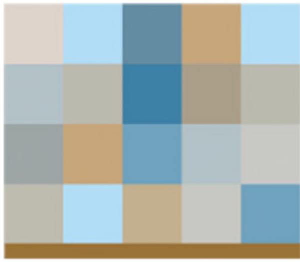

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CONSTRUCTION LAW ALERT

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The Relevance of the *Spearin* Doctrine in an Increasingly Design-Build World

Henry L. Goldberg
Chair
Construction Practice Group

Robert J. Fryman

by: Henry L. Goldberg & Robert J. Fryman

Prior to the U.S. Supreme Court's decision in *United States v. Spearin*, 248 U.S. 132 (1918), virtually all construction risk was borne by the contractor, except for (i) express carve-outs set forth in a contract or (ii) performance rendered impossible by acts of God or nature. In *Spearin*, the Supreme Court ruled that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, to inform themselves of the requirements of the work…and to assume responsibility for the work until completion and acceptance."

With the increasingly prevalent use of the design-build project delivery method of late[1], many assumed that the *Spearin* doctrine's protections would be diminished, and the risk of additional design-related cost would be borne solely by the design-build contractor. A review of recent cases however, indicates that *Spearin* is, in fact, still alive and well in the design-build context, if not more so.

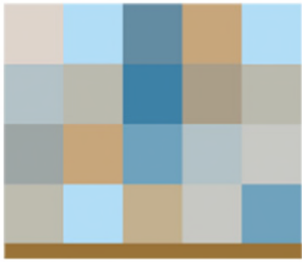
1. Owner involvement during the solicitation phase for a "design-build" project may trigger classic *Spearin* liability for the *Owner*.

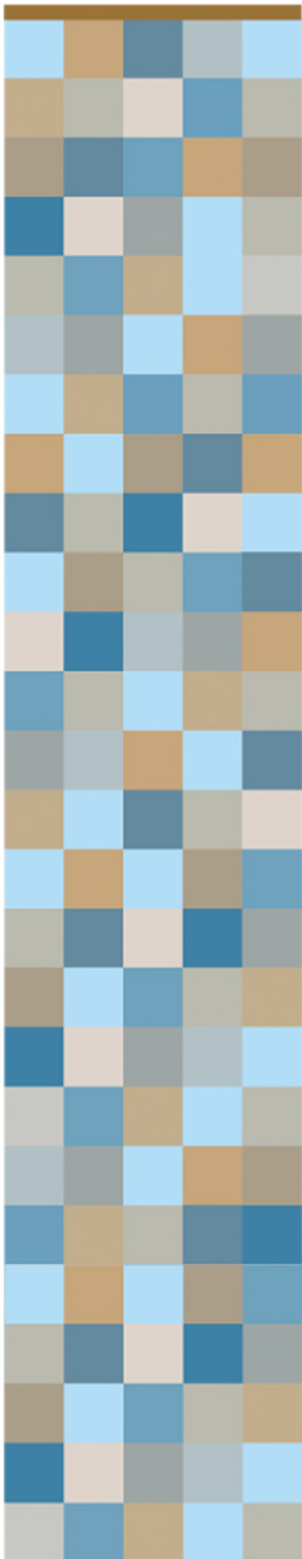
In *Drennon Constr. & Consulting, Inc., v. Department of the Interior* (CBCA 2013), Owner contracted with an engineering firm to provide project documents, drawings and specifications for a road widening project. The engineer's design required that the hillside be excavated and an "approximate" nine-foot gabion (a rock-filled basket or cage) wall be constructed to prevent the excavated hillside from falling onto the road. Contractor, as the design-builder of the gabion wall, was responsible for the survey, design, layout, and construction of the wall.

Engineer had used a digital terrain model based on photogrammetric mapping provided by Owner and notified Owner that the mapping was inaccurate at certain points. Due to limited funding, Owner attempted to shift risk to the contractor by requiring a site survey prior to commencing work.

Contractor reviewed and relied on the project documents to submit its bid. However, due to snow cover, no site survey could be performed prior to bidding. Based on the geotechnical

[1] Underscoring this trend is the recent passage, at the end of last year, of the New York City Public Works Investment Act. This will greatly expand the use of design-build project delivery by New York City public agencies. A follow-on article on this significant design-build expansion will be taken up by us shortly.





report provided, Contractor believed that the hill would stand despite an increased slope condition.

Following award, Contractor was able to survey the site and found that the road could not be built as indicated on the original contract drawings. A fifteen-foot gabion wall would be required, rather than the "approximate" nine-foot wall described in the RFP, necessitating significant excavation to widen the road into the hillside. Due to the site conditions, Engineer approved Contractor's fifteen-foot wall design, and Contractor subsequently sought recovery for the significant additional costs due to delay and design of the significantly larger wall.

The Board noted that *Spearin* liability attaches to design specifications and held that <u>general</u> disclaimers are insufficient to shift this implied warranty from the owner to the contractor. The contract's statement that a contractor site survey would be required (which the CBCA contemptuously, and accurately, called "weasel words") alerted bidders to the possibility that the design might have required a bit of tweaking, <u>but cannot reasonably be read to impose on the contractor</u> an obligation to construct the project in a manner significantly different from that envisioned in the contract."

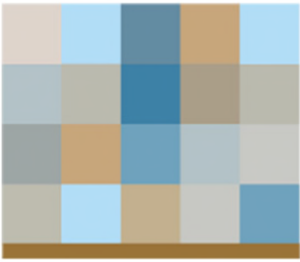
Thus, even on a design-build project, a contractor may prevail based on the *Spearin* doctrine's implied warranty of plans and specifications and the owner's control over elements of the design.

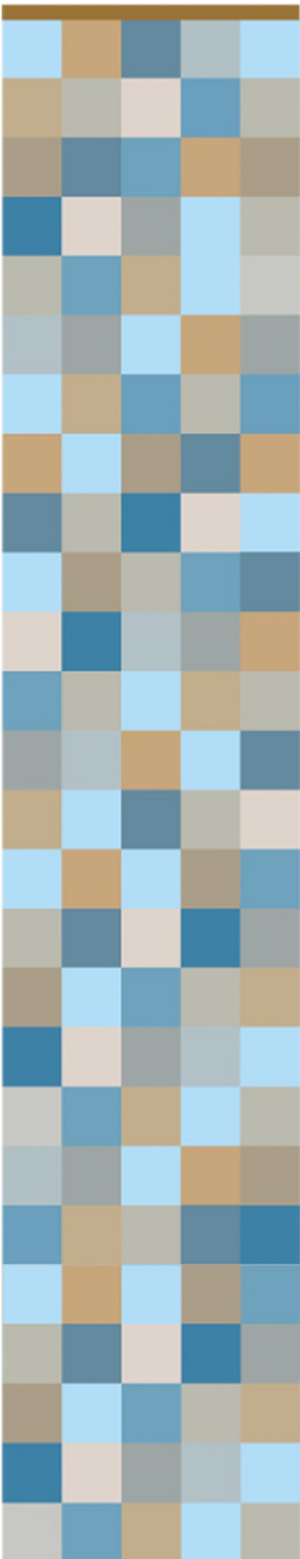
2. <u>Owner involvement in design phase, by merely providing site survey reports as "preliminary information", may be sufficient for *Spearin* liability to attach to the *Owner.*</u>

In *Metcalf Construction Co. v. United States*, 742 F.3d 984 (Fed. Cir. Feb. 11, 2014), a contract was awarded to Metcalf for the design-build construction of housing units at a Marine facility in Hawaii. In its bid package, the Government furnished a soil report with a disclaimer that it was "for preliminary information only" and the contract required Contractor to perform its own independent investigation of the soil conditions at the site. The Contractor did so and determined that the soil conditions were materially different from the Government's soil report.

The Contractor recommended that the project's foundations required a completely different design and construction approach from the specifications. The Government, however, rejected the recommendations and directed the Contractor to proceed as set forth in the contract documents. Ultimately, the Government granted a contract modification for the design, but rejected the claim that the soil conditions were materially different. When construction was complete, the Contractor sought $25 million in additional costs. The trial court ruled in favor of the Government.

The federal appeals court rejected the trial court's holding, that because Contractor was on notice that it would need to perform more investigation of the site conditions, it was also "on notice that it could not rely on the [Government's] '[preliminary] information only' report." The federal appeals court ruled that the lower court "treated the contract as placing on [Contractor] the risk and costs of dealing with newly discovered conditions different from





those stated by the Government before the contract became binding….Nothing in the contract's general requirements that [Contractor] check the site as part of designing and building the housing units, ***after the contract was entered into***, expressly or impliedly warned [Contractor] that it could not simply rely on, and that it, instead, bore the risk of error in the Government's affirmative representations about the soil conditions."

The federal appeals court also specifically referenced the "for preliminary information only" disclaimer that the Government had applied to its inaccurate soils report. "That statement merely signals that the information might change (i.e. it is 'preliminary'). It does not say that [Contractor] bears the risk if the 'preliminary' information turns out to be inaccurate. We do not think that the language can fairly be taken to shift that risk to [Contractor], especially when read together with the other Government pronouncements, much less when read against the longstanding background presumption against finding broad [Government] disclaimers of liability for changed conditions."

3. Use of the *Spearin* doctrine by lower tier design-build subcontractors might also expose design-build CM or general contractors responsible for design *defects*.

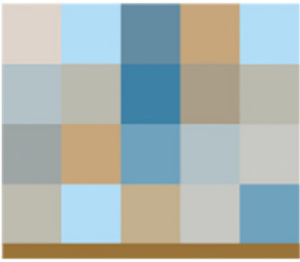
In *United States ex rel. Bonita Pipeline, Inc. v. Balfour Beatty Construction, LLC*, No. 3:16-CV-00983-H-AGS, 2017 WL 2869721, Balfour Beatty was awarded a $35-million, design-build contract to design and construct a hangar replacement at Camp Pendleton. Balfour Beatty provided Bonita, its subcontractor, with design documents so that Bonita could prepare its subcontract bid. The design documents provided to Bonita specifically noted that they were "incomplete", which is, of course, a hallmark of design-build projects.

Bonita and Balfour Beatty later entered into a $4.7 million subcontract by which Bonita agreed to design-build the structural steel, metal decking and other work for the project. The subcontract expressly provided that due to the design-build nature of the project, the plans and specifications were subject to further "refinement". Numerous disputes arose during the course of the project, and a lawsuit was commenced by Bonita seeking additional compensation due to alleged design errors and changes.

Bonita filed a motion for summary judgment, seeking a determination from the court that under the *Spearin* doctrine, Balfour Beatty, as contractor, could not shift legal responsibility for defective plans and specifications onto its subcontractor.

Balfour Beatty argued that *Spearin* did not apply because the subcontract explicitly indicated that it was a design-build project, and the plans and specifications were expressly incomplete when the subcontract was entered into. "Thus, according to [Balfour Beatty], the *Spearin* doctrine cannot be applied to the subcontract because, by the very nature of the contract, the plans were not complete when the parties reached agreement." *Bonita Pipeline*, 2017 WL 2869721, at *3.

Bonita responded by arguing that it assumed the risk that the plans and specifications would be refined – but not the risk that they would be defective. Bonita argued that the *Spearin* doctrine addresses whether plans are correct; not whether they are complete. *Bonita Pipeline*, 2017 WL 2869721, at *3.



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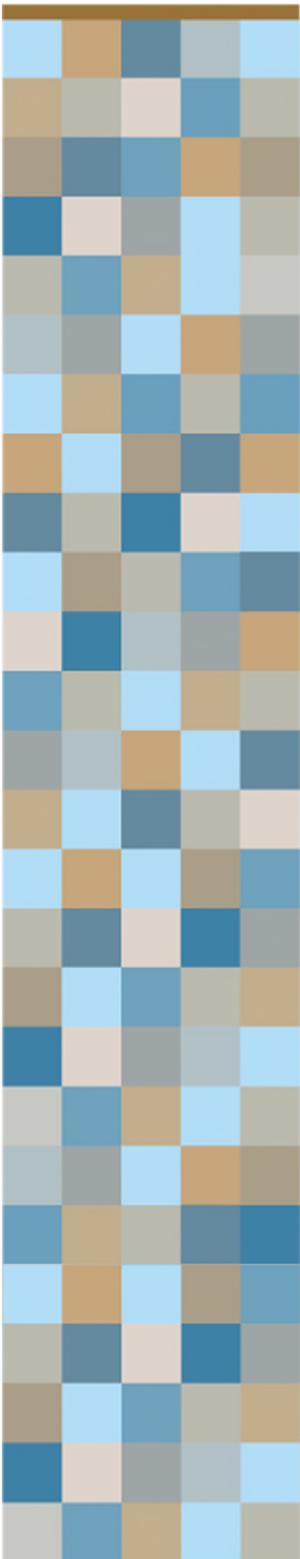


The Court noted that as a general proposition, *Spearin* may apply to design-build projects, stating, "[u]nder Spearin, the responsibility to provide correct plans and specifications 'is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work.'" *Bonita Pipeline*, 2017 WL 2869721, at *4; see also *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.,* 36 N.E.3d 505 (Mass. 2015) (applying *Spearin* to a construction manager "at risk" project).

However, on the facts before it, the court was not able to determine on a motion for summary judgment whether Bonita's extra work was due to errors in the plans and specifications or whether the extra work was due to expected design refinements as set forth in the parties' subcontract. Although this required that the motion for summary judgment be denied, it is clear that the *Spearin* doctrine may be used by a lower tier design-build subcontractor in seeking to hold a design-build CM/contractor responsible for design defects.

4. Shifting some design responsibility to the CM/contractor does not insulate owner from *Spearin*-based claims for additional compensation.

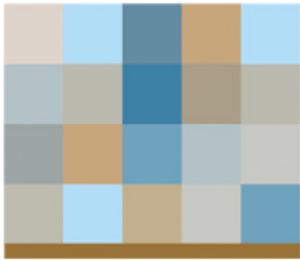
In *Coghlin Electr. Contractors, Inc. v. Gilbane Bldg. Co., 36 N.E.3d 505 (2015*), the highest court in Massachusetts considered, for the first time, whether a Construction Manager At-Risk ("CMAR") who participates to some extent in the pre-construction design phase could rely upon the *Spearin* doctrine to recover costs from the public owner as a result of its design errors.

Massachusetts law was amended in 2005, so that state agencies could utilize design-build and construction management at-risk delivery methods for certain construction projects. The amended law authorized CMAR projects for "construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost not less than $5,000,000."

Gilbane was a CMAR sued by Coghlin, its electrical contractor, alleging that various design discrepancies and changes affected Coghlin's performance, causing it to incur substantially greater labor costs. Gilbane brought the public owner into the lawsuit, seeking to pass through Coghlin's claim.

In dismissing the CM's claims against the public owner, the lower court held that the *Spearin* implied warranty of design should not apply in a CMAR contract. However, Massachusetts' Supreme Judicial Court reversed the lower court, finding the public owner liable because the CMAR did not have control of and responsibility for the design.

The court found that while the CMAR under the Massachusetts statute may consult in the design phase to some degree, the owner and its designer ultimately controlled the design and did not have an obligation to accept the CM's input regarding design-related matters, unless the contract between the parties expressly provided otherwise. Thus, the court concluded that the CM's *participation* in the design phase, *but not as the designer*, did not operate to shift the risk of a design defect from the owner (and its third-party designer), which remains liable for the defects.



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MHH Commentary

Given that the earliest of the foregoing four cases is barely five years old, and most are more recent, the *Spearin* doctrine appears to be very much alive and relevant to modern, design-build project delivery.

The cited cases provide a current review of the application of *Spearin* principles as design-build begins to finally take off in the public sector. It is clear from these decisions that general disclaimers, such as those in *Metcalf*, *Drennon* and *Balfour Beatty,* that warn of "potential design inaccuracies" or "forthcoming changes," will likely not relieve the responsible party (e.g., owner or design-build CM) of *Spearin* liability.

Care must be taken to analyze contractual provisions for various components of project design, including preliminary reports, surveys and design concepts. Well-drafted site inspection clauses and contract language specifically disclaiming potentially problematic information are needed to help transfer or avoid liability under *Spearin*. With a carefully worded contract, design-build delivery can still provide an avenue to avoid or mitigate *Spearin* liability for an owner. Otherwise, an owner might give up design control while still remaining liable for design defects, an owner nightmare.

While a case-by-case legal assessment is required, it is gratifying to see that "weasel words," as they were referred to by the Federal Board of Contract Appeals in *Drennon,* should not, and will not, carry the day. Rather, fair, express and specific risk shifting and the absence of design defect, is what design-build liability should be about.

Both contractors and subcontractors must know, and owners realize, that *Spearin* protections are still very much available, based on project-specific circumstances on your particular job. Your counsel should be able to help you analyze this fundamental design responsibility issue. This could be nothing less than a "make or break" determination as to the success and profitability of your project.

Henry L. Goldberg, a partner of the firm, chairs the firm's Construction Practice Group where he handles all facets of complex construction law related matters.

Robert J. Fryman, a partner of the firm, concentrates his practice on construction law and litigation matters.

Any issues raised in this Alert may be addressed to either Mr. Goldberg or Mr. Fryman who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com or rfryman@moritthock.com

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