Is a Public Contractor Responsible for the Owner's Design?

Over the last couple of years, our firm has been retained by multiple contractors coming to us with the same fundamental question: If we build the job according to the Owner's design, can the Owner assess damages against us if something on the project ends up not performing as it was supposed to?

On the one hand, if a contractor builds a project, they should have to stand behind that project. But on the other hand, if the project fails, but the contractor performed their job according to the plans, it doesn't make sense that they should be punished for what must be a poor design.

As you might imagine, this question has been raised (and argued in court) for a long time. And, for more than one hundred years, the Courts have found that Owners owe Contractors an "implied warranty of design adequacy" that their plans, if followed by the Contractor, will produce a project that is free of defects. In the most famous of these cases, the United States Supreme Court noted, "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 specification." *United States v. Spearin,* 248 U.S. 132 (1918).

What this has meant, typically, is that if a Contractor can show that they followed the plans and specifications, an Owner cannot then turn around and blame them for defects which appear while or after the project is built. The Owner would remain responsible for the costs to repair any such defects. This idea rests on the fundamental conclusion that the Owner, and not the contractor, designed the project, and should therefore be responsible if the design itself is responsible for problems which result on the project.

Of course, this idea holds true where the owner supplies what are called "design" specifications; plans and specifications which provide a complete, detailed design to a contractor which they must simply follow like a road map to properly construct the project. These design specifications typically contain lots of specific detail, and don't allow the contractor much room to make their own decisions on how a project should be built.

The outcome could be a bit different, however, if the owner supplies what are called "performance" specifications (often found in a "design build" contract situation). These types of specifications do not contain loads of detail for the contractor, but simply ask the contractor to build a project with specific outcomes. The courts have held that performance specifications such as these do not carry an implied warranty, because the Owner is relying on the contractor to make decisions and consider details which eliminate potential defects from the project.

There is, of course, a middle way, and that's where many of our recent clients find themselves. What if a design contains both "design" AND "performance" specifications? For instance, what if an Owner's design prescribes every little detail about how to build a project: from specific materials to use, specific construction methods, or even specific equipment; but that same design also has provisions that state something like, "the contractor shall be responsible for any defects which materialize during construction?" More and more, we are seeing Owner specifications which are inserting this type of performance guarantee or "disclaimer" language into their contracts in an attempt to avoid liability, even if it is their design which causes a given defect.

What do the courts say about these mixed specifications? It appears most courts will look at the contract specifications "as a whole" to determine whether the contract is more "design" or "performance." The Courts will look at things like the amount of specific construction detail contained in the project plans, discretion of decision making allowed to the contractor, and the conditions under which a contractor was required to meet project quality standards. One thing the courts have mostly agreed on is that Owners should not be allowed to disavow their flawed designs too easily. Thus, a one line "disclaimer" of project defects has not typically been enough to allow an Owner to shift liability for design flaws to the contractor. A court in Illinois put it this way:

> We construe this [disclaimer] as an impermissible attempt on the part of the [Owner] to shift the responsibility for the sufficiency and adequacy of the plans to the contractor, without providing the contractor the corresponding benefit of having something to say about the plans which he is strictly bound to follow. The contractor's duty is to perform his part of the contract in a workmanlike manner, not to evaluate the suitability of the specifications.

W.H. Lyman Const. Co. v. Vill. Of Gurnee, 403 N.E.2d 1325, 1332 (Ill. App. 1980).

This makes sense, and follows the courts' original reasoning for an implied warranty: The person who designs the project should be most responsible if the design turns out to have substantive flaws.

Of course, where a project design contains an even mix of specific design details coupled with performance standards which allow contractor discretion while requiring specific outcomes, the case becomes more difficult to predict. These have tended to be the cases which end up in our office. Like most things, these cases need to be examined on a case by case, line by line basis.