

Spearin Does Not Apply If Design Is Considered Performance Based. So, Who Decides?

THE AGE-OLD DEBATE over whether the government is liable for the designs it furnishes continues to be a hotbed of litigation. The issues at play in these cases typically turn on concepts like the *Spearin* doctrine, which espouses that the government impliedly warrants that its design is free from defects. In order for such a warranty to spring to life, the government must have supplied design specifications as opposed to less-detailed performance-based specifications.

When courts attempt to decide whether an implied warranty exists, they often look to the amount of discretion provided to contractors to choose means and methods. Readers are well aware that design specifications, which describe in precise detail the materials to be used and the manner in which the work is to be performed, leave little to no room for deviation; the contractor is required to follow them as a road map.

But the *Spearin* doctrine does not apply to performance-based specifications, through which the contractor is free to employ its own means and methods to achieve an end product that is acceptable to the client.

A recent decision, *James Talcott Construction Inc. v. United States*, sheds light on how the U.S. Court of Federal Claims considered a contractor's \$1-million claim for an allegedly defective design specification on a federal military housing project.

The Case

In 2010, the federal government awarded a contract for construction of housing at a Montana military base to James Talcott Construction. The government issued a notice to proceed in June 2010 and stipulated a March 2012 completion date. Talcott began by placing concrete.

The contract called for a crawl space

that would enclose wooden floor joists and subfloor decking. Talcott used untreated wood for the sheathing and the joists; this untreated wood required moisture levels to be maintained below 19 percent.

The government's design also incorporated sloped surfaces to divert water away from the foundation and into sump basins and trench drains. To prevent groundwater vapor from entering the crawl space, the design called for a 20 mm thick polyethylene sheet to cover the soil beneath the sheathing.

The facts presented at trial indicat-

The rights afforded under the *Spearin* doctrine are not unlimited.

ed that the concrete, wood, and soil remained exposed to snow and rain before Talcott enclosed the subfloor with sheathing. Talcott allegedly did not install temporary ground-vapor barriers despite the presence of moisture on-site.

In early 2011, workers discovered considerable mold growth in the crawl space under one of the buildings, where the humidity levels measured close to 80 percent. Talcott performed mold remediation and completed its work. However, the work extended into July 2012, 145 days after the required completion date.

Talcott submitted a request for equitable adjustment (REA) to the government, seeking additional time-related costs and other monies stemming from the mold issue. Talcott's primary contention was that the design documents were flawed and resulted in the mold problems. Specifically, Talcott argued, the design did not contain a plan or procedure to prevent mold and failed to ventilate the crawl spaces. Talcott

also contended that the government breached the contract by failing to disclose its superior knowledge relating to mold growth in those areas.

The government claimed Talcott's poor construction methods caused mold to grow in the crawl spaces and denied Talcott's REA. This prompted Talcott to file suit in the U.S. Court of Federal Claims.

The Decision

The court first considered Talcott's claim that the government's design documents were flawed, thus entitling

Talcott to schedule relief and associated costs. The court began its analysis by noting the distinction between the types of specifications: "[w]hile there are two types of specifications, design and performance, only a design specification creates

an implied warranty," it stated. In this case, the court determined that the specification for the finished structure was a performance-based specification. Looking at the contract, the court found Talcott responsible for the means, methods, and sequence of construction, as evident in this passage:

The contract structural drawings and specification represent the finished structure. They do not indicate the method of construction. The contractor will provide all measures necessary to protect the structure during construction. Such measures shall include, but not be limited to, bracing, shoring for loads due to construction equipment ... [N]or will the [U.S. Army Corps of Engineers'] structural engineer be responsible for the contractor's means, methods, techniques, procedures, or sequences of construction.

Because Talcott was free to employ

its own means and methods to complete an acceptable finished product, the government did not breach its warranty of the plans and specifications, the court found. The court's decision also stated that the government could not have accepted the housing units in the condition they were in, "especially [with] mold that covered floor joists, decking, walls, grade beams, and even appearing grass-like in the soil."

The court also dismissed Talcott's claim that the government possessed "superior knowledge" relating to mold growth in the crawl spaces. The court relied primarily on the fact that Talcott was aware that damp conditions would result in mold growth due to Talcott's performance as a subcontractor on a separate, earlier phase of the housing construction, during which mold was found in crawl spaces. The court held, "Talcott was aware of mold growth while working as [a] subcontractor in other phases of construction. . . . [W]e find that Talcott knew, or should have known, that damp site conditions would inevitably lead to mold growth in the crawl spaces."

The court also found that the government provided Talcott with a geotechnical report during the bidding process that purportedly should have informed Talcott of the potential for mold growth. And the court added that even without the geotechnical report, Talcott was obliged under federal regulations to have performed a thorough site investigation before construction, which in the court's view would have informed Talcott about the potential for mold.

The Analysis

Talcott's other claims for damages due to the remediation were denied on the basis that Talcott did not perform its contractual duties in a workmanlike manner. The court was also persuaded that "simple steps could have been taken to adequately dry out the crawl spaces by installing temporary ventilation and/or dehumidification, which would reduce the humidity level in the crawl spaces."

This decision underscores that the rights afforded under the *Spearin* doc-

trine are not unlimited and that courts will evaluate whether allegedly defective designs are performance-based specifications before determining the existence of implied warranties. In situations like the *Talcott* case, in which contractors had discretion as to how to build the end products, contractors will not meet their burden of proof in demonstrating that the owners are responsible for their damages. **CE**

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