Meglan, Meglan & Company, Limited
CONSTRUCTION
Claims Topics

Failures of Implied Warranties of Design

When a contractor, subcontractor, or material supplier provides a lump sum or unit price bid quotation based upon owner-furnished contract documents, those documents are presumed to be accurate in all respects and instances.

Generally, or almost without exception, contract documents include the project plans (drawings) and specifications. The general conditions of the contract — and sometimes the supplemental general conditions, too — usually define the contract documents as including both the plans and specifications.

Virtually every court, contract appeals board, arbitrator, or arbitration panel has upheld the *doctrine of implied warranty of design* or the presumed and implied correctness of the original, as-bid, set of project plans and specifications on firm-priced, hard-dollar construction contracts.

These include both lump sum-bid construction contracts *and* unit priced-bid, estimated quantity-based, extended-to-final lump sum construction contracts.

If, during the performance of the construction contract, plan and specification errors and omissions are encountered by the contractor, subcontractors, or material suppliers, *or* if the designs set forth in the plans and specifications are impossible to construct *at any cost*, the owner's implied warranty of design is considered to have failed (either in part or completely), depending upon the nature, number, and severity of the E&O and their consequences upon the progress and cost of the project.

Most design professional-prepared contract documents (plans and specifications, primarily) contain standard E&O discovery and remedy sections, usually in the General Conditions or Supplemental General Conditions of the contract. These sections require the contractor to notify the owner and/or owner's project representative in writing of any design E&O *when encountered by the contractor*. Correction of the plans and/or specifications then becomes the sole responsibility of the owner.

Resultant revisions to or changes in the plans and specifications and, where applicable, the time and/or sequences of performance of the project, then must be estimated, priced, and quoted to the owner as valid change order requests, modifications of contract, equitable adjustments to the contract, or changes to the contract. If not agreed to by the owner and contractor, they become claims under the disputes and remedy clauses of the contract.

Serious and numerous E&O in the as-bid plans and specifications can often cause lengthy suspensions of work on all or portions of the project and, in extreme cases, can lead to termination of the contract, usually for the convenience of the owner. When any failure of an owner's implied warranty of design is encountered, the contractor must:

- Provide written notice of the failure(s) to the owner and, sometimes, the design professional;
- Seek plan and/or specification revisions from the owner and, sometimes, the design professional, to correct the failure(s); and

- Accurately and fully estimate, price, and quote all subsequent owner-provided plan and specification revisions that allege to correct the failure(s).

Most contractors, subcontractors, and/or material suppliers overlook the costs of the *effects* of failures of an owner's implied warranty of design upon their individual activities and total construction project methods, sequences, and procedures, which includes the original project schedule. Those effects are usually the most serious and costly, especially if the owner and/or design professional takes a long time to revise the plans and specifications, during which, work on the project is halted due to the pending revisions.

# # #

Construction Claims Topics **serve as guidance documents only and are written for the expressed purpose of helping construction industry executives and supervisors learn better ways of identifying the sources and causes of construction claims and preventing disputes.**

Meglan, Meglan & Company, Limited
Columbus, Ohio