A New Twist: Contractor Found Liable to Subcontractor under *Spearin*

THIS COLUMN has periodically discussed court decisions that applied the *Spearin* doctrine to claims by contractors against owners for defects in plans and specifications. As many readers know, this doctrine is one of the country's most significant construction law principles. It holds that an owner provides its contractors with an implied warranty that the owner's plans and specifications are accurate and fit for their intended purpose. The U.S. Supreme Court decided *United States v. Spearin* in 1918, and since then virtually every state has one or more cases that endorsed the doctrine.

The fundamental question was whether *Spearin* could help a curtain wall subcontractor who was terminated for default by the general contractor.

Because of the importance of the *Spearin* doctrine, we like to report on cases that offer a twist on its application. This month's case, *Christopher Glass & Aluminum Inc. v. Tishman Construction Corporation of Illinois*, certainly does that. The fundamental question was whether *Spearin* could help a curtain wall subcontractor who was terminated for default by the general contractor. As explained below, both the trial and appellate courts answered with a resounding yes.

The Case

Tishman was the general contractor for a 21-story glass apartment and retail complex in Illinois. The architect's building specifications for the curtain wall were detailed and had numerous performance requirements. Tishman sent the specifications to potential curtain wall subcontractors, including Christopher Glass & Aluminum. During the bidding process, CGA and its window system vendor, U.S. Aluminum, met with Tishman, the owner, and the architect. At this meeting, USA proposed using one of its systems, and the architect's team thought this system was ideally suited for this application. After the meeting, Tishman confirmed with the owner and architect that this system was appropriate; all agreed it was.

Tishman ultimately awarded CGA a subcontract to deliver and install the building's curtain wall system. The subcontract's scope of work stated that: "The approved system is the [USA] structurally glazed (4500) system to be used exclusively for the main building's glass systems modified, where required, with the structurally adhered external aluminum components." It also called for the system to be thermally broken and have a maximum U-value of 0.38.

After the parties spent several months going through the shop drawing and mock-up process, the architect determined that the USA 4500 system would not meet all the specifications, particularly because it was not thermally broken and therefore could not meet the maximum 0.38 U-value. This led to discussions between Tishman and CGA about finding another curtain wall supplier, with CGA insisting that it be provided a change order for the increased costs since it had contracted on the basis of the USA 4500 system. Even though the parties never agreed on a change order, CGA did find another supplier.

Unfortunately, work did not go smoothly, and there were major project delays. Tishman blamed CGA, ultimately terminated CGA for default, and sued CGA for more than $16 million in damages for excess reprocurement costs and delays. CGA's position was fairly simple: The subcontract mandated the use of the USA 4500 system and the fact that the system did not meet the specifications absolved CGA of liability under the *Spearin* doctrine. The trial court agreed with CGA, not only denying Tishman's claim but also awarding CGA $1.6 million as compensation for its unpaid actual costs and profit on those costs.

The Appeal

Tishman's appeal focused on the argument that the trial court misapplied Spearin. This was resoundingly rejected by the Illinois appellate court.

Tishman first argued that *Spearin* did not apply because the requirement for using the 4500 system was found in the subcontract and not the specifications. The court found this to be a "distinction without a difference."

> "Nowhere in *Spearin* did the United States Supreme Court mention or rely upon whether the requirement in question was written in the plans and specifications or in the contract itself. … The basis of the court's holding is that the contractor should be relieved if he was misled by what he was required to do."

The court next considered Tishman's argument that *Spearin* does not apply if the party seeking its benefit (in this case, CGA) proposed, and the other party (in this case, Tishman) accepted, the use of a product that then fails to perform as specified. CGA

It certainly was a creative way for CGA's lawyers to frame the issue, and kudos to them for having convinced the courts that it was appropriate.

countered by arguing that Tishman could not rely on any precontractual statements from CGA because of the contract's "integration" clause, which stated:

> "This Agreement is complete and shall not be interpreted by any reference to any previous bid, letter, proposal, document or understanding, written or oral, or other document or agreement except as specifically provided in this Agreement."

Because the contract unambiguously required CGA to furnish and install only one type of specific system (the USA 4500 system), any prior statements from CGA could not be used to interpret the agreement. The court agreed, finding that the contract was clear on what was required.

However, the court went beyond that and specifically stated that while CGA may have suggested or even vouched for the USA 4500 system, this did not impact the application of the *Spearin* doctrine. The evidence demonstrated that CGA neither created the specifications nor selected the system. Rather, the parties conferred with USA, the manufacturer of the system, and then Tishman, "a sophisticated party with the ability to understand the information it was provided," wrote the contract and required the use of the USA 4500 system "exclusively." The court found that CGA suffered losses by reason of Tishman's specification and "not by a specification it imposed upon itself."

The court cited evidence that Tishman was presented with multiple systems it could have chosen from. While Tishman made its choice based on the attractiveness of certain representations about the USA 4500 system, "CGA did not assume the risk of nonperformance of that system, even if it did make the representations. … When Tishman made its election and stated it unequivocally in the contract it wrote, it assumed the risk of nonperformance, not CGA." The court specifically found that by requiring the USA 4500 system, Tishman impliedly warranted that the system would perform to the specifications.

Finally, Tishman tried to argue that it had written a performance specification, requiring CGA to deliver and install a window system that was thermally broken with a maximum 0.38 U-value. It cited the precedent that *Spearin* only applies to design — and not performance — specifications. Predictably, the court dismissed this argument, finding that the requirement to use the USA 4500 system was a design specification and that Tishman's choice of this window system is what precluded CGA from satisfying the performance specifications.

The Analysis

It is not unusual for subcontractors or equipment suppliers to recommend systems, processes, and other elements of the work. We suspect that many general contractors like Tishman would reasonably believe that these parties would stand behind their recommendations as meeting the specifications. This case gives some perspective on how two courts saw this issue as well as the strength of *Spearin*. From our viewpoint, it is a recognition that lots of "smart" parties looked at what CGA was providing and signed off on the use of the USA 4500 system as being compliant. With all that, we suspect that the trial court might have found it unfair to hold CGA accountable for the problem when the system was vetted and specified, and the appellate court found sufficient evidence to uphold that decision.

Another interesting point about the case should be noted. The decision noted that CGA stated "rather astutely," that Tishman chose not to include language in the contract such as "equal," "equivalent," or "of comparable quality" to the 4500 system. This gave CGA no discretion to select a different system of equal or equivalent quality and price, and it confirmed that CGA was to use only the USA 4500 system. This is the essence of *Spearin* — that a specification mandating a design shifts the risk of the design defect to the party that specified it.

One final note. While we have not researched this, we are unaware of *Spearin* having previously been applied to a general contractor like Tishman. There are cases in which design-builders are held to *Spearin* standards with their subcontractors, but that is because they have design responsibility. It certainly was a creative way for CGA's lawyers to frame the issue, and kudos to them for having convinced the courts that it was appropriate. **CE**


Loulakis


McLaughlin

Michael C. Loulakis (mloulakis@cp-strategies.com) is the president and chief executive officer of Capital Project Strategies LLC, in Reston, Virginia. Lauren P. McLaughlin (lpmclaughlin@smithcurrie.com) is a partner of Smith, Currie & Hancock LLP, in Tysons, Virginia.

Owner Acknowledgment of Site Conditions Doesn't Help Contractor

LITTLE IS MORE frustrating to a contractor than having an owner acknowledge the validity of a claim during the project, only to later change its mind. Contractors rely on these statements not only for how they approach their administration of the project but also for how they present their claims to a court or arbitration panel, if necessary. This is particularly true if someone in authority on behalf of the owner, like a government contracting officer, is the one making the acknowledgment. This issue's case, *Cherokee General Corp. v. United States*, explains how the U.S. Court of Federal Claims recently considered this situation in the context of a differing site condition claim.

The court found that CGC failed to identify any affirmative representation in the contract documents regarding the condition of the soils at the airstrip.

The Case

In August 2016, the U.S. Army Corps of Engineers issued a request for proposals from contractors to repair and improve a military airstrip at the Selah Airfield at the Yakima Training Center in Washington state. Six weeks after the release of the RFP, the Corps issued CGC a $7.2-million, fixed-price task order for the work. The task order was awarded under a multiple award task order contract between the parties. The task order required the task to be completed in 240 calendar days, by May 27, 2017.

Once work began, the project experienced numerous delays. The parties disagreed about who was responsible for the delays as well as whether some of the work the Corps directed CGC to perform was required by the task order contract or was additional work that should have been the subject of change orders. While the parties were at odds about the extent to which various delays affected the critical path of performance, the Corps did issue a change order that extended the contract completion date by 49 days, to July 15, 2017.

By mid-May 2017, the Corps concluded that CGC would not be able to complete the runway on deadline and therefore in time for an event called the Mobility Guardian exercise, which was a high-profile, combat-readiness exercise scheduled for summer 2017. The Corps' contracting officer issued a "show cause" notice to CGC on June 8, 2017. After considering CGC's response, the contracting officer terminated the contract for default.

CGC argued that the default termination was improper and filed a claim seeking payment for work performed along with damages, amounting to more than $4 million. CGC alleged that, among other things, the project delays were excusable because they resulted from design changes imposed by the Corps, differing site conditions, and other circumstances not within CGC's control. CGC ultimately filed a lawsuit in the Court of Federal Claims asking that the court convert the termination for default to a termination for convenience and that CGC be awarded damages for its claims.

The Corps counterclaimed for almost $7.5 million, which included more than $3.4 million attributable to hiring a replacement contractor, more than $3.2 million for repairs to the project site allegedly necessitated by CGC's over-excavation and placement of improper fill material in certain areas, and more than $600,000 in liquidated damages based on 435 days of delay in the completion of the contract.

The Decision

The court's decision was based on several motions for summary judgment filed by the Corps to dismiss CGC's claims. One motion related to CGC's differing site condition claim, in which CGC alleged that the presence of wet soils at the site constituted either a Type I or Type II DSC. The Corps moved to dismiss this claim because CGC failed to provide any evidence that could establish the elements of either type of DSC.

With regard to the Type I DSC, the court noted that CGC had to establish, at a minimum, that a reasonable contractor reading the contract documents as a whole would interpret them as making a representation as to the site conditions. In addition, the court cited longstanding precedent that the contractual representation had to affirmatively represent a condition (for example, that only hard material would be encountered). The court found that CGC failed to identify any affirmative representation in the contract documents regarding the condition of the soils at the airstrip. To the contrary, the court found that the contract explicitly "placed the onus on CGC to determine the condition of the site itself, by conducting its own geotechnical investigation and preparing its own report."

The fact that the court was willing to dismiss the differing site condition claim could have a major impact on CGC's ability to overturn the default.

As for the Type II DSC, the court noted that CGC was required to demonstrate that there existed unknown physical conditions at the site of an unusual nature, which "differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract." The court found that CGC failed to meet such requirements. CGC presented no evidence that it could not have reasonably anticipated that there would be a significant quantity of wet soils at the site shortly after the winter season or that the conditions of the soil differed materially from what would ordinarily be encountered and generally recognized when undertaking similar work in the region.

The court found that CGC's DSC claim appeared to be based entirely on a sentence in the contracting officer's "show cause" notice stating that "the Government recognizes [the drainage system, material quantity overruns, and saturated soils] as either changes to the Contract or differing site conditions." The court found CGC's reliance on this "conclusory observation" to be unavailing:

> "Even where a contracting officer's legal opinion is fully explained (unlike here), it is not binding on the government in judicial proceedings (which are de novo) and it cannot override the language of the contract itself."

As a result of the above, the court granted the Corps' motion for summary judgment of CGC's DSC claim. This meant, among other things, that CGC could not use the alleged DSC as a basis for claiming a time extension, which would have helped it defeat the default termination.

The Corps raised other arguments on summary judgment, including that at the time of termination it was not reasonably likely that CGC could have completed its work on the contract within the time remaining and that CGC committed "material breaches of the contract specifications justifying the default termination." These breaches included over-excavating and backfilling with noncompliant material, the Corps argued. The court declined to decide these issues on summary judgment, finding that there were facts in dispute and that all these issues were intertwined with issues that were associated with determining whether CGC's delays were excusable.

The Analysis

It is obvious that the disputes in this case involve much more than a DSC claim. However, the fact that the court was willing to dismiss the DSC claim could have a major impact on CGC's ability to overturn the default. The decision did not explain how many days of delay were tied to the soils issues, but given the court's decision, CGC is certainly in a more precarious position than it would have been had the issue remained alive for the full trial. We found it surprising that this was resolved on summary judgment, as one would have thought it important to understand why the Corps' contracting officer thought this was recoverable under the contract.

One other observation: The damages sought by the Corps are almost double the amount of CGC's original contract price, with the excess reprocurement costs being almost as much as that original price. While the validity of the default termination and resulting costs will be the subject of a trial and later opinion, it is a stark reminder to contractors of the potential liability from not finishing a contract. To defend itself against these damages, CGC will have to prove its entitlement to a time extension by demonstrating that it gave appropriate contractual notice and offering project records to support its position. Stay tuned to future columns to learn the results of the trial. **CE**


Loulakis


McLaughlin

Michael C. Loulakis (mloulakis@cp-strategies.com) is the president and chief executive officer of Capital Project Strategies LLC, in Reston, Virginia. Lauren P. McLaughlin (lpmclaughlin@smithcurrie.com) is a partner of Smith, Currie & Hancock LLP, in Tysons, Virginia.

It Takes Only One Word: Why the Construction Industry Avoids Jury Trials

Construction cases are rarely tried before juries for a number of reasons, chief among them the fact that business owners typically prefer to have their disputes resolved by seasoned arbitrators or judges. Indeed, standard contracts usually reflect the industry's widespread aversion to courtroom litigation by requiring arbitration. Even in contracts that allow for litigation, sophisticated contracts universally require waivers of jury trials.

Why? Not only are jurors inherently unpredictable, but anything can go wrong in a jury trial. A shocking display of this is highlighted in this issue's case, *Lake Hills Investments LLC v. Rushforth Construction Co. Inc.* Here the Washington Court of Appeals recently overturned a $9.6 million verdict awarded to the contractor because a single instruction given to the jury was found to be incorrect.

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The Case

The disputes in this case arose from the construction of a mixed-use project in Bellevue, Washington, that combined retail, residential, and commercial development. Lake Hills Investments LLC contracted with AP Rushforth Construction Co. to build the project in four phases over two years. AP began work in 2013, and the construction was beset with numerous delays.

In November 2014, Lake Hills notified AP that it was in breach of the contract schedule and blamed AP's management practices and insufficient job site staffing. Lake Hills also began identifying work it considered defective, such as excessive cracking in the concrete garage floor slab.

AP blamed the delays on Lake Hills reducing its pay applications, making it difficult for AP to hire and retain subcontractors. AP blamed construction defects on Lake Hills having provided "a sketch" or "a concept" rather than buildable designs.

The relationship between the two companies deteriorated, and in late October 2015, Lake Hills sued AP for breach of contract, asserting defective work. AP stopped work a few weeks later and filed its own breach claim, asserting underpayment.

In 2018, 24 witnesses testified during a two-month jury trial of the case. With respect to the allegation of defective work, the owner's concrete expert testified that excessive cracking in the garage slab was caused by late and deficient saw cuts to the concrete as well as inappropriate placement of certain crack-control joints. The expert opined that the cracks were not the result of poor design. AP's concrete expert testified that neither the saw cutting nor the crack-control joint placement caused the cracks, but rather that the plans and specifications themselves caused the cracking by requiring rebar as reinforcement through the slab.

Ultimately, the jury returned a mixed verdict. Lake Hills was found responsible for the vast majority of the delays and for breaching the contract by underpaying. On the question of defects, the jury found that AP performed defective work on six of the eight areas and awarded the owner damages. However, the jury found that in two areas, although AP was liable, the plans and specifications were defective and caused the defective condition. Ultimately, the court awarded AP a net judgment of more than $9.6 million, including nearly $6 million in attorneys' fees and costs.

The Appeal

Lake Hills appealed, claiming the trial court issued erroneous jury instructions in three respects. The first concerned the instruction associated with AP's affirmative defense that alleged defective plans and specifications served to absolve AP of responsibility for Lake Hills' defective work claims. The court had instructed the jury as follows:

> For its affirmative defense, AP has the burden to prove that Lake Hills provided the plans and specifications for an area of work at issue, that AP followed those plans and specifications, and that the [construction] defect resulted from defects in the plans or specifications.
>
> If you find from your consideration that this affirmative defense has been proved for a particular area, then your verdict should be for AP as to that area.

Because of that one word missing from that single instruction, the parties will perhaps spend millions more dollars to correct the error.

Lake Hills argued on appeal that the instruction had a glaring omission — that the word "solely" was missing from the instruction. Lake Hills' position was that this instruction did not properly state that AP's legal burden was to prove that the alleged construction defect resulted solely from defective or insufficient plans or specifications.

The Court of Appeals agreed, stating: "Proof of any defect in the plans and specifications for that area contributing to a construction defect would let AP avoid all liability for that area even if Lake Hills proved AP's deficient performance caused some of the damage. This instruction incorrectly understated AP's burden of proof."

The appeals court went on to state that for the two defective work areas for which the jury awarded no damages, there was evidence of both deficient performance by AP and defective plans and specifications by Lake Hills.

The court reasoned that the instruction allowed the jury to absolve AP of all liability for an area even if only part of the defective work resulted from poor plans and specifications. The instruction was found to have misstated the law and to be a reversible error. Inclusion of the word "solely" would have adequately stated the law and avoided a remand.

The Court of Appeals also addressed Lake Hills' other two claims of erroneous jury instructions. Lake Hills challenged an instruction given to the jury regarding its assessment of liquidated damages against AP and whether the jury was properly advised on the concept of apportionment. The appellate court reasoned that the jury instruction did not reflect the contract because it excused AP from delay days due to its own delays. However, it did not misstate the law, the court found. Moreover, there was no prejudice toward Lake Hills. Accordingly, the appeals court ruled that the jury instruction was not a reversible error.

Lake Hills also argued that the instruction given to the jury regarding AP's cessation of work was incorrect as it related to Lake Hills' alleged nonpayment. However, like the liquidated damage instruction, the appeals court found that the erroneous instruction was harmless.

The Analysis

When a jury is charged to begin its deliberations, dozens upon dozens of jury instructions are read to the jurors by the presiding judge. The process can take hours. The precise language of jury instructions is usually a hotly contested element of any trial, as it serves as potential grounds for appeal for either side. Because the appeals court found a reversible error here, the case was sent back for a new trial to take place.

This means that not only will the parties have to go through another lengthy trial, but they will also undergo another discovery phase. The parties already exchanged 1 million documents in preparation for the first trial and conducted close to 60 depositions. They will now be required to participate in all the pretrial activities leading up to a second jury trial of that same significant length. The costs are bound to be absolutely astronomical.

What is most shocking is that for the most part, this case involved a fairly straightforward *Spearin* doctrine-type defense. The owner alleged defects, and the contractor argued in response that it built to the plans and specifications. The *Spearin* doctrine says that a contractor who follows the design given to it will not be responsible for damage that results from defective or insufficient plans.

In Washington state, however, the law is that the contractor must prove that the damage resulted *solely* from the bad design. Because of that one word missing from that single instruction, the parties will perhaps spend millions more dollars to correct the error.

This is why construction litigants typically stay far, far away from jury trials. **CE**


Loulakis


McLaughlin

Michael C. Loulakis (mloulakis@cp-strategies.com) is the president and chief executive officer of Capital Project Strategies LLC, in Reston, Virginia. Lauren P. McLaughlin (lpmclaughlin@smithcurrie.com) is a partner of Smith, Currie & Hancock LLP, in Tysons, Virginia.

Who Is Responsible When a Substituted Product Causes Trouble?

Litigation stemming from disputes over "brand name or equal" products is all too commonplace. As a result, the law is relatively well settled that an alternative product need not be identical to or comply with every detail of the specified brand-name product. Rather, the contractor need only provide a product that has the salient characteristics of the brand-name product and is suitable to the owner's actual needs.

Stated differently, the contractor's burden of proof in these cases is to demonstrate that its proffered "or equal" product functions just as well in all essential respects as the specified product.

Cummins v. Bradford Sanitary Authority discusses a twist on the brand name or equal issue — namely: Who is responsible for changes to the project that result from the contractor selecting a product different than the brand name specified? While the contractor prevailed at the trial court, the jury verdict was ultimately overturned by a Pennsylvania appellate court.

The Case

Bradford Sanitary Authority is the owner and operator of a wastewater treatment plant that services the area around the city of Bradford, Pennsylvania. The Authority retained Gannett Fleming Inc. to provide design, engineering, and construction management services for the upgrade of the plant. Part of the project required the construction of concrete tanks containing sequencing batch reactors to treat sewage and other wastewater at the plant. An SBR is a type of bioreactor used to remove sludge from sewage in order to produce clean water for discharge (or in some cases, additional treatment).

GF's design was based on a continuous-flow SBR manufactured by ABJ Sanitaire, with four separate SBRs installed in four adjacent, contiguous tanks. The design called for wastewater to enter the SBR through two influent boxes, each of which serviced a pair of tanks. Each tank had its own manual gate in the influent box, and the system was designed so that the influent would continuously flow over these gates. Importantly, influent entered the boxes through 20 in. ductile iron influent pipes capable of supplying 13.88 mgd of wastewater.

The specifications authorized bidders to select from any of three acceptable manufacturers: ABJ, Ashbrook Simon Hartley, or Aqua Aerobics. The specifications also stated that whenever multiple products or manufacturers were listed in the specifications, the first-named product constituted GF's design. The specifications also stated:

> If products of manufacturers other than those named first differ from those named first in the Project Manual or on the [Contract] Drawings to the extent that their proper incorporation into the [work …] requires changes to the structural, piping, mechanical, electrical, instrumentation, or any other changes of whatsoever nature, the [c]ontractor shall be responsible for such changes.

There were numerous other provisions in the specifications stating that if a product other than the one first named was used by the contractor, the contractor would be responsible for all costs associated with design changes to any part of the project to make use of the equipment.

Bob Cummins Construction Co. was one of the bidders. Because it received a better deal on the SBR system from Ashbrook than from ABJ, Cummins proposed installing an Ashbrook SBR. Unlike the ABJ system, Ashbrook's system was not a continuous-flow system. Instead, it was a sequencing system, where only one of the four SBR tanks fills at a time. Cummins proposed to install automatic gates to control influent flow into a tank rather than manual gates or a separate pipe with a valve into each tank. Cummins was ultimately the winning bidder.

Cummins submitted the Ashbrook product data and shop drawings reflecting changes Ashbrook proposed to GF's design to incorporate the Ashbrook SBR. GF determined — based on assurances from Cummins and Ashbrook during the bid and submittal processes — that the proposed Ashbrook SBR would meet the SBR specifications and, in particular, that it could handle up to 13.88 mgd of influent. After several meetings and some changes, GF marked Cummins' final SBR shop drawings "reviewed," and Cummins installed the Ashbrook SBR at the plant.

After the SBR was put into operation, the parties discovered an influent overflow problem. Cummins claimed it was due to the 20 in. influent piping being too small to accommodate the Ashbrook system's sequencing. The Authority claimed that the overflow resulted from the automatic gates not controlling the flow properly and that a different piping configuration was necessary to accommodate the Ashbrook SBR. The corrective work was performed, and Cummins sued the Authority, alleging more than $600,000 in damages. The Authority countersued.

In the litigation that followed, the Authority argued that the trial court should dismiss Cummins' claim because the contract placed sole responsibility on Cummins for the defective system. The court refused to dismiss the case, and a jury awarded Cummins $488,243. The jury also found that

The contractor's burden of proof in these cases is to demonstrate that its proffered "or equal" product functions just as well in all essential respects as the specified product.

the Authority acted in bad faith in withholding the contract retention.

The Appeal

The Pennsylvania appeals court reversed the jury verdict for almost $500,000 and directed the trial court to either schedule a new trial on any remaining issues or grant judgment to the Authority. Its decision was based on the contract, which made Cummins responsible for reviewing all plans and specifications before bidding on the project and accepting responsibility for changes caused by its use of a product different from what was the basis of the design.

The court stated that a product being listed as acceptable in the specifications (i.e., Ashbrook's SBR) did not make that product interchangeable with the brand around which the project was designed (ABJ's SBR). The contract was clear and unambiguous in shifting to the contractor the responsibility and risk for "changes of whatsoever nature" required because Cummins decided to use Ashbrook 's system rather than ABJ's.

The court was not swayed by GF's review of Cummins' submittals and shop drawings. The contract, which appeared to be based on the Engineers Joint Contract Documents Committee construction contract, clearly disclaimed any liability on the Authority's part for the submittal process.

The court also rejected Cummins' argument that by naming Ashbrook as an additional manufacturer, the Authority made a guarantee that the Ashbrook SBR would fit and function without design changes. The court stated that this might be the case if Cummins' claim was based on a design specification for which the Authority explicitly stated how the contract was to be performed and permitted no deviations. Citing prior Pennsylvania precedent, the court found the specification here to be a performance specification:

> The mere identification of a product or manufacturer does not create a design specification. Where a government agency identifies a particular product or manufacturer by name, but permits substitution of 'an approved equal,' such a specification is 'performance' in nature and, as a result, carries no implied warranty.

As a result, the risk of meeting the performance goal was shifted to Cummins, and it could not successfully argue that the Authority was liable for the cost consequences of the repair work.

The Analysis

There are many nuances associated with the use of brand name or equal specifications. Most state procurement laws put very tight restrictions on the ability of a public agency to specify a product that can only be obtained from a sole source, as this can result in unfair competition and inflated prices. While the Authority did not "sole-source" ABJ's SBR system, the authors wonder whether it shifted the playing field by making the contractor responsible for design issues associated with using an alternative product. It certainly creates a strong incentive for a contractor to use the brand-name product.

Another point about this case that is hard to follow: If GF's design was only suitable for the ABJ system, one might have thought that this would have been determined by GF during the bidding or submittal process. Stated differently, if the Authority said to Cummins during these processes, "You can use the Ashbrook SBR, but here are the changes that GF says will need to be made to make it work," we could better grasp how the contract clause relied on by the Authority and court makes sense. But it seems as if the appellate court ignored the notion that GF was the engineer of record and that this was a project delivered through design-bid-build.

Finally, we note that the American Council of Engineering Companies of Pennsylvania submitted a legal brief in support of the Authority in this appeal. This is not surprising, as it is understandable that ACEC would have a strong vested interest in seeing that the contract language on product substitutions be enforced. **CE**

Michael C. Loulakis (mloulakis@cp-strategies.com) is the president and chief executive officer of Capital Project Strategies LLC, in Reston, Virginia. Lauren P. McLaughlin (lpmclaughlin@smithcurrie.com) is a partner of Smith, Currie & Hancock LLP, in Tysons, Virginia.

When Damages Are Apportioned, Everyone Loses

When engineering malpractice is proved against a firm or person, most states use a comparative fault model for determining damages. Under this model the court ascribes a percentage to each firm or person that it finds has contributed to the loss, regardless of whether it is a party to the litigation. Typically, no entity can be held liable for more than its percentage of total damages. Consequently, if an engineer's design was faulty, but there was also faulty construction, the engineer's liability would be limited to its apportioned percentage of fault, even if the contractor was not a codefendant in the court proceedings.

This month's case, *Broward County v. CH2M Hill*, discusses this principle in relation to problems on a project that were found to be caused by a combination of faulty design and poor construction workmanship. The trial and appellate courts were tasked with slicing and dicing damages to arrive at the right monetary awards.

The Case

The disputes stem from a county airport improvement project that included the construction of a new taxiway, Taxiway C. Broward County, Florida, engaged CH2M Hill Inc. for aviation design services. The county engaged Triple R as its general contractor and URS as the project manager. URS was to be the county's on-site representative and provide overall management of the airport improvement projects, including serving as the decision-maker for all questions concerning the quality of the work performed.

The county also engaged another engineering firm, Bureau Veritas North America, to provide "quality assurance materials testing and inspection services." This role included testing the density of the base course, subbase, and subgrade layers beneath the asphalt.

The project was completed, and even though the taxiway was expected to last 20 years, the county noticed rutting just eight months after it opened. The county's investigation concluded that Triple R had performed defective work and CH2M's design contained errors, omissions, and defects. The county directed Triple R to mill away 2 in. of the asphalt surface and fill it with new asphalt. Triple R complied and submitted a final payment request, which URS approved for payment.

The county never issued a final certificate of payment, however. Instead, it engaged the services of another engineering firm (RS&H) to completely redesign the project. It then engaged another contractor to implement the new design, costing the county almost $7 million.

The Litigation

The legal and procedural finger-pointing over liability began soon after. Triple R sued the county, alleging breach of contract and violations of the Prompt Payment Act. Triple R also asserted claims against CH2M for negligent design. Not surprisingly, the county brought claims against Triple R and CH2M for breach of contract and indemnification. The county also sued URS and Bureau Veritas for breach of contract and indemnification but settled those claims before the trial for $600,000 and $125,000, respectively.

In the lawsuit, Triple R argued that the county's damages were caused in whole or in part by the county, CH2M, and URS. CH2M argued that fault should be apportioned among Triple R, URS, and other nonparties to the suit.

The proverbial "battle of the experts" at trial included testimony from the county's engineering expert that CH2M's design was "doomed to fail" because it did not take into account any of the native, loose soils below the top 22 in. of the subgrade, which was "one of the principal factors" that caused the rutting. The county's expert opined that Triple R also contributed to the rutting, albeit to a lesser extent.

The expert testified that Triple R failed to properly construct the subgrade in accordance with CH2M's design because it did not compact the 22 in. layer in the excavation/cut and embankment/fill areas to their maximum dry density. The expert also asserted that Triple R did not compact the three layers below that level in the embankment/fill areas to the required density.

Triple R's expert testified that the premature rutting was caused by under-compaction and a design that did not meet the standard of care in the excavation/cut areas.

One of CH2M's engineering experts testified that the cause of the rutting was Triple R's under-compaction of the 22 in. layer. Another CH2M expert testified that URS' conduct fell below the standard of care by allowing Triple R to deviate from CH2M's design in various ways. CH2M opined that every time URS allowed a deviation from the design engineer's documents, URS was responsible for the deviation because URS was redesigning the project. A former URS employee who worked on the project testified that URS was understaffed and did not have the capacity to properly inspect all of Triple R's work.

The court found that the redesign and reconstruction of the taxiway was a "direct and proximate result of the breaches of contract by Triple R and CH2M and both are liable for those incidental damages that

What is uniquely interesting about this case is that the courts awarded most of the damages against an entity that was no longer a party to the suit, URS.

flow from their breach." The trial court relied on the testimony of the county's expert in finding that CH2M breached its contract with the county and relied on experts from both the county and CH2M in finding that Triple R breached its contract with the county "by failing to build Taxiway C in conformity with not only the specifications, but also the density testing."

The trial court found that the reason Taxiway C failed so soon after its opening to aircraft traffic was a combination of the failure to compact correctly and the failure to extricate the water from the job site.

The trial court found that URS was "the main participant on the job site that caused the failure of Taxiway C" because URS was the project manager and had the opportunity to make changes to the plans as well as to construction. Therefore, "URS was substantially in breach of its contract with the county and at fault for what occurred on Taxiway C."

The court considered the county's total requested damages of $6,723,303 but deducted the $725,000 paid by the parties that had settled before trial, URS and Bureau Veritas. This reduced the county's damages to $5,998,303.

The trial court then allocated the damages for the breaches as follows: 60% to URS, 25% to Triple R, and 15% to CH2M. All parties appealed.

The Appeal

The primary legal issue for the appeals court was whether the comparative fault statute applied, in general, to owners' contract claims against architects and engineers.

The court affirmed the lower court ruling, finding the trial court properly applied the statute and properly allocated the total damages between CH2M, Triple R, and URS. However, it disagreed with the trial court's calculation of the total amount of damages to be awarded to the county.

The appellate court stated that "the proper measure of damages … was the cost of repair to bring Taxiway C to its bargained-for state. However, the trial court computed damages based upon the county's expenditures in redesigning and reconstructing Taxiway C in accordance with a completely different design. The new design was more expensive and more robust than CH2M's original design."

As a result, it found that the county should only have been entitled to its true out-of-pocket costs, approximately $3.2 million. This substantially reduced the amounts for which all parties were ultimately responsible.

The Analysis

What is uniquely interesting about this case is that the courts awarded most of the damages against an entity that was no longer a party to the suit, URS. Recall that URS made an "early exit" out of the lawsuit in a mediated settlement payment to the county of $600,000. Yet, the trial court found URS responsible for 60% of the county's total awarded damages of $5.9 million — more than $3 million.

There is certainly a logic to parties settling before going to a full trial. However, a party like the county is the one that took the risk that URS would ultimately be liable. It may have also factored into the trial strategies adopted by CH2M and Triple R, who could argue that the "empty chair" (URS) was the true (or at least the major) culprit.

The decision is also noteworthy in that the appeals court found the county's trial court award too high and did not factor in testimony about what portions of the taxiway delivered by Triple R still had an expected useful life. As a result, while the county asserted damages of $6.7 million, its overall recovery was something far less.

This is another common issue in dealing with cases like this, where a plaintiff like the county has to prove the cause and effect of the flaw. Stated differently, just because an owner spends the money to fix a problem does not mean that the parties ultimately found liable will be forced to write checks to cover those costs. **CE**

Michael C. Loulakis (mloulakis@cp-strategies.com) is the president and chief executive officer of Capital Project Strategies LLC, in Reston, Virginia. Lauren P. McLaughlin (lpmclaughlin@smithcurrie.com) is a partner of Smith, Currie & Hancock LLP, in Tysons, Virginia.

When Serving as an Expert Witness, Do Your Homework

Most construction disputes involve a proverbial "battle of the experts," and professional engineers often serve as those experts. The starting point for the admission of any expert testimony to a case is Federal Rule of Evidence 702, which permits opinion testimony only if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Only witnesses who are first qualified by courts as experts may present opinion testimony, and that testimony must be based on their respective knowledge, skill, experience, training, or education. Engineering experts are often called on to opine on the applicable standard of care and duty owed to third parties in negligence actions.

In this article we focus on whether a professional engineer's opinion was admissible to establish a contractor's breach in a specific case.

The Case

The case, *Enclave Condominium Association v. Lime Contracting Inc.*, stems from efforts to restore the exterior of a high-rise condominium building that was experiencing water infiltration. The building, located along the Atlantic City, New Jersey, boardwalk, experienced water leakage, which prompted the condo association to engage two design professionals to investigate. Enclave Condominium Association retained Kanalstein Danton Associates P.A., known as KDA, a licensed architect, and O'Donnell & Naccarato, known as O&N, a licensed engineering firm, to ascertain the damage and scope of repairs needed. After two years of investigation, the two firms developed a construction contract for the restoration of the building's exterior. In February 2002, Enclave engaged Lime Contracting Inc. to perform the work.

Lime's scope of work and the specifications changed as work progressed. Because the pitch of the balconies varied greatly from balcony to balcony — and from the architectural drawings — the scope of work to be performed on each balcony differed and was directed in the field by KDA and O&N. Products were substituted and changed frequently without regard to the specifications drafted. O&N testified that the project manual was basically "thrown out" because of the balcony pitch conditions encountered in the field.

To make matters more complicated, after Lime completed the west elevation of the building, Enclave received complaints that water continued to penetrate the units. Enclave engaged a different contractor to inject foam into the base of the window walls and sliding glass doors while Lime was completing other areas of the building. Lime completed its work in 2006.

In 2008, Enclave notified Lime of continued water intrusion. Lime declined to perform repairs without additional compensation. In 2010, Enclave sued Lime and multiple other parties, alleging breach of contract, negligence, and consumer fraud. Two of the counts in Enclave's complaint were notable. Enclave sued Lime for "failing to comply with the plans and specifications … or otherwise failing to do the job in a workmanlike manner." Additionally, Enclave alleged that Lime had negligently performed its contractual duties and breached its duty of care by, among other things, failing to exercise reasonable and ordinary care in building, constructing, and performing the work.

Enclave then engaged an architectural and engineering firm, Structural Design Associates, known as SDA, to perform multiple "swing stage" inspections and prepare contract documents to address the facade and balcony leaks.

Enclave engaged both a liability expert, Andrew G. Scheerer, P.E., and a damages expert. Scheerer issued four reports and was deposed over the course of six days.

Following discovery, Lime filed a motion to bar Scheerer's expert re-

Only witnesses who are first qualified by courts as experts may present opinion testimony, and that testimony must be based on their respective knowledge, skill, experience, training, or education.

While any prospective project may seem like (and probably would be) an interesting assignment, engineers must do their homework. This includes, as shown in this case, having a full understanding of all aspects of the contract documents. It is insufficient to rely solely on your view of what is or is not an accepted practice.

port and prevent him from testifying at trial. The court not only issued a 62-page decision barring Scheerer from testifying but also granted judgment to Lime and its surety without a trial.

Enclave appealed, claiming the trial court erred by barring Scheerer's report and ruling in favor of the contractor on the entire case.

The Appeal

The appellate court began by citing the trial judge's "comprehensive and well-reasoned" decision in excluding Scheerer's report. The appeals court affirmed the lower court ruling because it found generally that the factual bases for Scheerer's opinions were not consistent with the contract in its original form or as modified over time. The court was also troubled that Scheerer did not consider the decisions made by Enclave, KDA, and O&N during the project in developing his opinion.

Moreover, Scheerer's opinions were found to be unreliable because his deposition testimony revealed he was not familiar with the contract documents. The court also noted that Scheerer's expert report and opinions were based on information provided by SDA, or conclusions drawn by SDA, without any independent analysis.

For instance, during Scheerer's deposition, he opined that the sealant contained no backer rod. When Scheerer was asked if the specifications called for backer rod, his response was that it was "industry standard." When pressed whether he reviewed the project specifications on that issue, he conceded he had not. He also had no knowledge that another contractor had been brought onto the project to inject foam into the window walls.

He further opined that one of Lime's failures was that there was no coating on the weep holes. When asked if he knew whether there was supposed to be coating on the weep holes, he replied that he "wasn't around during construction." He also testified that the drawings were not clear either way on that issue. Scheerer not only testified he had done no independent testing, he also admitted he had not even seen the contract. He stated that his opinions were based on his engineering judgment and expertise.

The Analysis

This is a case that was essentially won at deposition rather than at trial, a situation that is rare. The contractor and sureties were able to convince both the lower court and the appellate court that the expert's opinions were inherently unreliable and that without them, there was no reason to go forward on the issues. The two courts decided Enclave would not be able to meet its burden of proof to show that Lime had breached its contractual duties.

While expert testimony is not normally required for breach-of-contract cases, in this case the lower court judge found that without Scheerer's report, there was no triable issue for the jury on the alleged breach. Scheerer's report could not be admitted because he was on record as not having reviewed the contract.

The case also serves as an important reminder for those engineers who might be asked to serve as testifying experts on problems. The engagement is a very serious matter with evidentiary standards in place. While any prospective project may seem like (and probably would be) an interesting assignment, engineers must do their homework. This includes, as shown in this case, having a full understanding of all aspects of the contract documents. It is insufficient to rely solely on your view of what is or is not an accepted practice. **CE**

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