The Responsibility is to Perform

Plans and Specs Prepared by Design Professionals Carry the Responsibility For a System to Perform—Not the Wall and Ceiling Contractor.

By Peter R. Spanos, Esq.

In the case of a typical fixed price “build-to-design” contract, the contractor’s responsibilities are only to perform the work as reasonably indicated by the plans and specifications prepared by the design professional.

Unless it is expressly required in the contract itself, the contractor generally is not considered to assure proper performance of the completed work. If the project is properly constructed but does not function properly, that failure to function is not the contractor’s responsibility.

Consequently, you should be careful not to deviate from the requirements of the detailed plans and specifications in order to try to make something work. If you do, you may not only breach your obligation to build in accordance with the plans and specifications, but you may also assume the responsibility for its failure to perform in accordance with its intended purpose.

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work performed to only that within the original scope for which you contracted, as adjusted by subsequently issued and agreed upon change orders. The contractor must recognize that his scope of work is solely that reasonably indicated in the plans, specifications and contract documents.

A frequently encountered source of controversy regarding scope of work arises out of deficiencies or ambiguities in the plans and specifications. If the problem is considered "patent" (i.e., one that reasonably should have been discovered by the contractor before the bid was submitted), the contractor is under a duty to inquire further regarding the perceived problem and to obtain a clarification or other resolution prior to entering into the contract.

However, if the deficiency or ambiguity was a "latent" one (deficiencies not reasonably noticeable to the contractor during the pre-bid estimation process) the general rule is that such ambiguities are construed or interpreted most favorably to the bidding contractor and most strongly against the party that drafted the document.

In such a case the contractor is entitled to take the narrowest, easiest, and least costly reasonable interpretation — and he should do so! The contractor need only show that in assembling his estimate and bid he did actually employ such an interpretation and that it was a reasonable one under the circumstances. He need not show that it was the best or most reasonable interpretation.

Thus, unless the contract documents are irreconcilably in conflict or clearly indicate a design problem, the contractor should read the specifications as narrowly as reason permits in defining and pricing his scope of work.

Careful Analysis . . .

The first step in the protection of remedies for the extra work is careful analysis and definition of the scope of work to be performed. This should be done by the contractor at the outset, and the definition of scope of work must be effectively communicated and followed uniformly by all employees so that the contractor may present a unified front.

You should be careful to anticipate and recognize work or additional items of incurred direct or indirect cost falling outside, such scope of work. Any work outside the contract scope of work should not be performed without taking proper steps to protect your rights to additional time or compensation.

READ YOUR CONTRACT and comply as strictly as practical with the specified procedures for "notice," "changes," "claims," and "disputes". If you perform extra work without taking such precautions, you may be incurring unanticipated additional costs of performance for which you will not be compensated.

When you are in doubt about whether requested work is within the
scope of your contract or is extra work, perform the work as directed or required but reserve your rights to request additional time or compensation by following all of the contract requirements. Afterward, you can always elect not to pursue a claim for additional compensation or time, but if you have not taken the proper contractual steps you may have no choice but to forego the claim.

When you request an adjustment to your contract as a result of a change, make sure you cover all elements of time and cost.

Direct costs include labor, materials, and equipment, and indirect costs would include home office overhead and the costs of delay, disruption, inefficiency, and impact on the other work. If you believe that a particular change will have impact on the cost or time for performance of other work but cannot yet assess and quantify it, make sure you expressly reserve your rights in any “direct cost” change order proposal to claim later for indirect costs or time necessary to compensate for such impact.

The general rule on pricing change orders is “price it” as part of the change or “preserve it” for later assertion.

This article presents timely ideas and information on legal matters of interest to the construction industry. The text of these articles is necessarily generalized, and we recommend that you consult legal counsel as to the legal implications of any given actual circumstances.