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Nailing Down 'Design-Assist': Legal Issues in Construction Contracting

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Special to the Legal

In late 2018, the Comcast Technology Center opened to the public after approximately three-and-a-half years of construction. Not only did the immense tower present unusual problems and solutions (such as the 125,000 gallons of water on the 57th floor used to offset swaying on windy days), but the approximate-\$1.5 billion price tag reflects the hundreds of contracts and project participants that helped make the building a reality. Despite all the efforts from capable firms and contractors working on the project, it was completed about a year late and is subject to numerous claims and disputes.

Large and complex projects like the Comcast Technology Center often benefit from contractors' participation in the pre-construction design and planning phase. The traditional "design-bid-build" project delivery model generally separates design and construction: the owner hires a designer, who creates the plans and specifications, and then the owner hires a

contractor to build that design. Alternatively, "design-build" projects allow owners to contract with a single entity to handle both project design and construction. Regardless of the project delivery method, collaborating with specialty contractors during the design and planning phases presents a valuable opportunity for input on the constructability of the design, sequencing of the work, and estimation of the project cost. Early input by specialty contractors can have the significant benefit of allowing parties to avoid problems that may otherwise arise after the start of construction.

In light of these advantages, the concept of "design assist" has worked its way into the project delivery matrix. Under the design assist format, project participants have used the term to refer to everything from informal input on aspects of design to actual delegation of design responsibilities on certain items on the project. While design assist increasingly is a referenced term in construction



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contracts, its legal meaning has become less defined, therefore less reliable as an accepted concept within the industry.

Generally, "design assist" is understood as an agreement for a contractor or subcontractor to provide recommendations as to project design and planning. These recommendations are made to the project designer, owner or higher-tiered project participants. "Recommendations" is the operative term, and the recommendations are nothing more than that. Neither the designer, nor the owner, nor the higher-tiered project participants is bound to follow those recommendations. Similarly, the contractor or subcontractor is not expected to provide an engineered design for its work. Delegated design responsibility, on the other hand, generally requires the contractor or

subcontractor to retain its own design professional and make final decisions as to components of the design.

Adding to the complication is the lack of clear definition of “design assist” from sources of law. For example, in its public improvements statute, Ohio vaguely defines “design-assist services” as simply “monitoring and assisting in the completion of the plans and specifications,” see Ohio Rev. Code Ann. Section 153.501 (West). The state of Utah’s regulations permit the use of “design-assist contracting” when it is determined that the contractor “has a unique knowledge of a material or product that warrants the interaction of [contractor] early on with the designer,” Utah Admin. Code r. R131-4-501. However, these states, like others, fail to define exactly what legal obligations attach to “design assist contracting.” The commonwealth of Pennsylvania does not yet address the term in any of its statutes or case law. Like many things in law, the ambiguity in the meaning of the term creates ground for dispute, given that participants on a construction project may use the term with different understandings. The term “design assist” is the perfect example.

It is a fundamental principle in construction that, “as between the owner and contractor, the party in control of the detailed design impliedly warrants to the noncontrolling party the adequacy of the design.” Section 3:5. Implied terms and conditions—The Spearin Doctrine—Implied warranty of

design, 1A Bruner & O’Connor Construction Law Section 3:5. The U.S. Supreme Court long ago recognized this principle in *United States v. Spearin*, 248 U.S. 132, 133, 39 S. Ct. 59, 60, 63 L. Ed. 166 (1918). And even though courts have further developed the *Spearin* doctrine over the last century, it remains good law, with its underlying concepts a bedrock aspect of construction practice. It is also simple to understand in the abstract: an owner handing faulty or incomplete plans to a contractor in a design-bid-build scenario is generally responsible for the cost consequences of those faults or omissions when the contractor relies on those plans in good faith (though an owner and contractor both may have recourse against the designer). When a contractor is given design responsibility, the contractor will generally bear the cost for design faults or omissions. As the *Spearin* doctrine generally applies from owner to contractor, it similarly applies from general contractor to subcontractor. The predominant concept underlying the *Spearin* doctrine is control alongside good faith reliance.

But the concept of design assist in some measure has been used to cloud, if not intentionally undermine, the clarity of the *Spearin* doctrine. For example, in a design-build scenario, we have seen construction managers use provisions like the following to lock-in a subcontractor’s contract price, even though the design is incomplete: The construction documents available to subcontractor

for bidding and establishment of the subcontract amount do not describe in detail all work required for the completion of the work. The construction documents shall be added by change order to this subcontract without modification to the subcontract amount.

In establishing the subcontract amount, the Subcontractor fully acknowledges, understands, and considers that the construction documents do not fully reflect the subcontract work and that further details will only be reflected in later iterations of the construction documents. Accordingly, the subcontractor expressly acknowledges and agrees that it shall not be entitled to, and will not seek, any increase in the subcontract amount for providing any item that is consistent with, contemplated by, or reasonably inferable from the contract documents whether or not such items are specifically mentioned therein.

Subcontractor shall perform design-assist Services through completion of the construction documents. It is the subcontractor’s responsibility to take an active role throughout the design process, review the design at all iterations and phases, and work with the designer of record to maintain the subcontract budget. At conclusion of the design, lower-tier subcontractor will sign off on a \$0 change order.

Under the language of this provision, the subcontractor nominally has no recourse for increased scope and costs that result from the final design. If the subcontractor bid at one price before the design was

complete, an owner, designer or construction manager can point to this provision in defense of any subcontractor claim for increased costs based on the final design. Although this arrangement may have a hint of bait-and-switch, the ambiguous use of “design assist services” in this provision provides cover to argue that *Spearin* does not apply.

The provision above, however, is not an uncommon version of design assist that stealthily imposes the consequences of delegated design responsibility. It in no way requires the designer or the construction manager to follow the recommendations of the subcontractor on the design, yet it holds the subcontractor liable for the cost consequences as if subcontractor had complete control.

So, what are a contractor’s or subcontractor’s options if it finds a provision imposing responsibility without giving control? First, to the extent the contractor or subcontractor can negotiate, it should do so. It should negotiate away any ties between assisting with design and the final cost of its contract, or it should take on full design control and responsibility for the specific items at issue, with a cost reflecting the increased responsibility. Should it go the former route, it may be wise to split the design-assist and construction responsibilities into separate contracts signed at separate times. If a contractor or subcontractor chooses to bear full design control and responsibility, it should ensure that it retains the appropriate licensed professionals so

as not to violate Pennsylvania’s laws on the practice of architecture and engineering.

Second, if a contractor or subcontractor finds itself after the fact dealing with claims under a provision that imposes responsibility without giving design control, it should look back to fundamental principles of construction law. Under the *Spearin* doctrine, certain factual scenarios should provide clear grounds for striking exculpatory clauses like those discussed above, such as where a designer has specifically rejected a subcontractor’s recommendations and chosen more costly options. In instances where a designer’s decisions contradict original design assumptions at the time of bid, a contractor or subcontractor has additional support for the argument that the provision should be set aside, and the claimant should bear no responsibility for increased costs.

As design-assist arrangements with ambiguous terms see more widespread and creative use, we anticipate seeing more litigation focusing on the obligations that come with the arrangement. We also expect to see that litigation arrive in Pennsylvania at some point in the near future. When it inevitability does, the underlying principles from *Spearin* should be remembered when the courts are officially asked to nail down the meaning of “design assist”: who bears ultimate control over the design component at issue, and did the other party rely in good faith on that design (or lack thereof)?

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