

WHO PAYS WHEN DESIGN PLANS ARE INSUFFICIENT?

Design professionals and contractors have often asked themselves whether errors, omissions and conflicts in construction design documents furnished to bidders by the owner can safely be ignored by the contractor, or, if resolved by the contractor, whether the contractor is entitled to additional compensation for the economic costs associated with delays.

The answer depends upon who you ask and exactly how you frame your question. In 1918, when George B. Spearin was under contract with the U.S. Department of Navy to build a dry dock in accordance with government plans and specifications, the U.S. Supreme Court in U.S. v. Spearin (1918), 248 U.S. 132, in an opinion written by Justice Brandeis held that when Spearin encountered a flooded and unworkable work site because of the breakup of an underground sewer system which contained a dam which was not shown on the government's plans, Spearin was relieved of any responsibility for proceeding without extra compensation. The Department of Navy concluded that Spearin was wrong and terminated him. The U.S. Supreme Court held that the character, dimensions and location of the sewer in the plans and specifications imported a warranty that if the specifications were complied with, the sewer would be adequate. The Court held that the implied warranty was not overcome by the general clauses contained in the contract between Spearin and the Navy requiring Spearin to examine the site, check the plans and assume responsibility for the work until completion and acceptance.

In April of 2007, the Ohio Supreme Court refused to apply the Spearin doctrine in a case where a general contractor agreed to build three buildings to be part of the Ohio State University College of Business but found that the State's architects had provided plans and specifications containing numerous omissions, inaccuracies and conflicts, requiring a large number of requests for information and change orders. In Dugan & Meyers Construction Company, Inc. v. Ohio Department of Administrative Services, the Ohio Supreme Court reversed the Ohio Court of Claims which had held that the numerous omissions, inaccuracies and conflicts in the design

documents were discovered by the contractors before proceeding with their work requiring a determination as to what was intended or required which caused Dugan & Meyers delay, and that the underlying cause of the delay was the inadequacy of the design documents. The Court of Claims awarded damages to Dugan & Meyers and held that it was not responsible to Ohio State University for liquidated damages. The Ohio Court of Appeals affirmed in part and reversed in part.

The Ohio Supreme Court reversed because it concluded that the Spearin doctrine did not invalidate express contractual provisions contained in the contract between Dugan & Meyers and the Ohio Department of Administrative Services. Those express provisions stated that: “Time is of the essence”, provided a specific procedure to be followed in the event of project delay and contained a no damage for delay clause, expressly providing that the contractor was not entitled to additional compensation or mitigation of liquidated damages for delay. The contract also provided that the contractor must request an extension of time in writing within ten days after the occurrence of the condition necessitating an extension of time, or waive any claim for extension or mitigation of liquidated damages.

The Ohio Supreme Court noted that even if the plans had required more changes than originally contemplated, the contract established a detailed procedure to be followed for all changes and that in order to hold in favor of Dugan & Meyers the Court would “need, first, to find that the State had implicitly warranted that its plans were buildable, accurate and complete, and second, to hold that the implied warranty prevails over express contractual provisions. To do so would contravene established precedent, which we will not do,” said the Court.

The Ohio Supreme Court cited its own previous decisions which recognize the Spearin doctrine in cases involving unexpected site conditions but refused to extend Spearin to cover

errors in plans and specifications. The Court found its decision to be in accordance with numerous decisions throughout the country citing Illinois and Washington Supreme Court decisions holding that a contractor's claim for damages due to delay was precluded by a no damages for delay clause and that a contractor was nonetheless responsible for liquidated damages for delay despite the existence of multiple errors and omissions in the plans that had been supplied by the owner.

Practically every contractor association in the State of Ohio filed *amicus curiae* briefs urging reversal, including AGC of Ohio, MCA of Ohio, NECA of Ohio, and SMACNA of Ohio. The Ohio Municipal League, Ohio School Boards Association, Buckeye Association of School Administrators and Ohio Association of School Business Officials urged affirmance.

The Spearin doctrine has only been cited in one reported decision in Wisconsin, that being Thomsen-Abbott Construction Company v. City of Wausau, a 1960 decision, holding that a contractor was not entitled to additional compensation for de-watering a building site when the bid documents expressly placed a duty of investigation of the site upon the contractor. The Wisconsin Supreme Court's decision in Thomsen-Abbott v. City of Wausau did not expressly accept or reject the application of the Spearin doctrine in Wisconsin.

So whose responsibility is it if the architectural or engineering plans and specifications contain numerous errors or omissions? The Ohio Supreme Court held that it depended upon what provisions are contained in the contract between the owner and the prime contractor, and whether those provisions trump the implied warranty that the plans and specifications are suitable for the purpose intended. The dissent in Dugan & Meyers noted:

“As it turns out, the State could have saved a lot of money on blueprints and just submitted some sketches on the backs of a few cocktail napkins”... “Spearin sets forth the general rule of law that the contractor usually assumes the risk of work-site conditions.”... “But when the contractor's difficulties are a result of faulty specifications by the

government, the burden changes.”... “Justice Brandeis recorded the obvious assumption that the contractor’s responsibility for contract completion begins where the owner’s detail design ends. In essence, the Court recognized that the contractor’s right to recover for the owner’s breach of its implied warranty of the adequacy of design was conditioned upon the contractor’s reasonable reliance upon the owner’s defective design in preparing its bid and in doing its work.”

It is not easy to predict which way the Wisconsin Supreme Court would go on this issue.

Obviously, the reasons for the contractor’s delay and the terms of the contract between the contractor and the owner could make the difference.