The Owner's Implied Warranty — What You Need to Know

By Peter M. Kutil, Esq., and Karl Silverberg, Esq.

It is a basic tenant of construction law that owners impliedly warrant the plans and specifications provided to contractors. This means that if the contractor constructed a structure exactly according to the owner's plans and specifications, and the resulting structure does not perform as the owner had intended, the contractor is not responsible for such failure. Most contracts, however, also contain language that requires the contractor to check the plans and drawings, and requires the contractor to deliver the final product to the owner for its intended use. The question then posed is, does the implied warranty survive these requirements?

In other instances if the owner specifies the construction means and methods, and the owner's specifications or means and methods do not work, the contractor is not responsible for any increased costs of performance.

While it may seem obvious that the contractor should not have to assume the risk for the owner's faulty plans and specifications, it took a 1918 U.S. Supreme Court case to set the precedent. This seminal case was United States v. Spearin, and the proposition it stands for has become known as the "Spearin doctrine" or the "Owner's Implied Warranty."

The Spearin Case

Spearin involved a contract with the U.S. government to construct a Navy dry-dock. The site was intersected by a 6-ft sewer that required relocation. The government's plans and specifications prescribed the dimensions, material and location for the relocated sewer. Spearin followed the plans and specifications, and the government accepted the work as satisfactory.

About a year later heavy rains and a high tide overloaded the relocated sewer and the sewer broke, flooding the dry-dock. Upon investigation, it was discovered that a connecting sewer that should have relieved the pressure on the relocated sewer was blocked, thus overstressing the relocated sewer. None of the drawings available showed that the connecting relief sewer was blocked.

Spearin thought the government should assume responsibility for the damages to the construction site. The government insisted that Spearin was responsible for remedying the condition. The government then terminated Spearin and completed the work with a different sewer design. Spearin sued for wrongful termination and sought his contract balance as well as lost profits.

The Supreme Court determined that whether Spearin is entitled to damages depends on whether the government was justified in terminating Spearin. The court found that the termination was not justified. The court first stated the general rule that, "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." "But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." The court found

that, "the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate." Furthermore, "[t]his implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance." "The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view."

Modern Issues of Design Specifications vs. Performance Specifications

Spearin is alive and well. In White v. Edsall Construction, a 2002 case, the issue was whether the contract shifted responsibility for part of the structure's design to the contractor.

As described by the court: "In May 1996, the U.S. Army awarded Edsall a fixed-price contract for the construction of a facility to house the Montana National Guard's helicopters. The facility specification included two hangars designed for the Army … The specification and drawings called for 'tilt-up canopy doors' weighing about 21,000 pounds each. The design used a complex system of motors, cables, pulleys, and counterweights to open the doors. [T]he cables attach to the doors at points called 'pick points.' … The drawings also show the weight of each canopy door as distributed equally between three pick points."

The structural engineer placed a disclaimer on one of the drawings stating: "Canopy door details … must be verified by the contractor prior to bidding." Furthermore, the drawings showed a "v" (for "verify") to indicate schematic details, and asked the contractor to verify the door weight and the weight per pick point.

After the contract award, it was discovered that the three-pick-point design would not work. Edsall's subcontractor redesigned the system for a four-pick-point design. Edsall submitted a request for extra compensation associated with the redesign and the contracting officer rejected the claim. Edsall appealed to the Armed Services Board of Contract Appeals and was awarded its extra costs. The Army then appealed the decision to the U.S. Court of Appeals.

The Appeals Court started out by stating the basic propositions of law. Citing Spearin, the court noted that, "[w]hen the Government provides a contractor with design specifications, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects." The court then contrasted design specification with performance specifications, stating that performance specifications "merely set forth an objective without specifying the method of obtaining the objective." Performance specifications assign the design responsibility to the contractor, so Spearin is generally not applicable.

The court also noted that, "general disclaimers requiring the contractor to check plans and determine project requirements do not overcome the implied warranty, and thus do not shift the risk of design flaws to contractors who follow the specifications." To shift the design risk, the disclaimer must be "express and specific." "The implied warranty, however, does not eliminate the contractor's duty to investigate or inquire about a patent ambiguity, inconsistency, or mistake when the contractor recognized or should have recognized an error in the specifications or drawings."

Analyzing the law to the facts in the present case, the court had to determine whether the "three pick-point" system was a design specification, or whether the "three pick-point" system was merely a suggested system that was a performance specification. If it is a design specification, Edsall can recover its extra costs under the Spearin doctrine, but if it is a performance specification, then Edsall will be judged to have assumed the risk for designing the pick-points.

After reviewing the facts, the court concluded that the "three pick-point" system was a design specification. The court found that the "canopy door shown in the drawings incorporated significant design characteristics." The court further found that, "[b]ecause the disclaimer … required the contractor to seek clearance for 'any condition that will require changes from the plans,' Edsall could not alter the design without approval of the Army's architect." The court found this statement inconsistent with the Army's argument of a performance specification because the performance specification would require the contractor to perform the design, as opposed to "not altering" the design.

The Army also argued that Edsall had a duty to verify the design. But the court disagreed. The court said: "Although the disclaimer at issue requires the contractor to verify supports, attachments, and loads, it does not clearly alert the contractor that the design may contain substantive flaws requiring correction and approval before bidding. … Like the disclaimer in Spearin, the disclaimer in this case is only a general disclaimer. It required Edsall to verify general details, such as door weight and dimensions, but did not alert Edsall to the prospect that the Army's design might not work for its intended purpose."

Conclusion

Almost 90 years after the Spearin was decided, it is still provides the necessary framework for resolving construction disputes such as design vs. performance issues, as well as constructability issues.

Peter Kutil and **Karl Silverberg** are attorneys with the firm of *King & King, LLP* in New York and focus their practice on serving the construction industry. More information is available at the Web site: *www.king-king-law.com*.