



CONSTRUCTION

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RISK SHIFTING AND THE *SPEARIN* DOCTRINE OF IMPLIED WARRANTY IN DESIGN-BUILD PROJECTS

The United States Supreme Court ruled nearly a century ago that a contractor is not responsible for consequences of defects in the plans and specifications when that contractor is bound to build according to plans and specifications prepared by the owner. *U.S. v. Spearin*, 248 U.S. 132 (1918). This principle is commonly known as the *Spearin* Doctrine.

When the *Spearin* Doctrine was formulated, construction projects were typically constructed through the traditional delivery method. Many construction projects are now being designed and constructed through alternative delivery methods such as construction management at-risk, multiple prime contracting, design-build, and integrated project delivery. These alternative delivery methods are designed to overcome some of the weaknesses and pitfalls that exist under the traditional delivery method.

The evolution of different delivery methods for construction has allowed owners and contractors to undertake and shift risk and responsibilities. As a result, it is important for contractors to understand the changing landscape and their ability, or inability, to rely on owner-supplied information and important contractual considerations for such risk-shifting.

SPEARIN DOCTRINE AND THE TRADITIONAL PROJECT DELIVERY SYSTEM

The *Spearin* Doctrine is premised on the concept that the owner impliedly warrants to the contractor that the construction would be adequate if the contractor follows the plans and specifications that are provided to the contractor by the owner. In other words, a contractor is generally entitled to rely on the accuracy of the plans, specifications, and other information provided by the owner, and the contractor is entitled to relief in the event that information is deficient. This implied warranty is not overcome by general contractual clauses requiring the contractor to examine the site, to check the plans, and to assume responsibility for the work until completion and acceptance. Those general duties of the contractor do not constitute an acceptance of risk by the contractor if the plans and specifications are defective.

The purest form of the *Spearin* Doctrine is found with the traditional project delivery method. The owner retains a team of engineers and design professionals to design the project. Construction documents, including construction plans and technical specifications, are provided to contractors for bidding. The contractors review the construction documents and issue bids to the owner, offering to build the project in accordance with the plans and specifications in exchange for a fixed lump-sum price. The owner then reviews the bids and ultimately enters into a construction agreement with the contractor with the lowest bid that is qualified to perform the project.

Under the traditional project delivery method, the *Spearin* Doctrine is a practical and fair approach for assessing responsibility if the construction documents are defective. The *Spearin* Doctrine concept is often expressly reflected in standard contract forms, such as the ConsensusDocs® 200 standard form agreement, by obligating the owner to provide all architectural and engineering design services necessary for the completion of the work and including express provisions relieving the contractor from certain liability for errors, omissions, or inconsistencies in the contract documents, unless the contractor knew of such problems and failed to report it to the owner. In essence, the contractor relies on the construction documents provided by the owner and performs its end of the bargain by constructing the project in accordance with those construction documents, and the law requires nothing more of the contractor under the traditional project delivery method and the *Spearin* Doctrine.

IMPLIED WARRANTIES IN DESIGN BUILD PROJECTS

Unlike the traditional delivery project delivery method, the contractor in a design-build project is responsible for delivering the project to the owner based on the contractor's own design and construction. The contractor's design is inherently based on some degree of owner-supplied information such as design criteria, owner's program, engineering studies, conceptual drawings, or other information indicating the owner's project intent and requirements. This unique relationship between the owner and the contractor raises fact-intensive questions as to

whether the *Spearin* Doctrine applies to design-build projects. Some courts have ruled that it does not, representing a complete shift in responsibility from the owner to the contractor.

A case from the Civilian Board of Contract Appeals ("CBCA") presents one illustrative example. *Fluor Intercontinental, Inc. v. Dep't of State*, CBCA 490 (2012).

In 2003, The United States Department of State ("DOS") issued a request for proposals ("RFP") seeking offers from contractors for a firm fixed-price design-build contract for the completion of both the design and construction of several buildings and a perimeter wall for an embassy complex in Kazakhstan.

The RFP documents issued by DOS included, among other things: (a) an integrated set of design drawings and specifications for DOS facilities – for the sole purpose of illustrating the design intent of the owner – that was to be adapted by the contractor to the site when the contractor produced the construction documents; (b) a site utilization plan generally describing the plans for development and noting certain site conditions; and (c) an engineering feasibility study which included, among other things, permit requirements, information on material availability, and site and geotechnical data.

However, the RFP specifically required the contractor to perform its own engineering. The statement of work in the RFP required the contractor to provide design expertise in architecture, civil engineering, structural engineering, mechanical/plumbing engineering, and electrical engineering. The RFP included a disclaimer that the contractor remains solely responsible and liable for design sufficiency and should not depend on reports provided by the DOS as part of the contract documents. Moreover, the contractor was responsible for adapting the construction drawings according to the unique conditions of the site and other local and regional factors, based upon analyses performed by the contractor.

During the design phase, the RFP specified that the contractor would submit drawings for DOS's review at several stages of the design. The first design review occurred at 35 percent design development phase. The second, called the construction document phase, occurred at 90 percent. The third occurred at

the 100 percent stage, after which the contractor would submit the final construction documents. At each stage, the DOS had the opportunity to review it with technical representatives and provide comments to the contractor.

The contract was ultimately awarded to Fluor Intercontinental, Inc. (“Fluor”) with a contract price of \$63,057,022.

Throughout the project, Fluor encountered various conditions at the site that it claimed caused additional costs and delays to the project. Fluor sought more than fifteen million dollars, contending that DOS made certain promises about the conditions of the project site and that DOS breached those promises because, among other things, the site was not ready to support construction activities and changes related to the foundation required a redesign of the piles.

In order to prevail, Fluor was required to establish that the contract documents, reasonably read, made promises to Fluor about the conditions to be expected. Fluor was also required to establish that it relied upon those promises when it prepared its offer and entered into the contract. The CBCA found that Fluor did not prove either of those points and rejected Fluor’s claim as a result of Fluor’s design-build responsibilities under the contract.

With regard to Fluor’s contention that the conditions of the site were not ready for construction activities, the CBCA acknowledged the contractual provisions that expressly noted the unavailability of utilities and other infrastructure available at the site. The CBCA opined that, even if Fluor had relied upon certain representations by the DOS in initially preparing its bid, it should have observed the conditions of the site during its pre-proposal visit. The CBCA found that it was the responsibility of Fluor to investigate the site and that Fluor had plenty of time to adjust its bid to take into account the actual state of the construction site. To do otherwise, was to ignore the obvious for which Fluor was not entitled to additional compensation.

Fluor’s contentions regarding the foundation design changes were equally unavailing to the CBCA. The CBCA found that the contract made plain that Fluor would be responsible for adapting its design to the specific location in producing the project construction documents and that Fluor was told in many different

sections of the RFP not to rely on the drawings supplied by DOS. Moreover, the DOS did not supply partially complete design drawings for Fluor to use. Rather, Fluor was required to provide *all* design work and was ultimately responsible for the design and construction methods. As such, the risk that those methods might need to be changed during the course of performance remained with Fluor.

The CBCA concluded that, in that design-build contract, the risk of developing a design, and the consequences of miscalculating the resources available for constructing to the design, fell solely upon Fluor. Fluor assumed the risk that its plan for construction would work and changes to the plan based upon conditions at the project site were Fluor’s own problem.

The CBCA’s decision in rejecting Fluor’s claim represents a complete shift in responsibility since the proclamation of the *Spearin* Doctrine. The *Spearin* Doctrine traditionally prevented owners from avoiding responsibility through broad contract provisions requiring that the contractor examine the site and plans, and assume responsibility for the work until completion and acceptance. However, the *Fluor* decision is starkly different and allowed the owner to avoid all responsibility as a result of its use of a design-build delivery method, coupled with contractual disclaimers as to what the contractor was entitled to rely upon.

Contractors must pay special attention, particularly in design-build RFP’s and contracts, to the purpose of the documents supplied by the owner and the owner’s contractual disclaimers associated with them. Although certain risks are inherent in the contractor’s performance of design and construction, contractors should endeavor to reduce the risks by minimizing the owner’s contractual disclaimers regarding the contractor’s non-reliance on owner-supplied information and specifically identifying the owner-supplied information that may be relied upon by the contractor in the performance of its work. For example, the ConsensusDocs® 410 standard form agreement, subtly seeks to shift risk away from the design-build contractor through the lack of disclaimers and other express provisions regarding the owner’s responsibility for providing certain worksite information for the use of the contractor. If contractors do not incorporate necessary contractual protections regarding owner-supplied

information, the contractor may ultimately be precluded from reasonably relying upon those documents and be on the hook for unanticipated changes and associated costs.

ABOUT THE AUTHOR

Joseph R. Young is an associate in the Fort Lauderdale office of Smith, Currie & Hancock LLP. Joseph concentrates his practice on all aspects of construction law, including the representation of contractors, construction managers, major trade contractors, sureties, architects and engineers. Prior to entering law school, Joseph gained experience within the construction industry as an assistant project manager with a large contractor, assisting with planning and management of large mixed-use retail and custom-built condominium construction. Joseph received a Bachelor of Science degree in Construction Management from the University of Cincinnati and his Juris Doctor from the University Of Miami School of Law. During law school, he served as the Senior Articles and Comments Editor for the law school Business Law Review.

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