

K You Should **Know**



A Message from the American Concrete Pipe Association

Bulletin No. 101

The Truth Behind the Greenbook Acceptance of HDPE Specifications

March 1, 1996 – 7 pages

Last fall the American Public Works Association's Joint Cooperative Committee, which publishes the Greenbook, accepted specifications for HDPE pipe. There has been much discussion about why the Greenbook reached that decision. Meanwhile HDPE manufacturers have used this acceptance in their promotional campaigns.

Why did the Greenbook accept HDPE pipe?

The attached letters address this issue, and refer to events which preceded the acceptance of HDPE pipe. These letters are a matter of public record, but they must be reproduced in their entirety. Do not paraphrase them or use excerpts if you choose to reproduce them yourself.

The American Concrete Pipe Association makes these documents available to its members as part of its ongoing policy of sharing information relevant to the industry.

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FILE NO. 1114500-2

September 19, 1995

TO: AMERICAN PUBLIC WORKS ASSOCIATION /JOINT COOPERATIVE COMMITTEE MEMBERS

Dear APWA/JCC Member:

I am writing to all American Public Works Association members who have participated in the Joint Cooperative Committee to update you on the efforts to restructure the JCC to provide better protection for its participants, the status of the antitrust inquiry by the California Attorney General, and efforts to resolve Hancor's potential civil suit for alleged antitrust violations and monetary damages.

This letter specifically is being sent to everyone on the distribution list for JCC meetings, New Materials and Products Subcommittee Meetings, and all officers of the APWA Southern California Chapter. I am attempting to be as inclusive as possible in distributing this letter. If someone wants additional copies or knows of someone else who may want a copy, please let me know.

The APWA is working with the Associated General Contractors of California and other contractors associations to restructure the JCC/Greenbook Committee. Our primary goal is to increase the legal protections available to our members and the associations. Though final action will need to be taken by the APWA's national board of directors, the basic structure under consideration provides for the establishment of the JCC as a separate non-profit corporation. APWA members would retain majority voting control of the new entity.

The new legal entity should be able to purchase a liability insurance policy. Based on recent events, we want to assure our members that they may participate in the APWA and JCC without exposing themselves to threatened lawsuits by unhappy manufacturers. The new entity could obtain an insurance policy which would provide directors, officers, and members of committees, subcommittees and task forces with insurance to provide a legal defense. In addition, APWA as a

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national organization — just as in the recent Hancor/ California AG dispute — would anticipate working to resolve such legal complaints and assisting in the defense.

I also anticipate that APWA on a national basis will be adopting an antitrust compliance program. Because of the inherently collective nature of a trade association, especially one which directly interacts with another trade association comprising its customers, many serious antitrust concerns may arise. The APWA is working to implement a program which should avoid such problems in the future.

As you know, Barbara Motz of the California Attorney General's office inquired into the operation of the JCC. Though APWA members and the municipalities for whom you work do not sell products or services, as buyers of construction products and services, you are subject to the criminal and civil provisions of both federal and state antitrust laws. Most recently, Ms. Motz had two primary concerns: first, the wording of the Greenbook provision on payment for extra work; and, second, the procedure by which Hancor's HDPE pipe was considered - - and for several years - - rejected.

The JCC's Specifications Subcommittee, ably chaired by Gus Dembegiotes of LA County Public Works, recently adopted a revised version of the provision on extra work. Ms. Motz contends that under the old version, the various municipalities have collectively agreed to a specific percentage or dollar amount, and that may constitute a violation of the antitrust laws. The revised version provides that contractors will be paid a reasonable amount, including a reasonable profit, for extra work. I anticipate that the individual municipalities will specify the reasonable profit in their special conditions. From an antitrust standpoint, the critical factor is that such specification be done independently by each municipality rather than as part of a collective agreement. Ms. Motz has indicated that the revised version apparently complies with all antitrust requirements, and I anticipate that in the near future her office will prepare a letter reflecting that position. I anticipate that this revised version will soon be considered, and probably adopted, by the full JCC.

The adoption of the Hancor specification on August 17, 1995 significantly helped our situation with Ms. Motz. She has indicated that she wants to observe how the situation develops, and is concerned that all manufacturers receive fair treatment. Though I contend that the JCC has treated Hancor — and all other manufacturers — fairly, Ms. Motz is skeptical.

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As for Hancor's threatened lawsuit, the APWA has agreed in principle to a settlement which assures that Hancor will not sue either APWA or JCC or any of its officers, directors, employees or members for any conduct prior to August 17, 1995. Thus, upon its final execution, this settlement will protect you from liability, if any, in your capacity as a APWA/JCC member for all actions and conduct taken by the JCC in its consideration of Hancor's proposed specification. The APWA's fundamental commitment is that Hancor will be treated fairly in the future. Of course, APWA contends that it and the JCC treats all manufacturers fairly. I enclose a draft of the proposed settlement agreement between Hancor and the JCC.

As you may know, during your participation in APWA/JCC meeting most of you arguably wear two separate legal hats: one member of APWA/JCC and another as a representative of your municipality. The legal exposure of an association member is not necessarily the same as that of an employee of a municipality. In particular, the municipalities have legal defenses which are unavailable to trade associations. Thus, you may have certain legal immunities as an employee, but that same defense may not protect you in your capacity as a member of APWA/JCC

Though I technically represent the legal interests of APWA/JCC and its individual members, I also have worked with Hancor in an effort to prevent any claims from being asserted against you as an employee or representative of the various municipalities. In that effort, I have worked with Hancor's counsel to resolve any outstanding dispute between Hancor and the municipalities who participate in the JCC. In that effort, I repeatedly informed Hancor that I do not represent the municipalities, and that I am not in a position to negotiate on their behalf. However, in an effort to expedite a final resolution of this dispute, I enclose a draft settlement agreement which Hancor proposes to enter into with the various cities and counties whose employees participate in the JCC. On behalf of APWA/JCC, I have made no commitment or representation about whether individual municipalities will, or should, sign this agreement. On the enclosed draft, the parties are identified as "_____ and Hancor."

My goal was to assure that Hancor would not sue the municipality nor its employees, and to limit the municipality's obligation to fair treatment in the future. Since I understand that many of you in your independent professional judgment have serious reservations about the use of HDPE, I insisted that the settlement agreement contain a provision that the engineer has the option of excluding HDPE on any project.

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I encourage you to discuss this proposed settlement agreement with your legal departments. Attorneys from your legal department may want to negotiate directly with Ernest Gellhorn, counsel for Hancor. He may be reached at Suite 100, 2907 Normanstone Lane, N.W., Washington, D.C. 20008-2725; his telephone number is (202) 319-7104; and his facsimile number is (202) 319-7106.

Thanks for your collective support and assistance throughout this ordeal. I specifically would like to thank and commend the considerable efforts expended by the APWA's national delegate, Ken Montgomery of the City of Laguna Niguel for his efforts throughout this process, and Lance Grindle of LA County for his assistance in resolving the Hancor dispute. I am certain that none of you enjoyed being threatened with multi-million dollar civil suits or potential criminal investigations, and am happy that this situation is nearing final resolution without any formal investigation by the attorney general's office and without APWA, AGC, JCC, the municipalities or any of the individual members paying so much as one penny in damages.

If you or anyone from the legal departments for your agency has any questions, please feel free to contact me at (816) 292-8112.

Very truly yours,

James R. McKown

JRM:slh

Enclosures

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May 23, 1995

BY FAX AND FEDERAL EXPRESS

Mr. Russell Maguire
Co-Chairman, JCC
City of Anaheim/APWA
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Anaheim, California 92805

Mr. John Berton
Co-Chairman, JCC
Sawnan, Inc./AGC
12240 Woodruff Avenue
Downey, California 90241

Re: Demand That Publication of the JCC Greenbook
And Any Supplements Thereto Be Suspended

Dear Sirs:

This demand letter is submitted to you as the Co-Chairpersons of the Joint Cooperative Committee ("JCC").

During the course of the meeting of the JCC held on May 18, 1995, Mr. Maguire, the American Public Works Association ("APWA") Co-Chairperson made a number of comments directed at Hancor, Inc. ("Hancor") — comments that indicate a misperception of Hancor's intent. This letter is written to clarify any misperceptions. Hancor's aim is not to force the suspension or dissolution of the JCC. To the contrary, Hancor has always supported objective, merit-based standards developed by a fair process. However, Hancor has objected to proceedings that were controlled by competitors, the result of which was that decisions of the organization ignored substantial experience from successful installations and careful research findings. Had the JCC fairly followed its procedures and made an objective decision on the merits, Change No. 1005NU would be approved. Instead, eight years have passed since the first submission for a corrugated HDPE pipe specification without final action based on the merits.

Messrs. Maguire & Berton
May 23, 1995
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The failure to follow JCC procedures, and the disregard of experience and evidence, has caused and is causing Hancor to suffer significant damages in California and elsewhere. Thus, unless and until the JCC includes in the Greenbook an appropriate specification for HDPE pipe, Hancor demands that the JCC take all necessary steps to suspend the publication and distribution of the Greenbook and any supplements thereto. Any such publication would be a further violation of the antitrust laws as well as numerous other laws and would cause enormous additional injury to Hancor. The JCC'S decision to suspend its operations in the wake of the May 17, 1995 letter from the California Attorney General's office effectively admits as much.

Accordingly, Hancor hereby demands that the JCC provide written confirmation by June 2, 1995, that it will either (i) include an appropriate specification for HDPE pipe in the forthcoming supplement to the Greenbook, or (ii) cause the Greenbook and any and all supplements (including the supplement about to be published) not to be published and distributed. Hancor reserves its right to initiate legal proceedings seeking injunctive relief and/or damages should the JCC not satisfy this demand. Should litigation be undertaken, Hancor anticipates naming (among others) one or more of the following individuals and entities in its complaint: The JCC, the Southern California Chapter of the APWA, the Southern California Districts of the Associated General Contractors (the "AGC"), Russell H. Maguire, John Berton, Lance Grindle George Parkinson and BNJ Publications, Inc. A copy of the demand letter from Hancor to BNJ is enclosed.

This is also to advise you formally that, because litigation is contemplated, all of the above named persons or entities — as well as others who have participated in JCC proceedings and are possible additional defendants (specifically, Frank Lancaster, Gus Dembegiotes, Larry Johnson. Johnson-Bateman Company and Bill Heckenkamp) — should ensure that all records relating to the above matters be preserved. Accordingly, no documents of any type (e.g. notes, documents, calendars, files, telephone logs, whether personal or official), relating in any way to the consideration of a specification for HDPE pipe or to any requests or other contacts with the California Attorney General's office should be destroyed. The destruction of any such evidence may be independently actionable.

Thank you for your prompt consideration and response to this demand.

Very truly yours,

Ernest Gellhorn

Enclosure

cc: All named persons or entities identified within
Barbara Motz, Esq.
Bernard S. Kamine, Esq.