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Fixing the Problem – Not the Blame

INET v DFW Airport Board, 2016 WL 1445205 (5th Cir., April 12, 2016)

Who is responsible for defective design under Texas law? The contractor, under *Lonergan*? The owner, under *Spearin*? A recent Fifth Circuit decision suggests that in some cases this might be the wrong question when design responsibility is disputed. The appellate court recently remanded a case back to the district court to determine whether the contractor or owner breached an implied duty to cooperate in discovering defects in design and subsequently pricing the change required to correct the problem.

INET won a competitive bid to provide rooftop air conditioning units ("Units") to passenger jetways at Terminal E of the DFW airport. By submitting its bid, INET certified that it had satisfied itself with respect to plans and specifications. The Units were to use "30% ethelyne glycol/water" ("EG Water") supplied by DFW. INET also agreed to provide schematic drawings of control sequence operations and the required components for a fully operational control sequence that would "provide auto defrost of the coils" within the rooftop units, through which the EG Water would cycle. At the pre-construction meeting, INET expressed a concern that the Units might not function properly with the EG Water, suggesting that the EG Water's sub-freezing temperature might cause ice buildup on the coils and prevent their proper operation. After INET received no response, it resubmitted the concern in two separate RFI's.

The contractor, owner and designer conducted "extensive discussions" about the problem and prepared at least two proposals to modify the control sequence program and the piping design. However, the parties never reached agreement on pricing of the proposals or how to proceed. After the substantial completion date passed, DFW notified INET that DFW would begin to assess liquidated damages since the rooftop units were not completed. DFW then made a claim against INET's performance bond and completed the work with a different contractor. A dispute ensued about whether the contract had been terminated or abandoned, and a federal lawsuit resulted.

The district court granted INET summary judgment, determining that DFW had breached the contract by supplying defective plans and specifications. On appeal, the Fifth Circuit reversed the district court's decision. Although the court stated that it was not disputed that the plans and specifications were defective, it expressed uncertainty about whether DFW had accepted all of the risk of defective design. The Court referenced contract clauses allocating responsibility for correct design to DFW, while also noting provisions requiring INET to carefully review plans and specifications, design a control sequence to defrost the coils and assume responsibility to make the system function properly.

Texas construction lawyers have long debated whether such a case should be controlled by *Lonergan* (a 1907 Texas Supreme Court case holding that the contractor is responsible for defective design) or *Spearin* (a 1918 U.S. Supreme Court case holding that an owner impliedly warrants the

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adequacy of design). In *INET*, however, the Fifth Circuit focused on contract language requiring the contractor to determine if there were any defects in design requiring INET to submit a change order to the Owner in order to resolve any defects once discovered. The Court found that after a defect was reported, the parties had a duty to work together to come up with an acceptable solution and a price for the change order. The Court stated further that a party's failure to cooperate in this process would be a material breach of contract. Because the appellate court could not tell from the record which party had breached this duty to cooperate first, it remanded the case to the district court, directing the trial court to determine who breached first.

The *INET* opinion offers a welcome respite from the debate about whether Lonergan or Spearin represents Texas law. It recognizes that defective design requires modifying the contract, which in turn demands a change order (or at least a written directive as to how to proceed). The contract required INET to bring defective design to the owner's attention, particularly since INET, by contract, could not depart from plans and specifications without DFW's written authorization. In short, instead of focusing on which party was responsible for the overall design, the Fifth Circuit focused on the parties' attempts (or failures) to resolve disputes on how to deal with the design defects.

Texas contractors are still well advised to ask the owner to warrant the adequacy of plans and specifications, and to reject attempts to shift design responsibility away from the design professional and Owner to the contractor. But *INET* goes further, warning Texas contractors to identify problems with design quickly, to follow contract procedures for reporting any such defects to the owner and/or designer, to request and/or offer a solution and to cooperate with the project team in finding and pricing any necessary changes to the original design. The key factor is that contractors have a duty to and should always reasonably take documented steps to cooperate in fixing a known design problem. The first party that fails to cooperate may be breaching the contract and ultimately liable for damages.