

2022 THE CONSTRUCTION
ASSOCIATION
CONVENTION

**Who's on the Hook
for Design Defects
in Design-Build
Projects?**

**It May Not Always
Be Who You Think.**



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Learning Objectives

By the end of this session, participants will be able to:

1. Understand the differences between design and performance specifications and how they may govern design defect liability on a design-build project.
2. Determine when the *Spearin* Doctrine applies to design-build contracts.
3. Identify cases where a design-builder has recovered for defect design liability against an owner, as well as examples of cases where the design-builder was unsuccessful.
4. Learn about government misunderstanding of the need to coordinate under the coordination clause of federal acquisition regulation.

Recent Experience Reflects Owners Seek to Control Design and Construction Without Respecting Design-Builder's Discretion

Design-Build vs Design-Bid-Build

Design-Build Contract

- Government states general criteria
- Contractor drafts the design specifications and builds according to its own design
- Government involvement in design ranges from limited to extensive
- Contractor may be liable for design defects when Government's involvement is minimal

Design-Bid-Build Contract

- Government provides detailed specifications with design requirements
- Contractor involvement in design is very limited or non-existent
- Government is generally liable for design defects

Owner Overreach on Recent Design-Build Projects

Examples of Owner Overreach

- Delayed Review or Approval of FDCs to Force Acceptance of Preferences.
- Imposing New QA/QC Hold Points to Force Acceptance of Preferences
- Failing to Project Necessary ROW
- Significant Project Enhancements through Final Design Approval Process
- Disavow Accuracy of all Owner-Furnished Material on which Bids are to be Based.
- Stakeholders Using Permit Process to Force Design Enhancements
- Force Acceptance of Preferences Through Abusive Design Approval and Comment Process.

Example of Owner's Use of Abusive Submittal Review Process to Force Design Preferences

- Over 14,000 comments by Owner (on sampling of just 2,000 of 15,568 submittals).
- “Concern” and “Preference” comments out-numbered “Non-Compliant” comments by a factor of nearly 4:1.
- Design-Builder required to address every comment to the Owner’s “satisfaction” (instead of using “**Reasonable Efforts**”), the Owner forced GC to implement a staggering increase of Owner preferences.

Owner Comment Category	Comment Quantity ¹	% of Total
CN or P Comments	11,332	79%
NC Comments	3,042	21%
Total Comments	14,374	100%

Extrapolating this to the 15,568 submittals would mean that Design-Builder received 111,887 comments of which 88,390 would have been CN or P

Using the *Spearin* Doctrine to Push Back on Certain Types of Owner Overreach on Design-Build

The *Spearin* Doctrine

U.S. v. Spearin, 248 U.S. 132 (1918)

“Where 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 responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work . . . The contractor should be relieved, if he was misled by erroneous statements in the specifications.”

The Justification for Applying *Spearin* to Design-Build Projects

Owners often take incorrect position that design-build project delivery eliminates the *Spearin* warranty, and that the DB Contractor is responsible for delivering the finished project regardless of how involved the Owner was in the design or how strictly limited the DB Contractor was by the Owner's stated design parameters. The following are areas where an Owner might retain design responsibility even in a Design-Build Project:

- Accuracy of reports prepared by Owner's outside consultants
- Owner's design approval process
- Viability of Owner's Stated Design and Project Criteria

Assessing Design-Build Risk and *Spearin*

Many owners take position that design-build eliminates the *Spearin* warranty, even though this is not always accurate. The following are areas where an owner might retain design responsibility:

- Accuracy of reports prepared by outside consultants
- Owner's design program
- Bridging design

Assessing Design-Build Risk and *Spearin*

- Generally, courts and boards of contract appeals review the details of a particular project and make a fact-specific decision on design responsibility
- Important considerations
 - The RFP and contract language
 - Interactions between contractor and owner before and during performance
- The more control/input the owner has on the design, the more likely it is that the owner will be liable for compensating the contractor for design defects

Contract Specifications

Two types of specifications

(1) Design: set forth precise measurements, tolerances, materials, etc. (i.e., a “roadmap” for performance)

- Owner warrants that design specifications are free from defects under the *Spearin* doctrine

(2) Performance: set forth “operational characteristics” but leave the details to the contractor

- Contractor is usually liable for issues with achieving compliance

Contract Specifications

Most contracts are a combination of both design and performance specifications

- Becomes necessary to determine which specification caused the design defect
- Recovery may be denied if the particular specification at issue granted discretion to the contractor to solve the problem and the parties' acted accordingly

Design vs. Performance Specifications

Factors in determining if the *Spearin* doctrine applies:

- Contract language and clauses
- Discretion exercised by the design-builder
- Circumstances surrounding the bidding (limitations on time and resources)
- Discussions and negotiations
- Owner reliance on design-builder's representations and expertise
- Prior course of dealings between parties and customs of the industry

Recent Design-Build Case Law

- *Drennon Constr. & Consulting, Inc.*, 13 B.C.A. (CCH) ¶ 35213 (Jan. 4, 2013).
 - The government argued that because of the design-build nature of the procurement, the contractor should be liable for the hill collapse that occurred during excavation.
 - The Civilian Board of Contract Appeals (CBCA) disagreed, noting that the contractor's design had to fall within the confines of its own engineering firm's design, not the government-provided geotechnical information.
 - *Drennon* is an example of how an agency's involvement in project design during the solicitation stage of a contract can be the basis of a *Spearin* defective design claim.
 - *Drennon* also exposes the common misconception that the government bears no liability simply because the federal contract is design-build.

Recent Design-Build Case Law

- *Metcalf Const. Co. v. United States*, 742 F.3d 984, 996 (Fed. Cir. 2014).
 - The government provided erroneous soils reports which caused the contractor to incur over \$4.8 million in soil excavation costs. Specifically, the government issued a revised request for proposals which provided a “soil reconnaissance report,” stating it was “for preliminary information only.”
 - The Federal Circuit held that the statement merely signaled “that the information might change,” not that the contractor would bear the risk if the “preliminary information turn[ed] out to be inaccurate.”
 - Moreover, none of the provisions requiring the contractor to check the work site as part of the design-build contract “expressly or implicitly” warned that the contractor could not rely on the government’s soil report or that the contractor bore the “risk of error” contained in the government’s soil report.

Recent Design-Build Case Law

- *United States for the Use & Benefit of Bonita Pipeline, Inc. v. Balfour Beatty Constr. LLC*, 2017 WL 2869721 (S.D. Cal. May 19, 2017).
 - Naval Facilities Engineering Command Southwest awarded Balfour Beatty Construction (“BBC”) a design-build contract to design and construct a hangar replacement.
 - Bonita Pipeline, Inc. (“Bonita”) was awarded a subcontract to design-build certain work. Bonita filed a lawsuit seeking compensation for alleged design errors and changes.
 - The court noted that *Spearin* may apply to design-build projects. The court agreed with Bonita that the “critical factor” in applying *Spearin* is to determine whether the “specifications [are] deficient,” and that contractors can recover when plans or specifications are “incorrect.”

Spearin Application to Other Emerging Project Delivery Methods

- Construction Manager At-Risk (“CMAR”) Projects
 - In *Coghlin Electr. Contractors, Inc. v. Gilbane Bldg. Co.*, 36 N.E.3d 505 (2015), the Supreme Judicial Court of Massachusetts concluded that a public owner of a construction management at risk project gives an implied warranty regarding the designer’s plans and specifications, but the scope of liability arising from that implied warranty is more limited than in a design-bid-build project:
 - “The general contractor in a design-bid-build project may benefit from the implied warranty where it relied on the plans and specifications in good faith, but the CMAR may benefit from the implied warranty only where it has acted in good faith reliance on the design and acted reasonably in light of the CMAR’s own design responsibilities.”

Spearin Application to Other Emerging Project Delivery Methods

- Public-Private Partnerships (“P3”) Projects
 - Emerging area of design risk responsibility
 - Large projects typically have unique structures
 - Can have design criteria coming from both public and private entities
 - Design-Builder may have participation in up-stream entities, creating unique considerations for design responsibility
 - “Major” subcontractors are often large general contractors
 - QA/QC inspections and Differing Site Conditions have been recent areas of litigation over design responsibility and standards

Questions?



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