



ARE YOU LIABLE FOR DEFECTIVE DESIGNS?

Lawsuits alleging defective design plans continue to be a significant legal issue for contractors. With careful planning and proper counsel, however, a contractor can better manage legal risks and costs. There are several contract issues that contractors, as well as owners and architects, should consider and understand for purposes of their contract negotiations.

The issue of whether a contractor can be responsible for defective design plans was first addressed by the United States Supreme Court in *United States v. Spearin*. In that case, the Court decided that 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." This means that, generally, a contractor does not have a duty to conduct its own investigation to determine the adequacy of design plans provided by the owner or the architect. The exception to that rule, however, is that if the contract language states that the contractor is responsible for design, then the contractor will be responsible for any design defects.

As a result, many owners and architects use certain form contracts with general contractors that include language that seeks to expressly impose additional responsibilities onto the contractor to check the design elements of a project. Depending on the details of the contract language and, to some degree, the state law that governs the contract, these standard-form contracts may expose contractors to increased liability for any defects contained in the architect's and owner's design plans, even though the general rule is that contractors will not be responsible for any design defects.



Conflicting Contracts

The American Institute of Architects (AIA) has been producing standard contract forms for use in the construction industry since the late 19th century. The AIA forms have undergone numerous changes since their inception. Until fairly recently, most of the revisions were endorsed by contractor associations. The 2007 version of the AIA General Conditions received extensive criticism, however.

A key point of contention between the AIA and contractors' associations involved Section 3.2.2 of the AIA General Conditions, which requires the contractor to "carefully study and compare the various contract documents," "take field measurements of any existing conditions related to that portion of the work," and "observe any conditions at the site affecting it." This section specifies that such observations "are for the purpose of facilitating coordination and construction by the contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the contract documents." However, if "errors, omissions or inconsistencies in the contract documents" are "discovered by or made known to the contractor," the contractor "shall promptly report" them to the architect.

It's no surprise that this has raised concerns among contractor associations over the potential of increased contractor responsibility stemming from the revised section. As drafted, Section 3.2.2 could be interpreted by some courts to impose an increased duty or responsibility on the contractor to inspect contract documents. Therefore, it leaves open the possibility of courts imposing responsibility or liability on contractors if they "should have known" of an error or defect. This means that liability could be imposed if a reasonable contractor in similar circumstances would have known, could have known or should have known by a reasonable diligence or investigation of an error or defect.

As a result, the AGC now uses ConsensusDOCS, a different version of standard-form construction documents designed to compete with the AIA's contracts. Section 3.3.1 of ConsensusDOCS requires the contractor to examine the contract documents and notify the owner of any errors or inconsistencies, but it is followed by a statement that "the contractor's examination is to facilitate construction and does not create an affirmative responsibility to detect errors."

The contractor is not responsible "for errors, omissions or inconsistencies ... unless the contractor knowingly fails to report a recognized problem to the owner." It should be noted that both the AIA General Conditions and ConsensusDOCS obligate the contractor to report any errors, omissions or defects that are actually known to the contractor, but the language of the AIA documents may be understood to place a heavier burden to require the contractor to discover a defect or error. Failure to detect such deficiencies may therefore expose the contractor to liability under the AIA language, but the ConsensusDOCS form expressly limits such responsibility or liability.

Protect Yourself

Many courts follow the general rule and will not impose liability on contractors who build in accordance with design plans and specifications that are produced by the architect or owner – unless the contract

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Company Profiles

- 124** Turks & Caicos Islands Airports Authority – Providenciales International Airport
- 128** Blakeslee Arpaia Chapman Inc.
- 130** Clearwater Construction
- 132** Fairfax County Public Schools – Thomas Jefferson High School for Science and Technology Renovation
- 134** HAKS
- 136** John T. Jones Construction – Wastewater Reclamation Treatment Plant
- 138** Louis Armstrong New Orleans International Airport
- 140** Southeast Environmental Contracting Inc.
- 142** Southeast Road Builders

states that the contractor has such responsibilities. When a contract is clear and unambiguous, courts will look no further than the contract. For this reason, the adoption of the 2007 AIA Form General Conditions is cause for concern among contractors, as courts may interpret Section 3.2.2 to shift responsibility and liability to the contractor to detect plan and design errors. If courts read the revised section to impose affirmative duties of detection on the contractor, that may be very costly. To limit or avoid potential issues, contractors should familiarize themselves with ConsensusDOCS forms and consider trying to incorporate protective language into their next project contract. ♦

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