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Spearin Doctrine

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WHEN SPEARIN WON'T WORK: HOW CONTRACTUAL RISK ALLOCATION OFTEN UNDERMINES THIS LANDMARK RULING

One of the most litigated issues in construction today involves contractual risk allocation: Who bears the risk of imperfect design documents? The seminal decision of *United States v. Spearin* established that a project owner impliedly warrants the suitability of the plans and specifications. [1] That legal precedent notwithstanding, contracting parties all too often face off in court or a similar claims process over the viability of the plans and specifications. Their compensated advocates will sound the proverbial gong arguing earnestly on behalf of their clients as to the applicability of the *Spearin* doctrine. But the starting point for any legal analysis on this issue should be that an implied warranty--while long-standing, equitable, and founded upon sound principles--is not impervious to death by a thousand cuts.

As we have seen from the progeny of *Spearin*, an implied warranty can be undermined by a number of factors, among them express disclaimers by owners, specific exculpatory clauses, the nature of the specifications themselves, and contractual clauses requiring a contractor to affirm that a design is sufficient or a site condition is suitable. Given the number of issues that can sink a *Spearin* claim for defective specifications, this article addresses the current status of *Spearin*, identifies how parties draft around its application, gives unique consideration to design-build disputes, and opines on the future evolution of this long-standing doctrine.

The Genesis of the Doctrine: *United States v. Spearin*

It all began more than a century ago when George Spearin was handed a set of contract drawings by the federal government to build a dry dock in a navy yard in Brooklyn, New York. [2] Part of the design included the diversion and relocation of a six-foot sewer system. When the navy furnished its design to bidders, the government knew that the sewer to be diverted had a history of capacity and overflow problems. Although it relayed this information to some bidders, it did not disclose those earlier issues to Mr. Spearin. [3] Moreover, neither the government nor the bidders had any knowledge (remarkably) of the existence of a dam inside an adjacent seven-foot sewer, which ostensibly contributed to the overflow problems. Spearin constructed the diverted sewer, and all was fine until one evening in 1906, when a heavy downpour coupled with a high tide caused the sewer to collapse and flood the dry dock.

The parties then discovered the existence of the dam inside the seven-foot sewer, not shown on the drawings, which diverted water into the six-foot sewer, causing or contributing to the overflow. Spearin determined that the sewer would continue to be a "menace" to the dry dock project unless redesigned. [4] He abandoned the work until the government assumed responsibility for the design documents--which he artfully described as a "grave blunder." [5] The government declared Spearin's contract null and void and sought damages for his refusal to repair the defective sewer. Meanwhile, and perhaps undermining its own argument, the government relet the project, incorporating substantial design changes

to the sewer and construction of the dry dock. The Court of Claims found Spearin's abandonment of the work to be justifiable. After all, the Court of Claims concluded that abandonment was "merely an acceptance of the situation which the wrongdoers ... had brought about." [6]

The Supreme Court affirmed the ruling, holding that the fact that specific plans and specifications were provided, coupled with the government's nondisclosure about the sewer's capacity problems and existence of a dam, placed the risk of the design squarely on the government. Thus, the *Spearin* doctrine was born and it remains one of the landmark principles in construction law today: an owner impliedly warrants that the plans and specifications, if followed, will result in a functioning system. The corollary to the doctrine is that the contractor will not be liable to the owner for loss or damage resulting solely from defects or deficiencies in the plans and specifications.

***40** Since the issuance of *Spearin*, courts at the federal and state level have further refined the doctrine to encompass two specific implied warranties. The first implied warranty is that the plans and specifications are accurate, and the second implied warranty is that they are suitable for their intended use. An owner breaches the first warranty when the actual condition of the site is not as the owner has stated (as Spearin actually encountered). An owner breaches the second warranty when a contractor accurately follows the plans and specifications to completion, yet the construction either cannot be completed as directed or results in functional deficiencies.

The Modern Day Limitations on *Spearin*

Fast-forward almost a century, and although there is a healthy body of case law at both the state and federal levels enforcing the implied warranty of a defect-free design, [7] the *Spearin* doctrine has many exceptions, carve-outs, and limitations. One could argue that recent cases rejecting contractors' invocation of the *Spearin* doctrine signal the demise of the doctrine. [8] But, because parties can contract around an implied warranty without much difficulty, it is more accurate to conclude that construction industry participants have simply become more sophisticated in shifting the risk, i.e., staking out positions where *Spearin* does not apply.

Under the modern rule, the *Spearin* doctrine cannot be invoked when (1) the contract contains a specific exculpatory clause or other express disclaimer of design liability; (2) the contractor had a duty to inquire as to patent or obvious defects but failed to do so; (3) the specifications provided are classified as performance specifications only, and not design specifications; (4) the defects in the plans and specifications are minor and do not result in substantial design changes; and (5) in some jurisdictions, delay damages are sought flowing from design defects.

In addition, the most current version of the AIA-A201 standard form contract (2007) arguably shifts substantial risk from design professionals and owners to contractors for costs resulting from defects in the plans and specifications. [9] Finally, while most states have expressly adopted and incorporated the *Spearin* doctrine, there are still a few states that have refused to extend the doctrine to commercial projects. [10] An understanding of the breadth and significance of each of these limitations is vital to understanding where *Spearin* stands today.

Inclusion of Well-Drafted Exculpatory Clauses Nullifies* Spearin *Liability

Numerous construction industry studies have shown that realistic allocation of risks between parties involved in a construction project will "improve efficiency, promote a much more positive working relationship between the parties, and reduce the overall cost of the project." [11] Given the altruistic tones taken by various construction industry participants touting the benefits of fair risk allocation, disclaimers and exculpatory clauses may someday be viewed as antiquated or unnecessary.

However, despite the focus on collaboration and equitable allocation of risk, one could argue that many construction owners continue to shift all risk downstream to those contracting parties who are least able to control and manage that risk. The concept of realistic risk allocation remains, for many contractors and subcontractors, merely aspirational.

Express disclaimers might address a specific aspect of the design and/or site conditions, or they may generally disclaim certain information supplied with the bid documents. Although general disclaimers are not sufficient to overcome the ambit of the *Spearin* doctrine, [12] express disclaimers can effectively nullify applicability of the *Spearin* doctrine [13] and transfer the burden of adequacy of the design to subcontractors, who are the project participants least financially capable of absorbing the risk.

Consider a scenario where an owner of a hospital wishes to renovate thousands of square feet of the facility. The owner knows that the building is very old and has gone through a number of renovations during the life of the premises. The owner does not have a full set of as-built drawings for the hospital but engages a design professional to prepare design drawings for the renovations. The design professional takes some field measurements but is not compensated to perform a laser survey of the building to determine what is actually contained inside the plenum and walls. The design professional prepares detailed design drawings of exactly what the owner wishes to construct in the renovated facility but includes on the drawings multiple disclaimers that what is shown on the mechanical and electrical drawings is only representative and may not accurately depict the actual conditions of the ceilings and wall space.

The prime contract contains a differing site conditions (DSC) clause, entitling the contractor and subcontractor to recover for materially different site conditions they encounter, thus setting up a conflict with the numerous disclaimers and exculpatory clauses shifting the risk to the contractor of verifying the conditions of the site, taking field measurements, and developing a BIM model.

In this hypothetical scenario, it seems unfathomable that in a series of interrelated and sophisticated multimillion-dollar contracts, there could be gaping holes in the contractual allocation of risk for unforeseen conditions (i.e., between express disclaimers in the plans and DSC clauses). But this scenario occurs regularly in our ***41** industry. The two questions that project participants on both sides of the table should ask during contract negotiations are (1) what specific language is sufficient to disclaim the implied warranty afforded by the *Spearin* doctrine; and (2) what other provisions, if any, conflict with those disclaimers.

In one case, the court found *Spearin's* implied warranty inapplicable when it enforced a contract provision expressly disclaiming "any responsibility [of the owner] for the data [in a soil report] as being representative of the conditions and materials which may be encountered." [14] In another case, a court found the *Spearin* doctrine inapplicable where the contract contained an express waiver: "[t] he Contractor agrees that he will make no claim against the City or the Engineer if, in carrying out the work, he finds that the actual subsurface conditions encountered do not conform to those indicated by said borings, test excavations, and other subsurface investigations." [15]

Other types of disclaimers obligate the contractor to verify the specifications for accuracy and completeness. The AIA A201-2007 requires the contractor to (1) carefully study the contract documents as well as information supplied by the owner, (2) take field measurements of any existing conditions related to that portion of the work, (3) observe any condition at the site affecting it, and (4) promptly report to the architect any errors or omissions discovered by or made known to the contractor. The A201 further provides that the contractor will be liable for all costs and damages that the owner suffers as a result of its failure to perform these obligations. These provisions prompted the Associated General Contractors of America to refuse its endorsement of the standard form contract, for the first time in 50 years, in large measure because of what contractors viewed as unacceptable provisions shifting risk from the designer and owner to the contractor.

In *Miami-Dade Water and Sewer Authority v. Inman, Inc.*, a Florida state court examined whether a contractual disclaimer trumped the *Spearin* doctrine. [16] There, a contractor was contracted to install sewer pipes for the authority. After it completed the project, it sought additional compensation, alleging that the project drawings supplied to it by the authority were "in many instances in error as to the location of existing utilities or failed to show existing utilities, which resulted in [the contractor] incurring additional costs due to delay and extra work." [17] The authority admitted the allegations but denied liability, relying on the terms of a disclaimer within its contract. The disclaimer provided, in part, that the information on the drawings were "prepared from the most reliable data available to the Engineer. This information is not guaranteed, however, and it shall be this Contractor's responsibility to determine the location, character and depth of existing utilities." [18]

Although the contractor argued that the *Spearin* doctrine invalidates similar exculpatory clauses and disclaimers, the court disagreed, holding that where there is no misrepresentation, a disclaimer or like clause "may ... negate the liability of the contracting authority." [19] Although express disclaimers can trump the implied warranty of *Spearin*, courts have also ruled that the existence of a DSC clause will be enforced over express exculpatory clauses. That is, where a contract contains a DSC clause, it may supersede any other language that attempts to place responsibility on the contractor for unknown conditions that adversely impact the design. [20] As noted above, contracts can then become layered with conflicting risk-shifting provisions.

Taking disclaimers one step further, some owners attempt to shift the risk to the contractor through contract or bid document language, requiring the contractor to affirmatively warrant the adequacy of the owner's design. [21] A contractor recently argued that the *Spearin* doctrine protected it from liability for consequences arising from defects in the plans and specifications provided by a municipality. The court rejected this contention, holding that the contractor was in breach by failing to notify the owner regarding design errors prior to proceeding with the work. In so doing, the court focused on provisions requiring the contractor to "verify all ... details shown on the drawings ... received from the Engineer" and to "notify him of all errors, omissions, conflicts and discrepancies." [22] The court found that the contractor had implicitly warranted to the owner that the drawings that it was contractually obligated to review for defects or ambiguities were free from such infirmities. The court dismissed the contractor's claim with prejudice.

In 2002, the Federal Circuit provided useful guidance on the validity of disclaimers of the implied warranty of design in its decision in *White v. Edsall Construction Co.*: [23]

> Although the disclaimer at issue requires the contractor to verify supports, attachments, and loads, it does not clearly alert the contractor that the design may contain substantive flaws requiring correction and approval before bidding. While suggesting the possibility of minor problems in the drawings, the disclaimer did not shift the risk of design flaws to [the contractor]. Like the disclaimer in *Spearin*, the disclaimer in this case is only a general disclaimer. It required [the contractor] to verify general details, such as door weight dimensions, but did not alert [the contractor] to the prospect that the Army's design might not work for its intended purpose.

The court found that the board correctly rejected the exculpatory clause, but it contained a "warning" that if the government had specifically stated that it was not warranting the design and that it had not verified the design, the clause would have protected it from compensating the contractor. [24] Just this year, a federal court had occasion to evaluate whether the disclaimers contained in the prime contract were sufficient to sink the contractor's *Spearin* claim. [25] The court ruled that the following disclaimers ***42** were more general in nature and did not expressly shift the risk of unforeseen conditions to the contractor:

> First, the [owner] asserts that [contractor] agreed in the parties' contract that the construction documents were "complete and sufficient for bidding, negotiating, costing, pricing, and construction of the Project," and that it had a "continuing duty to review and evaluate the Construction Documents" and to notify the [owner] of any problems it discovered. ... These standard contract provisions, however, do not amount to an express warranty by which [contractor] affirmatively accepted the burden of any defects in the [contractor's] construction documents. [26]

Because the nature, type, and content of disclaimers vary, the ability of an owner to disclaim liability for the implied warranty is truly clause-specific. A 50-state reference guide is available from the authors regarding each state's treatment and adjudication of exculpatory clauses disclaiming liability under *Spearin*.

Reasonable Reliance: The Contractor's Duty to Inquire and Prebid Investigations

Another area ripe for litigation in the *Spearin* world arises when the owner alleges that the actions a contractor took were unreasonable in reviewing and relying on information supplied to bidders. [27] A contractor hoping to prevail on a defective specification claim must be able to show that its reliance on the bid documents was reasonable. In other words, when a contractor has reason to know of defects in the plans or specifications, courts will look askance at the implied warranty of the owner's design documents, focusing instead on whether the contractor had a duty to inquire or seek clarification of "glaring or obvious" errors. [28]

This "reasonable reliance" pitfall played out in a federal suit brought by a general contractor in Florida against a state highway department. [29] The contractor sought more than $10 million in damages relating to the difficulty it had in accessing areas of the construction site located in and over water and marshes. The contractor alleged that the city transportation authority misled bidders into believing that the areas could be accessed. The court held that the contractor could not have reasonably relied on the plan sheets showing access roads because there were no provisions for soil reinforcement of the access roads. Moreover, the court determined the contractor should have sought clarification on the plans prior to bidding and, as a result, could not prove it reasonably relied on the information furnished to bidders.

Ten years ago, the US Supreme Court denied certiorari on a *Spearin* case involving the contractor's duty to inquire. In *KiSKA Construction Corp. v. Washington Metropolitan Area Transit Authority*, [30] the transit authority in the District of Columbia wished to extend the Metro subway line. Prior to issuing a request for bids, WMATA hired a geotechnical engineer who concluded that the groundwater was a significant problem at the site. A second geotechnical report was issued confirming the findings of the first report, noting that "even ... fairly extensive dewatering was not likely to be entirely effective." After WMATA required a third report, the geotechnical engineer acquiesced but designed a system that included more than 300 dewatering wells.

The invitation for bids did not disclose any of the reports, nor did the design plans include the recommended 300 dewatering wells. Instead, the contract specified a system for just 61 dewatering wells. However, it contained language subtly alerting bidders that "additional dewatering wells may be required." Not surprisingly, the successful bidder and contractor ran into difficulties in dewatering the site. The contractor sued and argued that the failures in the specified dewatering system constituted a breach of the implied warranty of the plans and specifications under the *Spearin* doctrine. The jury sided with the owner. On appeal, the court held that the specification provided by WMATA was so confusing that a patent ambiguity was present. Because an "obvious" error was present in the specifications, the court held that the contractor had a duty to inquire about its correct meaning during the bid phase. The court ruled that failing to inquire resulted in the contractor assuming the risk for the damages it incurred, to the tune of $40 million. [31]

The Applicability of **Spearin** *Depends Upon the Nature of the Specifications*

Another potential hazard to those pursuing *Spearin* claims concerns the sometimes unclear distinction between performance specifications and design specifications.[32] The *Spearin* doctrine applies only where the owner furnishes detailed, "how-to" design specifications.[33] Generally, performance specifications set forth an objective or general standard that is supposed to be achieved, and the contractor determines the manner in which the system will be designed or constructed to achieve the performance objective. Performance specifications specify the results to be obtained and not the manner in which performance is achieved.[34] Instead, the precise manner in which the specified performance will be obtained is within ***43** the contractor's discretion, and "[d]iscretion serves as the touchstone for assessing the extent of implied warranty and intended liability."[35]

In 2006, a Pennsylvania court examined whether a specification was performance-based or design-based in evaluating *Spearin's* applicability.[36] *A. G. Cullen* involved a contract for the renovation of a historical building on a state university campus, which included the removal and replacement of 550 wood-framed windows.[37] The project's specifications identified two manufacturers to provide the required windows, but also permitted the use of other manufacturers' windows, provided the windows complied with the specifications.[38] The contractor entered into a purchase order for the windows with one of the two specified manufacturers, but the manufacturer was unable to provide windows that satisfied the project's specifications.[39] The contractor ultimately procured compliant windows from the second manufacturer and sought a time extension and increase in the contract price, which the owner denied.[40]

On appeal, the contractor argued that by specifically identifying by name an approved manufacturer in the specifications, the defendant impliedly warranted that the manufacturer could produce the required windows and that the inability of the manufacturer to adequately perform constituted a defect in the specifications for which the state was responsible.[41] The court disagreed, explaining that "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."[42]

Of importance to the court was the fact that "the window replacement specifications do not 'describe in precise detail the materials to be employed and the manner in which the work is to be performed' ... [and] the contractor retains sole responsibility for the means and methods of the replacement of the windows."[43] Contractors should be mindful that the key to distinguishing performance and design specifications is the level of discretion given to the contractor. Although design specifications carry the implied warranty, performance specifications carry no such warranty.[44]

Minor Defects Will Not Trigger Application of **Spearin**

In any cause of action for breach of the implied warranty of the adequacy of the plans and specifications, another obstacle can arise regarding the standard of proof. Namely, the design defects must be material to result in a breach. As the contractor in *Caddell Construction Co. v. United States*[45] learned, the fact that drawings require repeated clarification does not, in itself, prove the drawings are defective.

Caddell, a general contractor, sponsored a claim by its structural steel erector, Steel Service Corporation, arising from the construction of a Veterans Administration hospital in Memphis, Tennessee. The genesis of the pass-through claim was that the steel drawings provided by the Veterans Administration were incomplete. The conflicting design documents

resulted in more than 300 requests for information aimed at clarifying and correcting the allegedly defective documents. When the dispute went to the Court of Federal Claims, the court held that the contractor failed to meet its burden of proving that the specifications were "substantially deficient or unworkable." The court rejected the notion that a substantial number of RFIs are dispositive of a defective design. Instead, the court noted that unless the responses to the RFIs generate changes that reveal the design was flawed, the mere fact that many RFIs were issued is not enough to support a defective specification claim under *Spearin:*

> [T]he [owner's] documents must be substantially deficient or unworkable in order to be considered a breach of the contract. If there are many errors or omissions in the specifications, the [owner] breached the contract if the cumulative effect or extent of these errors was either unreasonable or abnormal taking into account the scope and complexity of the project .... To prove that the plans [are] defective, it [must be shown] that the plans were unworkable.

As this decision instructs, a contractor pursuing a defective design claim under *Spearin* must show that the design contained a fundamental flaw, or a collection of flaws that required a major revision to the design and delays to the project. Experts may be required, and a strong nexus must be established between the substance of the RFIs and the design as a whole. One can foresee the difficulty contractors face on a *Spearin* claim where the damages are in the nature of loss of productivity or impact type damages stemming from the defective design. Rather than proving the cumulative nature and effect of RFIs, the contractor would arguably also have to prove the design itself is flawed, rather than simply showing the impacts of the RFI process on the work.

A No-Damage-for Delay Provision Could Sink a Spearin Claim

In 2007, a decision issued by the Supreme Court of Ohio incited much analysis and commentary regarding the limitations of the *Spearin* doctrine. In *Dugan & Meyers Construction Co., Inc. v. Ohio Department of Administrative Services*,[46] a contractor asserted a claim against a public owner for additional performance costs and delays due to inaccurate, defective, and incomplete plans. The contractor alleged that the delays it encountered on the project were caused by defects in the design, resulting in more than 700 RFIs, many of which had not received a timely response. In addition, the architect had issued more than 250 fieldwork orders and 85 architectural supplemental instructions directing the contractor to perform work outside the scope of the contract. The contractor sued ***44** the university for breaching its duty to provide it with plans that were buildable, accurate, and complete. The court-appointed "referee" relied upon the *Spearin* implied warranty doctrine and recommended that the contractor be awarded damages for the "cumulative impact" of the excessive number of design changes required during construction. The court of appeals reversed, however, holding that an award for cumulative-impact damages has no basis in Ohio law and is contrary to the express provisions of the contract.

The Supreme Court of Ohio affirmed and interpreted the *Spearin* doctrine as an implied warranty only as to the accuracy of affirmative representations regarding the jobsite. The court emphatically declined to extend *Spearin* to the facts before it because (1) the contractor sought indirect delay damages due to plan changes as opposed to direct damages and (2) the contract contained an enforceable no-damage-for-delay clause. The court held that the more specific, express, no-damage-for-delay clause trumped the implied warranty of *Spearin*.

While some commentary regarding the *Dugan & Meyers* case suggested that this might be the beginning of a trend limiting *Spearin*, the holding in *Dugan & Meyers* has not been widely followed by other states, at least not yet. Just two years after the *Dugan & Meyers* decision, a federal court in Pennsylvania ruled just the opposite, holding that indirect damages occasioned by defective specifications or a defective design would be compensable under *Spearin*.[47]

Spearin's Status in the Federal Design-Build World

While *Spearin* applies mostly to the traditional design-bid-build delivery method, project delivery has evolved to design-build, where there is a single source of responsibility for the design. In design-build, where the contractor is responsible for the design, and the government is, in large measure, issuing performance specifications, one would think the soil is no longer fertile for *Spearin-type* disputes. However, design-builders and the government have litigated *Spearin* claims with design-builders generally emerging victorious, as the courts will enforce the implied warranty if the government provides any measure of a design specification. [48]

On design-build projects, the government may provide a hybrid specification with some design and some performance requirements, and many large trades, such as the mechanical and electrical subcontractors, are tasked with design responsibilities for specific scopes of work. Consequently, it has become increasingly difficult to determine when and how *Spearin* should be applied in these situations. Prior to the landmark 2014 Federal Circuit decision *Metcalf Construction Co. v. United States*, [49] the government had increasingly been successful in circumventing the intent of a DSC clause by expressly disclaiming the soils information provided in an RFP *Metcalf* effectively reversed that trend and drew a line in the sand where none previously existed. Under *Metcalf*, the phrase "for preliminary information only" or "for bidding purposes only" no longer provides a shield for the government to avoid the risk-shifting provisions of the contract.

Metcalf was a design-builder who was awarded a contract by the US Navy to design and build housing units at a Marine Corps base in Hawaii. The adjusted contract price was just under $50 million for Metcalf to build 212 units. The government's request for proposals (RFP) to potential bidders included a soils report for the site that identified the soils as having "slight expansion potential." The RFP included exculpatory language seeking to shift the risk of differing site conditions to the contractor. By stating in the RFP that the soils report was for "preliminary information only," the government attempted to disclaim any liability for information in the report. The prebid discussions documented that the government intended for the successful contractor to undertake its own investigation. However, in a written question-and-answer publication during the RFP phase, the government stated that a change order would issue should the successful contractor's postaward investigation yield information that was contrary to the preliminary soils report.

After award, Metcalf's geotechnical engineer discovered that the soil's swelling potential was "moderate to high," and not "slight," as represented in the government's soil report, and therefore recommended design changes to account for the changed condition. Construction was delayed for nearly a year when discussions between Metcalf and the Navy yielded no resolution. Without a contract modification, Metcalf proceeded to overexcavate the soil and replace it with nonexpansive fill. The Navy ultimately rejected the assertion that there were material differences between the prebid and postaward soil assessments and refused to compensate Metcalf for the overexcavation. Metcalf then began using "posttension" concrete, which was more expensive than ordinary concrete but avoided the additional time and cost of continuing to overexcavate and import select fill. Upon completion, Metcalf asserted $4.8 million in damages against the Navy for the expansive soil problems experienced on the project.

An additional soils issue also plagued the project--the presence of chlordane, a chemical contaminant. In the RFP, the government represented that chlordane was present at the site but that remediation actions would not be required because the levels of the contaminant were deemed "acceptable." Metcalf later discovered soils with higher levels of chlordane than expected and incurred costs to remediate. The Navy reimbursed Metcalf $ 1,493,103 for its remediation costs but did not reimburse Metcalf for another $500,000 in claimed remediation costs.

The Court of Federal Claims ruled in favor of the government on the soils claims. [50] It interpreted the prebid site representations and related RFP provisions to be nullified by Metcalf's contractual responsibility to investigate during performance. In other words, the trial court ***45** decided that the contract placed upon Metcalf the risk and costs of dealing with newly discovered conditions different from those stated by the government before the contract became

binding. Regarding the expansive soils, even though the Navy found that differences in soil investigations would be dealt with via change order, the trial court found that Metcalf was on notice that it should not rely on the soils report provided with the RFP. The court similarly rejected Metcalf's claim associated with the chlordane remediation, holding that even though the government stated no remediation was required, Metcalf was on notice to seek more information and its failure to do so barred its subsequent claim for costs.

On appeal, and in a decisive "win" for federal contractors, the Federal Circuit reversed the Court of Federal Claims. The Federal Circuit held that the lower court's approach misinterpreted the risk allocation imposed by the DSC clause. The Federal Circuit decided that while Metcalf was responsible for investigating subsurface conditions postaward, it did not bear the risk of "significant errors" in the precontract assertions by the government about the subsurface conditions. The Federal Circuit reasoned that the DSC clause was incorporated into the contract to "take at least some of the gamble on subsurface conditions out of bidding." Instead of requiring high prices that must insure against the risks inherent in limited prebid knowledge, the provision allowed the parties to deal with actual subsurface conditions after work commenced and "more accurate" information about them could be reasonably uncovered.

Importantly, the Federal Circuit ruled that the phrase "for preliminary information only" was not an effective disclaimer. The phrase, the Federal Circuit held, "merely signals that the information might change (it is 'preliminary'). It does not say that Metcalf bears the risk if the 'preliminary' information turns out to be inaccurate." [51]

A recent case at the Civilian Board of Contract Appeals (BCA) also found in favor of a contractor who challenged the adequacy of the federal government's design after encountering differing site conditions. The dispute in *Drennon Construction & Consulting, Inc.*, [52] arose from a federal road project in central Alaska. For several years, the Department of the Interior (Agency) desired to widen a road to a campground from one lane to two and to eliminate a blind curve. The Agency obtained ARRA-funding for the project and engaged an engineering firm, USKH, to prepare 100 percent design drawings and a geotechnical report.

The Agency provided USKH a digital terrain model based on earlier photogrammetric mapping. When USKH realized the model contained inaccurate control points, it requested additional funds to perform a more reliable and accurate survey. The agency was concerned about the limited funding and denied the request. USKH suggested that in the absence of a more reliable survey, the government ought simply to incorporate "weasel words" into its solicitation to warn potential bidders of possible inaccuracies in the model. The solicitation for the construction work included a requirement that the contractor perform a survey before commencing work.

The Agency contracted with Drennon Construction & Consulting, Inc. (Drennon) to excavate the hillside and to design and build a gabion wall along the two-lane road. Drennon conducted a survey demonstrating that the road could not be built as shown on USKH's drawings. As a result, the road needed to be shifted in the opposite direction, into the hillside, requiring additional excavation and construction of a much higher wall to restrain the contents of the hill from falling onto the road. The contractor also encountered soil problems during excavation, as the hillside slopes collapsed due to the soils being "at or near [its] angle of repose." In essence, every "scoopful" excavated from the slopes caused a small landslide from above. Drennon concluded that the hill could not be stabilized and stopped work.

Drennon filed a claim with the BCA arguing that the project's design was defective and that the geotechnical information provided by the government in the solicitation, on which Drennon relied in pricing the job, significantly differed from the site conditions actually encountered. The Agency asserted that Drennon could not recover for any alleged defective specifications because the contract required Drennon to design, as well as to build, the gabion wall.

In granting Drennon's appeal, the BCA acknowledged that while Drennon's technique for excavating the hillside was "not ideal," the design defects and significant differences between the geotechnical information provided by the government and the actual soil composition encountered entitled Drennon to recover on both claims.

In reaching this result, the BCA first evaluated the *Spearin* doctrine. The board found that Drennon could not have anticipated the design defects because the area was covered with snow during the period available for bidding and the solicitation revealed no obvious problems with the design. Moreover, the BCA held that the design-build portion of the retaining walls was a subset of the contract and that Drennon was obligated to design the wall within the government's design for the entire project.

In its ruling, the BCA expressed a disdain for the broad exculpatory language included in the agency's geotechnical report, such as the reference to "esker" soils. A "battle" of the soils experts then ensued, with each side debating whether a reasonable contractor should have known that an "esker" typically implies noncohesive soils. Ultimately, the BCA found that while a geotechnical engineer should be familiar with the term, it was not reasonable for Drennon to have been cognizant of that soil characterization.

Where Does the *Spearin* Doctrine Stand Today, and Will the Exceptions Ultimately Swallow the Rule?

Given the recent treatment of *Spearin* at the federal level, one could argue the *Spearin* doctrine is alive and well. The cases discussed above, however, also demonstrate ***46** the myriad ways in which a *Spearin* claim can fail. In context, neither group of cases establishes a trend in any direction. Instead, the impressively balanced "win-loss" column for *Spearin* cases leads to the conclusion that (1) muddy waters await anyone navigating a defective design or specifications claim and (2) the outcome depends heavily on the contract and the jurisdiction. Although these conclusions are both true, the substantive takeaway is that the *Spearin* doctrine today remains nothing more than an implied warranty and is easily capable of being overcome in the drafting of bid documents and contracts.

Indeed, precisely because the application of the *Spearin* doctrine can be unpredictable, it is critical that construction industry participants identify, address, and fairly distribute risk allocation for the design or site conditions at the inception of the project. This is especially true given that in today's complex contracting world, each party's resistance to accept risk results in contract negotiations that resemble a game of "hot potato." The reward for engaging in that game at the outset of the relationship brings far more certainty during the project and, more importantly, will ultimately decrease the number of *Spearin* cases litigated.

Footnotes

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1 United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59(1918).

2 *Id.*

3 Spearin v. United States, 51 Ct. Cl. 155, 159 (1916).

4 *Id.* at 181.

5 *Id.* at 160.

6 *Id.* at 181.

7 Drennon Constr. & Consulting, Inc. v. Dep't of the Interior, C.B.C.A. Case No. 2391, 13-1 B.C.A. (CCH) ¶ 35,213 (Jan. 4, 2013); Harbor Constr. Co., Inc. v. Bd. of Supervisors, 2011 La. App. LEXIS 577 (May 12, 2011); *see also* Lynn R. Axelroth,

The Recent Progeny of Spearin--*When Is an Express Warranty Implied?*, CONSTRUCTION CONTRACTING TODAY: KEY LEGAL AND DRAFTING ISSUES (2001).

8 United States v. Turner-Penick Joint Venture, No. 3:11-CV-2834-GPC-MDD, 2014 WL 1279701 (S.D. Cal. Mar. 27, 2014) (adding a fraud-type element to a contractor's burden of proof under *Spearin* doctrine; F.T. Lincoln v. Fla. Gas Transmission Co., No. 4:13-CV-74-MW/CAS, 2014 WL 3057113, at *5 (N.D. Fla. July 7, 2014), *aff'd sub nom*. Lincoln v. Fla. Gas Transmission Co. LLC, No. 14-13510, 2015 WL 1514706 (11th Cir. Apr. 6, 2015) (refusing to extend *Spearin-type* claim to a third party). Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co., Mass. Supreme Judicial Ct., Docket No. SJC-11778, Jan. 2015 (refusing to extend *Spearin* to CM).

9 Nancy W. Greenwald, Construction Law and Public Contracts Section, *An Assault on the* Spearin *Doctrine: How AIA A201-2007 Shifts the Risk for Design Defects to the Contractor*, 59 VA. LAW., Oct. 2010, at 33.

10 *See, e.g.*, Thomas & Marker v. Wal-Mart Stores, Inc., No. 3:06-CV-406, 2008 WL 4279860 (S.D. Ohio Sept. 15, 2008) (refusing to extend the *Spearin* doctrine to private projects in Ohio).

11 J. GROTON & R. SMITH, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, REALISTIC RISK ALLOCATION: ALLOCATING EACH RISK TO THE PARTY BEST ABLE TO HANDLE THE RISK (2010).

12 *See* Al Johnson Constr. Co. v. United States, 854 F.2d 467, 468 (Fed. Cir. 1988) ("The implied warranty is not overcome by the customary self-protective clauses the government inserts in its contracts.").

13 S&M Constructors, Inc. v. City of Columbus, 70 Ohio St. 2d 69, 24 0.0.3d 145, 434 N.E.2d 1349 (1982) (holding that specific contractual disclaimers for accuracy of site conditions preclude recovery under more general *Spearin* implied warranty doctrine).

14 McDevitt v. Marriott, 713 F. Supp. 906 (E.D. Va. 1989), *aff'd in part, rev'd in part on other grounds*, 911 F.2d 723 (4th Cir. 1990).

15 *S&M Constructors*, 70 Ohio St. 2d 69, 24 0.0.3d 145, 434 N.E. 2d 1349.

16 See 402 So. 2d 1277 (Fla. Dist. Ct. App. 1981).

17 *See id.*

18 *Id*

19 *Id.* at 1278.

20 *See* Dep't of Gen. Servs. v. Harmans Assocs. Ltd. P'ship, 98 Md. App. 535, 633 A.2d 939 (1993) (enforcing a differing site conditions clause incorporated by reference into the contract over express disclaimers); Raymond Int'l, Inc. v. Baltimore Cnty., 45 Md. App. 247, 258-59, 412 A.2d 1296, 1302-03 (1980); Joseph F. Trionfo & Sons, Int. v. Bd. of Educ. of Harford Cnty., 41 Md. App. 103, 395 A.2d 1207 (1979) (noting that the absence of a DSC clause resulted in enforcement of disclaimers).

21 *See* Shopping Ctr. Mgmt. Co. v. Rupp, 54 Wash. 2d 624, 626, 343 P.2d 877, 878 (1959).

22 Modern Cont'l S. v. Fairfax Cnty. Water Auth., 72 Va. Cir. 268 (2006).

23 296 F.3d 1081 (Fed. Cir. 2002); Ralph C. Nash Jr. & John Cibinic Jr., *Exculpatory Clauses*, 16 NASH & CIBINIC REPORT, no. 9, Sept. 2002, ¶ 47.

24 Nash & Cibinic, *supra* note 23.

25 *See* Costello Constr. Co. of Md., Inc. v. City of Charlottesville, No. 3:14-CV-00034, 2015 WL 1274695 (W.D. Va. Mar. 19, 2015) (denying owner's motion to dismiss contractor's breach of implied warranty of design adequacy claim).

26 *Id.* at *6.

27 *See* Hendry Corp. v. Metro. Dade Cnty., 648 So. 2d 140, 145 (1995) (owner made no representations to demolition contractor on what type of bridge pilings it would be demolishing); Martin K. Eby Constr. Co., Inc. v. Jacksonville Transp. Auth., 436 F.

Supp. 2d 1276, 1310 (M.D. Fla. 2005) (finding no evidence of reliance upon the misleading plans provided by the owner because the contractor undertook an exhaustive prebid investigation and obtained information contradicting owner's specifications).

28 *See, e.g.*, Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987); Johnson Controls, Inc. v. United States, 671 F.2d 1312 (Ct. Cl. 1982); Allied Contractors, Inc. v. United States, 381 F.2d 995 (Ct. Cl. 1967); Blount Bros. Constr. Co. v. United States, 348 F.2d 471, 172 (Ct. Cl. 1965); Graham Constr. Co., Inc. v. Earl, 362 Ark. 220, 208 S.W.3d 106 (2005).

29 *Martin K. Eby Constr. Co.*, 436 F. Supp. 2d at 1310.

30 321 F.3d 1151 (D.C. Cir. 2003), *cert. denied*, KiSKA Constr. Corp.-USA v. Wash. Metro. Area Transit Auth., 540 U.S. 939, 124 S. Ct. 226, 157 L. Ed. 2d 252 (2003).

31 *Id.* at 1164.

32 *See, e.g.*, Laura A. Hauser & William J. Tinsley Jr., *Eyes Wide Open; Contractors Must Learn to Identify and React to Design Risks Assumed Under Performance Specifications*, 27 CONSTR. L. 32 (2007); Ralph C. Nash Jr. & John Cibinic Jr., Price Realism Analysis, 19 NASH & CIBINIC REPORT, no. 12, Dec. 2005, ¶ 56.

33 *See* PCL Constr. Servs., Inc. v. United States, 47 Fed. CI. 745 (2000); *see also* Kevin C. Golden & James W. Thomas, *The* Spearin *Doctrine: The False Dichotomy Between Design and Performance Specifications*, 25 PUB. CONT. L.J. 47 (1995-1996); P. D'Aloisio, *The Design Responsibility and Liability of Government Contracts*, 22 PUB. CONT. L.J. 515, 568 (1993).

34 *See* Blake Constr. Co. v. United States, 987 F.2d 743, 745 (Fed. Cir. 1993).

35 Conner Bros. Constr. Co., Inc. v. United States, 65 Fed. Cl. 657, 685 (2005).

36 *See generally* A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145 (Pa. Commw. Ct. 2006); *see also* Willamette Crushing Co. v. State Dep't of Transp., 188 Ariz. 79, 932 P.2d 1350, 1353 (Ct. App. 1997) (holding *Spearin* does not apply to performance specifications).

37 See 898 A.2d at 1152.

38 *See id*

39 *See id*

40 *See id.* at 1153.

41 *See id.* at 1155.

42 *Id* at 1157.

43 *Id.* at 1158 (quoting in part Blake Constr. Co. v. United States, 987 F.2d 743, 745 (Fed. Cir. 1993) (internal quotations omitted)).

44 Fru-Con Constr. Corp. v. United States, 42 Fed. Cl. 94, 42 Cont. Cas. Fed. (CCH) ¶ 77,399 (1998) (contractor claim denied where performance specifications furnished contained no implied warranties).

45 78 Fed. Cl. 406, 413-15 (2007).

46 113 Ohio St. 3d 226, 864 N.E.2d 68 (2007).

47 E. Elec. Corp. of N.J. v. Shoemaker Constr. Co., 657 F. Supp. 2d 545 E.D. Pa. (2009).

48 *See generally* M.A. Mortenson, Co., A.S.B.C.A. No. 39978, 93-3 B.C.A. (CCH) ¶ 26,189; Donahue Elec., Inc., V.A.B.C.A. No. 6618, 2003-1 B.C.A. (CCH) ¶ 32, 129.

49 742 F.3d 984 (Fed. Cir. 2014).

50 Kimberley A. Smith, *Differing Site Conditions and* Metcalf: *Judicial Shifting of the Risks*, 34 CONSTR. LAW., Summer 2014, at 35.

51 *Metcalf Constr. Co.*, 742 F.3d at 996.

52 Drennon Constr. & Consulting, Inc. v. Dep't of the Interior, C.B.C.A. No. 2391, 13 B.C.A. (CCH) ¶ 35, 213 (Jan. 4, 2013).

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