



CONTRACTOR OBLIGATIONS IN THE DESIGN ASSIST MODEL

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In the traditional “design-bid-build” project delivery system, a project owner sometimes engages a construction manager or contractor during the pre-construction phase to consult and provide insight regarding costs, sequencing, scheduling and constructability issues. After completion of the initial design phase, the construction documents are published and then provided to subcontractors for review and bidding.

But in the ever-evolving world of construction contract risk shifting, a new concept is taking root. In the “design assist” approach, the project owner assembles a construction team during the design phase to collaborate with the architect or engineer in an effort to minimize design issues during the construction phase of work. Trade contractors become active participants in the development of plans and specifications. Supporters of this approach believe, in the long run, it improves value on a project by taking advantage of contractors’ respective specialties and facilitating better constructability, more efficient scheduling, and fewer RFI’s and change orders. Sounds good, right? Maybe not.

From a legal standpoint, early collaboration among the owner, architect, engineer, and contractors raises knotty questions about who is responsible – and ultimately liable – for design problems that reveal themselves during the construction phase of a project. While a contractor may reasonably expect that any changes proposed by the contractor and approved during the design assist process by the project owner and designer(s) would insulate the contractor from second-guessing at a later

time, this expectation is not necessarily true. Instead, the advanced input by contractors may expose them to liability for design errors that someone believes they should have caught.

For the last century, since the seminal case of *United States v. Spearin*, 248 U.S. 132 (1918), it generally has been accepted throughout the construction industry that the project owner impliedly warrants the adequacy of the design plans and specifications. Under this rule, liability arising from defective design is borne by the owner. The *Spearin* doctrine, as it is known, holds that if a contractor is required to perform work on a project in accordance with plans and specifications prepared by an owner or owner’s representative, then the contractor is entitled to rely on the plans and specifications and is not, in the end, liable for design defects. More precisely, “insertion of the articles [in a contract] prescribing the character, dimensions and location of the [contractor’s work] imported a warranty that if the specifications were complied with, [the contractor’s work] would be adequate.” *Spearin*, at 137.

In Pennsylvania, the case of *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa. 454 (2005) similarly holds that where a design professional prepares plans and specifications on a project, a contractor is entitled to rely upon the design documents in submitting its bid and performing its work. In fact, under the *Bilt-Rite* case, if the design plans and specifications are defective in a material way, the contractor who relied upon them may sue the design professional, even without a direct contract.

Most courts have adopted the Spearin reasoning, but there are exceptions. For example, in 1907, the Texas Supreme Court held in the case of *Loneragan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S.W. 1061, that the contractor was liable after a building collapsed due to defective design documents. In *Loneragan*, which has yet to be expressly overturned, the Texas court dismissed the notion that the owner impliedly warranted the design plans and specifications and ruled that, when defective plans and specifications lead to damages, the contractor bears the risk of loss.

Historically, responsibility for defective design has been attributed to the owner and designer so long as the plans and specifications in question are primarily design in character (as opposed to performance). As design assist becomes increasingly common, could contractors hired to consult during preconstruction inadvertently waive or disclaim the project owner's implied warranty of the plans and specifications?

In the recent case of *Coghlin Electrical Contractors, Inc. v. Gilbane Building Co.*, 472 Mass. 549, 36 N.E.3d 505 (2015), Massachusetts' highest court considered this question. The case was on appeal after the trial court initially determined that a contractor, who provided design assist services during preconstruction, was later not permitted to bring a claim against the owner when problems arose due to alleged design deficiencies. Notwithstanding the *Spearin* doctrine, the trial court found that the contractor's early role in assisting with development of the plans and specifications acted to waive the owner's implied warranty.

But on appeal, the Supreme Judicial Court of Massachusetts reversed, holding that a contractor's involvement performing design assist services during preconstruction did not disclaim the owner's implied warranty with respect to the plans and specifications. The court stated that, "although [the contractor] undertakes significant design-related obligations, there is no express abrogation of the implied warranty." *Coghlin*, 36 N.E.3d at 515.

Looking to the specific contract provisions in *Coghlin*, the court determined that the language supported, rather than waived, the owner's implied warranty. The contract stated that, "[the Contractor] shall consult with [the Owner] and the Designer regarding the selection of materials, building systems and equipment, and shall recommend alternative solutions whenever design details affect construction feasibility, schedules, cost or quality (without, however, assuming the Designer's responsibility for design) and shall provide other value engineering services to [the Owner][.]" (emphasis added). The contract also stated that the designer "shall decide all questions which may arise as to the interpretation of the [design] and as to the fulfillment of this Contract on the part of [the Contractor]." Because, under the contract, the owner and designer maintained authority over design, the owner's implied warranty would remain effective.

Unlike "pay-if-paid" or indemnity contract language, which have produced a long and predictable body of case law in virtually all states, design assist provisions are not standard in today's construction industry and have not yet developed a consistent interpretation by associations such as the American Institute of Architects (the "AIA") or by courts that have addressed the issue. The *Coghlin* decision emphasizes the importance of contractors negotiating language in their contracts that clearly defines and delineates responsibility for design. Indeed, contractors and subcontractors must be careful to ensure that ultimate authority over the plans and specifications remains with project owners and their designers, and that contract language expressly reserves contractors' rights to protection against, and exclusion from, design errors.

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