract price or anticipated value of this labor, services and/or material is: ["at least" and state the subcontract or purchase order amount, if known, or state "not presently determinable" if not known or yet determinable];

3. This labor, services, and/or material were provided or are to be provided for the project known as: [insert the project name set forth in the "Notice of Commencement"] and located at: [insert location of the project set forth in the "Notice of Commencement"];

4. This labor, services, and/or material were and/or are to be provided at the instance of the following persons: [insert the name and address of the person or persons "at whose instance" the labor, services, and/or are being furnished (i.e., the person with whom you have contracted by subcontract or purchase order or agreement)]; and

5. This labor, service or material has been and/or will be provided by:
   [insert subcontractor's or supplier's proper name]
   [insert subcontractor's or supplier's address]
   [insert subcontractor's or supplier's telephone number].
Potential Liability - Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

- When Are Bonds In Play?
  - What is a Public Work?
    - Who is Funding the Project?
    - Who is the Obligee of the Bond (circular)?
    - Who is the Owner?
    - Who is the Contracting Party?
    - Does the Bond cites the Miller Act?
      - *Operating Eng's Health & Welfare Trust Fund v. JWJ Contracting Co.,* 135 F.3d 671, 675 (9th Cir.1998)
  - Often Federal Miller Act Case Law Persuasive Authority for Little Miller Act Claims
Different Avenues of Recourse Against Your Interest-Bottom Up

FROM DOWN STREAM

• Breach of Contract:
  – Offer, Acceptance, Mutual Consideration
  – Statute of Limitations-verbal, written, sealed
  – Keep the Terms As Good or Better than Those Below You
    • Right to and rate of interest
    • When entitled to be paid
    • Whether retainage withheld and when released
    • Indemnification
    • Warranty
# GIC Trade Credit Application

## Trade References (Insulation and HVAC suppliers)

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Address</th>
<th>City-State-Zip</th>
<th>Contact</th>
<th>FAX#</th>
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**GIC Use ONLY**

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<th>How Long</th>
<th>High Credit</th>
<th>Terms</th>
<th>Pay</th>
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## Trade References (3 largest trade creditors)

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## Bank Reference

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**GIC Use ONLY**

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<th>Curr Bal</th>
<th>Sec/Unsec Pay</th>
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## History With GIC

**Under what name have you traded with GIC before?**

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<th>GIC USE ONLY</th>
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<tr>
<th>Prior history with GIC</th>
<th>Credit Dept Auth</th>
<th>Credit Amt granted</th>
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Company Promise to Pay

Corporate Signature Required for Open Account Credit

1) Company promises to pay General Insulation Company ("GIC") for services and materials purchased within 30 days from the date of invoice, and pay GIC interest of 1.5% per month (18% per annum), or the highest lawful interest rate, whichever is greater, on all amounts unpaid by Company 30 days after invoice date.

2) If the amount is not paid in full as agreed and GIC chooses to take legal recourse, Company promises to pay all costs and expenses of collection, including actual attorney's fees and costs, and expenses and attorney's fees incurred upon appeal.

3) Company agrees to all terms and conditions of sale of GIC.

4) Company consents to an investigation into its credit worthiness and agrees to disseminate credit information about itself to inquiring sources. Company further authorizes its financial institutions to share standard credit information with GIC during the initial credit investigation process and routine credit updates.

5) Company waives all rights related to venue it may have under any applicable state or federal law, and further agrees to submit to the jurisdiction of any Court in the United States where a collection action may be brought.

6) Company certifies that all the information contained in this application is correct, true and accurate.

Personal Commitment to Fulfill Trade Obligation

1) This agreement is made in consideration of GIC's selling and delivering to Company on GIC's usual and customary terms of sale, such goods, wares, merchandise and services as company's authorized purchaser or representative may, from time to time, order or select.

2) The undersigned Guarantor(s) do each individually agree that the Guarantor(s) shall be personally responsible, jointly and severally, for payment at maturity of purchase price of all goods, wares, merchandise and services so sold or delivered, whether evidenced by open account, acceptance, note or otherwise.

3) This is intended to be a continuing Guaranty applying to all sales made by GIC to the Company and shall not be revoked by the death of the Guarantor(s). This Guaranty shall remain in full force and effect until the Guarantor(s) or their Executors or administrators shall have given notice in writing to make no further advances on GIC to the Company.

4) The Guarantor(s) understand and agree that their liability under this Guarantee shall be UNLIMITED.

5) Should GIC place this Guarantee with an attorney or other collection agent for collection or legal proceedings, the Guarantor(s) agree, jointly and severally, to pay all resulting attorney's fee and expenses.

6) Guarantor(s) waive all rights relating to venue they may have under any applicable state or federal law, and agree to submit to the jurisdiction of any Court in the United States where a collection action may be brought.
Breach of Contract:

Contingent Pay Clauses vs. Prompt Pay Acts

- Good News: In some states, contractors and subcontractors are entitled to be promptly paid for work they complete.
- Contractor must be paid within a certain number of days of the owner receiving an application for payment for completed work.
- A contractor must pay its subcontractors within a certain number of days of being paid if the subcontractor has completed all conditions precedent to payment.
- Likewise, a subcontractor must pay its remote subcontractors within a certain number of days of being paid if the sub-subcontractor has completed all conditions precedent to payment.
Potential Liability - Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

Breach Of Contract: Prompt Pay Acts - Right to Withhold Monies

- Bad News: Often, an owner or Contractor may withhold payment for:
  - unsatisfactory job progress
  - defective construction not remedied
  - disputed work;
  - third-party claims filed or reasonable evidence that a claim will be filed;
  - failure of the contractor or its subcontractor to make timely payments for labor, equipment, and materials;
  - damage caused by the contractor to the owner, other contractors, or subcontractors;
  - or reasonable evidence that the contract cannot be completed for the unpaid balance of the contract sum.
Potential Liability-Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

Prompt Pay Acts-Interest

• Good news: Should the payor fail to pay within the statutory period, the payee is often entitled to interest at a rate of 1% per month.

• Bad news: Sometimes you need to provide notice of interest as early as your payment application for this interest to accrue pursuant to these statutes.

• May Be High Stakes:
  – The prevailing party may be entitled to reasonable attorney’s fees for among other things, trial, appeals, and arbitration.

• May Be Inapplicable if Contracted Away in Some States
Potential Liability-Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

Breach of Contract: Right to Interest

- Lien claimants can often recover liquidated prejudgment interest.

- Most if no all states provide for a legal rate of interest where one is not stated in a contract.

- Prompt Pay Acts often specify a specific interest rate and sometimes it is higher than the standard legal rate.

- Sometimes open commercial accounts may accrue at an even higher rate.
Potential Liability-Try to Make It Jive Up Stream and Down

FROM DOWN STREAM

Release of Claims in General-Don’t Do It Until Lower Tiers Have

• Payment and Claim Rights Can Be Lost Inadvertently by Waiver or Release Language Lurking in:
  – Payment Application Forms
  – Lien and Claim Waiver Forms
  – Certification Language
  – Change Orders

• Often Lurking in Small Print and Obscure Text
  – Remember—“large print giveth, and small print taketh away”
FROM DOWN STREAM

Release of Claims in General-Don’t Do It
Until Lower Tiers Have

• Progress payment form provision stating:

  “I hereby certify that the work performed and the materials supplied to
date, [of the payment application] as shown on the above, represent
the actual value of accomplishment through the date hereof under the
terms of the contract (and all authorized changes thereto) between
the undersigned and [contractor], relating to the above referenced
project.”

• Held: Eleventh Circuit Federal Court of Appeals (applying
Georgia law):

  “This would seem to bar recovery for any additional costs allegedly
incurred by [contractor] during the course of construction for the
periods of time represented by the invoices.”
Potential Liability-Try to Make It Jive Up Stream and Down

Release of Claims in General-Don’t Do It Until Lower Tiers Have

• A change order requesting release stated that:
  “... the undersigned of [Subcontractor] for and in consideration of [...] dollars and other good and valuable consideration, the receipt for which is hereby acknowledged, does hereby waive, release and relinquish any and all claims, demands and rights of lien for work, labor and/or materials furnished through the [date of the change order].”

  And the Change Order itself expressly stated that:
  “THE UNDERSIGNED further deposes and says that all labor, materials, supplies, equipment, etc. furnished by the undersigned, have been fully paid for and discharged through the above date.”

• Held: Eleventh Federal Circuit Court of Appeals, that these were unambiguous and released all remaining unresolved claims.
Different Avenues of Recourse Against Your Interest-Bottom Up

TORT CLAIMS (personal liability)

- Conversion
  - Failure to pay amounts due to lower tiers after receipt of funds from above
    - unauthorized assumption and exercise of the right of ownership over personal property (money) belonging to another
    - in hostility to his rights;
    - an act of dominion over the personal property of another inconsistent with his rights;
    - or an unauthorized appropriation
  - Fail to pay despite demand and defendant disposed of funds

- Fraud
  - False statement
  - Intended to mislead
  - Reasonable reliance
  - Damage caused by reliance on false statement
Inspection/Consultant Liability

• Breach of Contract-Inspector/Consultant
• Negligence
• Should Not Subject You to Liability from trade contractors
  – ASTM E2174 Para. 5.4 specifically states that inspector “. . . is not intended to establish any performance criteria of the inspected fire stops.”
• Implied Warranty of Specifications to contractors and trade contractors arise from implied warranty in design specifications.
Standard Practice for
On-Site Inspection of Installed Fire Stops

This standard is issued under the fixed designation E 2174; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval.

1. Scope

1.1 This practice covers the establishing of procedures to inspect fire stops, including methods for field verification and inspection.

1.2 This practice addresses all types of fire stops installed through or into fire resistive assemblies.

Norm. 1—Fire stop is defined in Test Method E 814.

1.3 This practice provides methods by which qualified inspectors verify that required fire stops on a project have been installed and that their installations are in accordance with the inspection documents.

1.4 The values stated in inch-pound units are to be regarded as standard. The values given in parentheses are mathematical conversions to SI units that are provided for information only and are not considered standard.

1.5 This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use.

1.6 The text of this standard references notes and footnotes that provide explanatory material. These notes and footnotes (excluding those in tables and figures) shall not be considered as requirements of the standard.

2. Referenced Documents

2.1 ASTM Standards:

E 176 Terminology of Fire Standards
E 631 Terminology of Building Constructions
E 699 Practice for Evaluation of Agencies Involved in Testing, Quality Assurance, and Evaluating of Building Components

2.2 Other Standards:

UL 1479-94 Fire Tests of Through-Penetration Fire Stops

3. Terminology

3.1 Definitions—Terms defined in Terminology E 631, Terminology E 176, and Practice E 699 will prevail for terms not defined in this document.

3.2 Definitions of Terms Specific to This Standard:

3.2.1 authorizing authority (AA)—the designated person or organization, or their duly authorized representative, charged with the administration and enforcement of the provisions of the inspection document.

Note 1—Examples of the AA include the responsible architect, engineer, building owner, or their representative.

3.2.2 authority having jurisdiction (AHJ)—the designated authority, or their duly authorized representative, charged with the administration and enforcement of the local fire code or building code, or both.

3.2.3 accredited testing laboratory—a company engaged in conducting testing and possesses a valid evaluation report for testing services and is recognized by the AHJ.

3.2.4 evaluation report—an approved document issued by the Model Code Body Evaluation Service or by the AHJ.

3.2.5 inspection document—any information provided to the inspector by the AA that is to be used as the basis for the inspection process. This information shall include, but is not limited to, project specifications, contract drawings, listed designs, judgments, manufacturer’s instructions and designs, building codes, and other documentation.

Note 2—The approved fire stop submittal should have sufficient details including the fire stop manufacturer’s product data, a design listing of the tested fire stop or the engineering judgment design with illustrated...
6.1.2 Have a minimum of two years experience in construction field inspections and have education, credentials, and experience acceptable to the AA; or
6.1.3 Be a quality assurance agency accredited by the AHJ.

6.2 Conflicts of Interest:

6.2.1 The inspector shall be completely independent of, and divested from, the installer, contractor, manufacturer, or supplier of any material being inspected.

6.2.2 The inspector shall not be a competitor of the installer, contractor, manufacturer, or supplier of any material being inspected.

6.3 The inspector shall submit notarized statements to the AA assuring compliance with 6.2.

6.4 The inspector shall make a written submission to the AA requesting acceptance. If accepted, the AA shall present the inspector with written confirmation of acceptance.

5. Significance

5.1 This practice provides guidelines that are to be followed when conducting and reporting on inspections of installed fire stops.

5.2 This practice is intended to provide a means to verify compliance of the installed fire stops to the inspection documents.

5.3 This practice is not intended to provide a basis for selecting installers or products or both.

5.4 This practice is not intended to establish any performance criteria of the inspected fire stops.
10.11 The inspector shall verify compliance of the fire stop by observing the installation process and by taking and recording measurements of the substrates and materials being installed or by destructive examination of completed installations.

10.12 Inspection frequency shall depend on the method of inspection and the scope of the project. The method of inspection shall be one of the following:

- Randomly witness a minimum of 10% of each type of fire stop being installed, or
- Conduct a post-installation inspection and repair of the fire stop. A minimum of 2%, but not less than one, of each area of a floor when a floor is larger than 10,000 ft² (946.6 m²), or for each area of a floor of 10,000 ft² or less.
11. Inspection Forms

11.1 Inspection forms, as defined in 8.2.6, shall be submitted to the AA and installer within one working day after an area is inspected.

Note: —The filing of inspection reports should be performed in such a manner to ensure that project construction schedules are not delayed and that the installer has an adequate opportunity to repair all deficiencies prior to the next or later phase of the project. Provided herein are sample completion of typewritten, written, checksheets, and so forth, marking or checking proper locations.

11.2 An inspection form shall be written and clearly describe the results of the inspection and any deficiencies.

11.3 Example of inspection form is shown in Fig. 1.

11.4 Inspection forms shall be sequentially numbered, starting with 1, and only contain information about one type of fire stop. Use a new inspection form for each type of fire stop. Use an empty inspection form as needed. Attach drawings and additional pages if needed.

<table>
<thead>
<tr>
<th>INSPECTION FORM</th>
<th>Reference No.</th>
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<tbody>
<tr>
<td>Inspection Date:</td>
<td>Inspector:</td>
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<tr>
<td>Installer:</td>
<td>AA:</td>
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<tr>
<td>AHJ:</td>
<td>Project:</td>
</tr>
<tr>
<td>Fire stop Type per Inspection Document:</td>
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</tr>
<tr>
<td>Quantity of Fire stop Type on Project:</td>
<td>Quantity Inspected Today:</td>
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<tr>
<td>Total Quantity Inspected to Date:</td>
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**Inspected Fire stops**

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<th>Location &amp; Inspection Document Reference</th>
<th>Deficiency</th>
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**Repaired Fire stops**

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<tr>
<th>Location &amp; Inspection Form Reference</th>
<th>Compliant “Yes” or “No” State Deficiency</th>
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11.5 When deficiencies or repairs are made to a fire stop, the inspection form number shall be cited on the inspection form in 11.4 for cross reference.

12. Report

12.1 At the end of the installation and inspection process, the inspector shall submit a final report.

12.2 The final report shall contain a cover page with the following:

12.2.1 The project name, location, and reference number;

12.2.2 The name and address of the inspector;

12.2.3 The name and address of the installer, as well as the prime contractor if different;

12.2.4 The name and address of the AA and AHI;

12.2.5 The name and address of the AASA.

12.3 The final report shall also contain a summary page with the following:

12.3.1 Types and quantity of each fire stop on the project according to the inspection documents.

12.3.2 When verification methods from 10.12 were used to ascertain compliance with the inspection documents.

12.3.3 The quantity of each fire stop inspected on the project and a narrative written statement by the inspector that the number of fire stops inspected comply with 10.12.

12.3.4 The summary page shall also contain percentages of deficiencies for each type of fire stop referenced in the inspection documents.

12.3.5 A total number of deficiencies shall be expressed as a percentage of the total number of fire stops inspected.

12.4 The final report shall also contain copies of all information submitted by the inspector to the AA.

12.5 The final report shall also contain copies of all inspection forms submitted during the inspection process. They shall be arranged chronologically.

13. Keywords

13.1 fire stop, inspection, inspector

APPENDIX

(Normative Information)

XI. DISCUSSION OF ITEMS IN THIS PRACTICE

XI.1 Inspector

XI.1.1 The inspector is responsible for the verification and inspection of all the fire stops on the inspection documents.

XI.1.2 Therefore, it is possible that in addition to meeting the requirements set forth in this practice that the inspector is also one of the following:

XI.1.2.1 A code official,

XI.1.2.2 An architect,

XI.1.2.3 A engineer,

XI.1.2.4 A representative of a quality assurance agency or an accredited testing laboratory, or

XI.1.2.5 A licensed professional in the construction industry.

XI.2. The procedures discussed in this practice should be established at a mandatory pre-construction meeting attended by representatives of the owner, general contractor, the sub-contractors responsible for creating penetrations or openings, the fire stop installer, and the inspector.

XI.3. In order to facilitate cooperation between all parties during the installation and inspection of the fire stops, the AA and AHI should make the following documents available: project specifications, drawings, penetration schedule and the approved fire stop submittals. Project drawings should include, but not be limited to, architectural, structural, mechanical, plumbing, electrical and fire protection. These drawings and the penetration schedule should be sufficient for identifying and locating all fire resistance rated assemblies on the project, as well as the penetrating items, and openings relative to the construction trades involved (mechanical, plumbing, masonry, etc.).

XI.4. Normally, a current design listing of a fire stop manufactured by an approved quality assurance agency should be displayed to be integrated information for reference in contracts, specifications, drawings, submittals and reports. Published fire stop design listings shall be used if available. Submittals should be from manufacturer's or accredited testing laboratories and acceptable to the AASA.

Note XI.1—Examples of listing and testing agencies that produce design listings are Factory Mutual, Underwriters Laboratories, Underwriters Laboratories of Canada and Shawnee/Honeywell Testing Services.

XI.5. Prior to the establishment of the inspection documents, the fire stop installer shall make a submittal to the AA. The name of the fire stop product manufacturer, a description of the product and systems that will be installed, and the manufacturer's installation instructions should be submitted for approval by the AA.

XI.6. The inspector uses the following as a guide during inspections:

XI.6.1 The inspector brings any tools needed to examine the fire stop for compliance. These tools include, but are not limited to, the following:

XI.6.1.1 A straight edge to cut into the fire stop,

XI.6.1.2 A tape measure to verify dimensions,

XI.6.1.3 A thickness gauge to verify wall thickness, and

XI.6.1.4 An outside caliper to measure penetrating item diameters.

XI.6.2. The following are some types of penetrating items that may be encountered by the installer and inspector:

XI.6.2.1 Plastic Pipe,
Typical Floor Fire Stop

X.1.6.2.2 Cables,
X.1.6.2.3 Metal Pipe,
X.1.6.2.4 Cable Tray,
X.1.6.2.5 Ducts, and
X.1.6.2.6 Multiple Means.
X.1.6.3 The thickness and construction of the fire rated assembly into which the fire stop is installed is also critical.

X.1.7 Examples of Fire Stops
X.1.7.1 Item 1 is the fire-resistant assembly. The thickness and construction may be critical to performance.

X.1.7.2 Item 2 is the materials placed into an annular space. The thickness of the resilient may be critical, as well as the thickness and density of the backing material. The shape of the annular space is typically rectangular or circular.

X.1.7.3 Item 3 is the penetrating item. The material and diameters may be critical components.
Inspection/Consultant Liability

- Should Not Subject You to Liability from trade contractors
  - Consultant rejecting work not liable to trade contractor even if rejection is incorrect because it is (1) outside the chain of contracts, (2) not responsible for design and (3) no privity of contract and thus no duty to tradesman.
    - ASTM E2174 Para. 5.4 specifically states that inspector “. . . is not intended to establish any performance criteria of the inspected fire stops.”
  - Implied Warranty of Specifications to contractors and trade contractors arise from implied warranty in design specifications.
Inspection/Consultant Liability

• May need E & O Insurance Coverage-Professional Services Exclusion*
  
  
  - *Hartford Cas. Ins. Co. v. Benchmark, Inc./Taylor Associates, Inc., 1999 WL 33656863 (N.D. Iowa 1999) (stating that “The term is not limited to services performed by persons who must be licensed by a governmental authority in order to practice their professions. Rather, it refers to any business activity conducted by the insured which involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature.”)
Inspection/Consultant Liability

Work Classification

• Typical Form Language:
  – Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

• Insurance is typically governed by contract law
  – Need a meeting of the minds on the material terms
  – Could raise issues of fraud and misrepresentation

• Insurer may have authority determine the appropriate classification and premium
An Ounce of Prevention (Negotiation) is Equal to a Pound of Cure (litigation).

Avoid the Killer Contract Clauses
- No Damage for Delay
  - Example (emphasis added):
    If the progress of the Subcontractor’s Work is substantially delayed without the fault or responsibility of the Subcontractor, then the time for the Subcontractor’s Work shall be extended by Change Order to the extent obtained by the Contractor under the Contract Documents and the Schedule of Work shall be revised accordingly. **The Contractor shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays unless the Contractor has first recovered the same on behalf of the Subcontractor from said person,** it being understood and agreed by the Subcontractor that, apart from recovery from said person, the Subcontractor’s sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontractor’s Work.
An Ounce of Prevention (Negotiation) is Equal to a Pound of Cure (litigation).

Avoid the Killer Contract Clauses

• Differing Site Condition-Latent defect, defects in precedential work etc.
  – Example:
    Subcontractor shall check all work performed by others necessary for Subcontractor to “receive” the Subcontractor’s work. Failure to give notice 10 days from when Subcontractor knew, or should have known, of any discrepancy shall relieve the Contractor of any responsibility therefor.
An Ounce of Prevention (Negotiation) is Equal to a Pound of Cure (litigation).

Avoid the Killer Contract Clauses

• Avoid blend of design specification and performance specification
  – Example:

    The Contractor shall furnish and install the roof membrane strictly in accordance with the plans and specifications and the manufacturer’s details and recommendations **in order to achieve a watertight roof system.**
An Ounce of Prevention (Negotiation) is Equal to a Pound of Cure (litigation).

Avoid the Killer Contract Clauses

• Overly Broad Indemnification Clauses
  • Example (emphasis added):
  Contractor shall indemnify and hold harmless, [the Owner, its designee] and their directors, officers, employees, agents, attorneys and volunteers (“Indemnified Parties”) from any and all claims, set-offs, losses, damages, liabilities, fines and expenses, including without limitation, the concurrent negligence of one or more Indemnified Parties and Contractors, the contributory negligence of Contractor and any third party, and any attorneys’ fees, expenses or other costs associated with or incurred, based on or in any manner arising out of or related to the performance or nonperformance of this Agreement by Contractor or the exercise of rights granted to Contractor hereunder, including, but not limited to, injury to persons or property, actual damages, consequential damages, punitive damages, losses, set-offs, warranty claims, product liability claims or other damages arising out of an action for strict liability in tort; provided however that nothing contained in this provision shall be interpreted to indemnify or hold harmless the Indemnified Parties.....
An Ounce of Prevention (Negotiation) is Equal to a Pound of Cure (litigation).

RESPONSES

Avoid the Killer Contract Clauses
Overly Broad Indemnification Clauses

A. Be aware that many states have “anti-broad form indemnity” statutes which may render void and unenforceable

B. But, in many states, if the “broad form” indemnity language (which would otherwise be unenforceable under this statute) is matched to a duty to “insure” such obligation, then the “broad form” language is fully enforceable, even if you cannot actually procure insurance for the full scope of such obligation.
RESPONSES

Avoid the Killer Contract Clauses
Overly Broad Indemnification Clauses

C. Such provisions generally should be reasonably limited to circumstances for which conventional insurance coverage is available. Indemnity obligations are often coupled with a corresponding insurance requirement, and you should not agree to indemnity duties broader than the insurance coverages available.
Avoid the Killer Contract Clauses
Overly Broad Indemnification Clauses

D. AVOID contract language that purports to require you to indemnify or hold parties harmless where (Cont.):

1. The claim arises out of the indemnified party’s sole negligence [seek to limit such duty to a “comparative” or proportionate basis by qualifying the duty to only “the extent caused by” you or others for whom you are responsible]

2. Such duty goes beyond the typical CGL insurance coverages for death or personal injury or property damages [e.g. including economic or consequential damages that may flow irrespective of their insurability]
An Ounce of Prevention (Negotiation) is Equal to a Pound of Cure (litigation).

RESPONSES

Avoid the Killer Contract Clauses
Overly Broad Indemnification Clauses

D. AVOID contract language that purports to require you to indemnify or hold parties harmless where:

3. Such duty is triggered by actions other than “negligence” since that could extend such indemnity and hold harmless obligations to “breach” or failure of performance of contract requirements - which again would fall far beyond conventional insurance coverages.

4. Such duty arises even from circumstances beyond your control - such as those generally “arising” out of or simply “related to” the performance under the contract – and not due to your fault.
Avoid the Killer Contract Clauses
Overly Broad Indemnification Clauses

E. AVOID contract language that purports to require you to “defend”, in addition to “indemnify and hold harmless”.

F. Make sure to give your insurance agent or counselor a copy of any proposed indemnity language - especially if it is specified to be insured - and obtain a firm written commitment that the insurance contemplated for the project does in fact cover the obligation [or specifies what is not covered, so that you can fully assess the uninsurable risk].
This outline and presentation briefly covers some of the legal topics concerning liens, bonds contract claims and liability. The laws vary from state to state and the foregoing general information is not intended to provide legal advice or render legal opinions and should not be considered as a substitute for consulting with a lawyer.

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