Defective Specification Claims and Impossibility of Performance

by Allan H. Goodman, J.D.
Course Number: 1001

Course Description - This one hour course will teach the basic principles of the owner’s obligation to draft design specifications so that the contractor can build the project as specified. The warranty of owner-furnished specifications is discussed together with the owner’s burden to assure that the design specifications describe a workable project. The results of defective specifications are described, making the distinction between defective specifications that are actually impossible to perform and those that are practically impossible (economically unfeasible) to perform. This course contains references to actual court decisions describing the principles discussed.

Learning Objectives

! To understand the owner’s obligation to furnish adequate design specifications.
! To distinguish between the contractor’s obligation to accomplish the objectives of design and performance specifications.
! To understand the implied warranty of design specifications as adopted by most states.
! To assess the degrees of impossibility of performance and practical impossibility.

Note: This course is for educational purposes and discusses legal principles and concepts with references to court opinions. It is not to be construed or relied upon as legal advice. The views expressed in this course are solely those of the author in his capacity as a private citizen, and do not represent the views of any entity by which the owner is or has been employed.

Contents

Defective Specification Claims and Impossibility of Performance

I. Introduction
II. Categories of Defective Specifications
III. Design Specifications and the Owner’s Warranty
   A. The Difference between Design and Performance Specifications
B. The Owner’s Warranty of Design Specifications
C. Minor Errors
D. The Owner’s Warranty As Adopted in State Law
E. Implied Warranty to Comply with Building Code

IV. Impossibility of Performance
A. Actual Impossibility
B. Practical Impossibility

V. Summary
VI. Quiz

Defective Specification Claims and Impossibility of Performance

I. Introduction

With almost every construction contract the owner furnishes the contractor specifications to explain, supplement, and clarify the original contract provisions. Unfortunately, specifications often have the opposite effect -- they confuse the contractor and offer conflicting explanations of contract provisions which vary from the plain meaning of the words used. When this occurs, unless the owner and the contractor can resolve the dispute between themselves, they often turn to the legal system for resolution. Judges and juries must determine the meaning of specifications and interpret them in such a manner as to give effect to the parties’ intentions at the time of contracting.

Interpretation of specifications is an area of frequent dispute in construction contract law. What is crystal clear to one party to the contract may appear vague and ambiguous to the other. Sometimes the specifications are not only poorly drafted but they are defective, i.e., they contain erroneous information which makes the contract impossible to perform or, if not impossible, causes an increase in the contract price and performance. In this course, we will discuss defective specifications, which cause impossibility of performance or an increase in the contract price.

II. Categories of Defective Specifications

There are two general categories of defective specifications, although court decisions do not go to great lengths to make this distinction clear. One category of defective specifications is that which makes performance impossible. The result of this type of defective specification is that the contractor is unable to achieve the end product required by the contract.
The second category of defective specifications are those which cause delays, increase costs, etc. but do not make it impossible to achieve the end result of the contract. Such defects include:

- errors
- omissions
- incompleteness
- inadequate detail
- inadequate description
- conflicts
- inconsistency
- insufficient legibility
- unusability of the material specified
- commercial unavailability of specified items, or misleading provisions.

III. Design Specifications and the Owner’s Warranty

A. The Difference Between Design and Performance Specifications

Before we discuss defective specifications, we must understand the difference between design specifications and performance specifications. In theory, specifications may be classified as either design or performance specifications, depending on their purpose. In practice, this distinction is often blurry, as specifications often contain characteristics of both.

Design specifications contain detailed instructions concerning the production or construction of the contract items. They include precise measurements, tolerances, materials, tests, quality control, inspection requirements, and other specific information. The contractor is required to follow design specifications “as one would a road map.” J.L. Simmons Company, Inv. v. U.S., 188 Ct. Cl. 684, 412 F.2d 1360 (1969).

A design specification drafted by the owner (or the owner’s engineer or other design professional), is a representation that if the contractor specifically constructs the project as designed, then the construction will perform as required. Thus, the owner and its design professional have assumed the risk of failure, as the contractor is merely following the specific, detailed direction of the owner. If the contractor is unable to perform or incurs increased costs attempting to comply with defective design specifications, the contractor is compensated by the
owner for its efforts.

On the other hand, *performance specifications* specify performance characteristics only, and omit details of design. The contractor therefore has the responsibility for design, engineering, and achievement of the performance requirements. Performance specifications are actually criteria which the owner requires the finished product to meet. By agreeing to perform a performance specification, the contractor assumes the risk of non-performance of the end product.

The subject of defective specifications usually deals with defective design specifications.

**B. The Owner’s Warranty of Design Specifications**

When the owner provides design specifications in a contract, there is an implied warranty that if the contractor follows such procedures and/or uses the materials described therein, a workable product will result. The concept of implied warranty has its origins in Federal procurement law, and was set forth by the Supreme Court of the United States in the landmark case of *United States v. Spearin*, 248 U.S. 132 (1918).

In this case the contractor was to build a dry dock at the Brooklyn Navy Yard. Part of the work required relocating a section of the storm sewer which ran through the dry dock area, and this was accomplished without problem. About one year later, the contractor was working on the remainder of the work and a heavy rain storm coincided with a high tide, breaking the sewer and flooding the dry dock site. The contractor notified the Government that the sewer was built according to defective specifications, was a hazard, and refused to continue work until the Government made changes in the sewer system and agreed to pay for the damage caused by the flooding. The Government annulled the contract, and the contractor sued for damages. In ruling in the contractor's favor, the United States Court of Claims awarded damages consisting of costs incurred to the date of annulment plus anticipated profits. The Supreme Court affirmed this decision, and stated:

In the case at bar, the sewer, as well as other structures was to be built in accordance with the plans and specifications furnished by the Government .... The insertion of the articles prescribing the character, dimensions and locations of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate. This implied warranty 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 until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.


From the above case it is clear that when the Government as owner furnishes plans and specifications they must be written with reasonable care so as to communicate to the contractor the necessary details of design and performance. The Government's responsibility extends to the correctness, adequacy and feasibility of the specifications, including any time and weight limitations, drawings, and models. Note also that the Spearin case emphasizes that when the Government furnishes specifications the contractor is not under a duty to examine them in order to determine their adequacy for construction or production purposes prior to award. Any contract clauses requiring the contractor to check plans or dimensions before beginning performance impose upon the contractor the duty to discover obvious discrepancies in measurements, scales, etc., but does not obligate the contractor to decide whether or not the specifications will result in a workable product.

C. Minor Errors

It should be noted that minor errors in specifications will not amount to a breach of implied warranty. The owner is allowed a reasonable number of errors and ambiguities, and the specifications will not be considered defective if they contain a reasonable number of errors, have been prepared with reasonable care, and are of the average quality used in the industry. In the case of John McShain, Inc. v. United States, 412 F.2d 1281(Ct. Cl. 1969), the Court stated:

Although Government-furnished plans need not be perfect, they must be adequate to the task of reasonably accurate.

412 F.2d at 1283.

Whether or not the specifications are “reasonably accurate” is determined by the result. If
the contractor carefully follows the specifications and the contract item is deficient or fails to perform as required, then the Government will normally be held not to have met its duty of reasonable care in the preparation of the specifications.

D. The Owner's Warranty As Adopted in State Law

The concept of implied warranty of owner-furnished specifications has been applied to private construction contracts in many states. The following cases illustrate this application in California, which is one of the states that adopted the “Spearin Doctrine” soon after the Supreme Court established this principle.

In *Gagne v. Bertran*, 275 P.2d 15 (Cal. 1954), the contractor brought an action against an owner because a test hole driller's report as to the depth of fill on a lot was erroneous. As a result, the contractor incurred additional costs in laying the foundation. The Court held the owner of the building liable for the increased cost to contractor, holding that the owner of a building to be erected warrants the workability of the architect's plans that he furnishes to the contractor. The Court stated that historically warranties have become identified primarily with transactions involving the sale or furnishing of tangible property, but they are not confined to such transactions.

In *Kurland v. United Pacific Insurance Company*, 59 Cal. Rptr. 258 (1967), an air conditioning subcontractor installed an air conditioning system in accordance with plans and specifications prepared by the architect and engineer on behalf of the owner but the system failed to maintain a 30-degree differential as provided in the performance bond of the subcontractor. The Court held that since the contractor complied with the specifications furnished by the owner, the contractor did not guarantee that the system would produce the desired differential as specified in the specifications. The subcontractor was not liable for failure of the air conditioning system to properly cool the building, as the Court held that the subcontractor's failure was the result of the defective design of the system by the owner's architect. Such defective design was a breach of the owner's implied warranty of suitability of the specifications. For a similar case holding that a contractor does not guarantee a workable product but has only the duty to perform work according to specifications in a workmanlike manner, see *Corporation of Presiding Bishop v. Cavanaugh*, 32 Cal. Rptr. 144 (1963); *Sunbeam Construction Company v. Fisci*, 2 Cal. App.3d, 181, 82 Cal. Rptr. 446 (1969).

The Doctrine of the Owner's Implied Warranty of Specifications has also been applied in many other states including Texas.
In *Shintech Incorporated v. Group Constructors, Inc.*, 688 S.W.2d 144 (App.Tex. 1985), an owner issued design specifications which contained numerous errors and caused the contractor to incur increased costs in complying with them. The court ruled:

We find no evidence that [the contractor] had knowledge of defective specifications prior to beginning its work. Where the contract is silent on the subject, there is an implied warranty that the plans and specifications for a construction job are accurate and sufficient for the purpose in view. *Newell v. Mosley*, 469 S.W.2d 481, 483 (Tex.Civ.App.-Tyler 1971)

It is interesting to note that in Texas, some courts earlier had ruled quite differently. In *McDaniel v. City of Beaumont*, 92 S.W.2d 552, (Tex.Civ.App.) 1936 a contractor executed a contract with the following provisions:

Every contractor bidding on this work shall carefully read these conditions in connection with the AIA printed general conditions and the typewritten specifications with the twenty-one sheets of drawings accompanying them, and submit his bid subject to all the conditions herein contained. He shall examine the building site and familiarize himself with all the conditions in connection with the construction of the High School Building.

The fact of a Contractor submitting a bid will be construed by the Board to mean that the person bidding, bids and agrees to carry out all the provisions set forth in the drawings and the specifications.

When the contractor executed the plastering specifications and then painted over the plaster with the paint specified, the plaster interacted with the paint to leave a rough surface. The owner required the contractor repair, patch and repaint the plastering work. The contractor alleged that the architects, as the owners agent, knew that the specification was defective and that the repair work was not contemplated under the contract documents, and that the cost of the repair work was an extra expense and damaged the contractor because of errors in the contract documents and particularly in the amended plaster specifications. The contractor sought $25,000 for the extra work, alleging that the owner and its architect warranted that following the specifications would result in the project being built without additional costs.

The court held in favor of the owner. First, it held that the contract language above was an agreement by the contractor to build the project as specified, since it had the opportunity to
review the specifications prior to bid. The court then denied that warranty of specifications was at that time the law in Texas:

On the facts alleged [the contractor] contends that [owner] "warranted" the sufficiency of the plaster specifications, and that, if executed in the manner explained by the superintendent of construction and the architects, and under their instructions, the specifications would produce an "Acme finish trowelled to a hard surface and free from all defects." *This proposition is not the law of Texas.* The owner has the right to submit to prospective bidders any character of plans and specifications for the erection of his building. The bidder himself must know the nature of the plans and specifications, and must decide for himself whether or not, by the due execution of the plans and specifications, he can erect and deliver to the owner the character of building called for by the contract. It is a simple matter of contract; the bidder has agreed to erect the building--the very building--upon which he submitted his bid, by the use of certain specific materials and according to specific plans and specifications. The owner *does not warrant* that the materials and plans and specifications will produce the building; that fact the bidder must decide for himself and at his peril. There is no law compelling him to submit his bid, but, if he bids, he must execute his contract or respond in damages. (Emphasis added.)

As we see from the Shintech case discussed previously, which was issued in 1985, the law in Texas changed since the decision above, as now the implied warranty of specifications applies in Texas and the burden has shifted from the contractor to check specifications prior to bid to the owner and its design professionals to assure the adequacy of the specifications when issued.

In New York, in *Monroe Contracting Company v. County of Westchester*, 80 F.2d 841 (2nd Cir. 1936), the Court held that the defendant County impliedly warranted that a tunnel to be constructed was to be built in free-air, and issued specifications which would be adequate only if the tunnel were built in free-air. The Court held that the County impliedly warranted the sufficiency of the specifications for the purpose in view, and was liable to the contractor for damages sustained either in making the bid or in proceeding with the work in reliance on such a warranty. The contractor sustained such damages because during construction it became necessary to construct over 6,000 feet of the distance of the tunnel by the use of compressed air, while the specifications stated that only 600 feet would be constructed by this method.
In Oklahoma, in the case of *Miller v. City of Broken Arrow, Oklahoma*, 660 F.2d 450 (10th Cir. 1981), the court found that a contractor was entitled to rely on the plans and specifications prepared by the owner's engineer and to thereafter recover its damages and losses incurred as a result of the inadequacy of the owner- furnished claims and specifications. The court clearly emphasized that the basis of the implied warranty of owner-furnished specifications in Oklahoma had its origins under the “Spearin Doctrine”, and stated as follows:

Oklahoma's law holding that a contractor is entitled to rely on an owner's plans and specifications and that the contractor is not thereafter liable to the owner for loss or damage which results solely from the insufficient or defective plans is in accord with numerous court decisions. See *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918), holding that a contractor who is bound to build according to plans and specifications prepared by the owner will not be responsible for the consequences of defects in the plans and specifications; *Centex Construction Co., Inc. v. James*, 374 F.2d 921 (8th Cir. 1967), holding that where one party furnished plans and specifications for a contractor to follow in a construction job, he impliedly warrants their sufficiency for the purpose in view.

Cases in other jurisdictions which adopted the Spearin Doctrine are as follows:

* Arkansas - *Centex Construction Co., Inc. v. James*, 374 F2d 891 (8th Cir. 1967)


**E. Implied Warranty to Comply with Building Code**

In general, in most states, in every contract to build, it is implied that the building will be constructed in conformity with all laws and ordinances. *Gutowski v. Crystal Homes, Inc.*, 26 Ill. App. 2d 269, 167 N.E.2d 422 (1960). In this case, purchasers of a new home brought suit against the real estate developer on the ground that the home was located on the lot in violation of a city ordinance respecting the width of the side yards. The court held that the developer was obligated to construct the homes in compliance with the ordinance, and failure to do so made him liable in damages to the purchaser.

Similarly, in *Schiro v. Gould*, 18 Ill. 2d 538 (1960) the court held that a contract to sell and purchase land and the building to be constructed on the land included, as an integral part of
the contract, relevant provisions of the city code in existence at the time the contract was executed.

In Maryland, the general rule is unless the contract provides otherwise, the law applicable at the time and place of making of a contract is as much a part of the contract as though it were expressly referred to and incorporated in the terms of the contract. In *Denice v. Spotswood I. Ouinbv, Inc.*, 237 A.2d4 (MD Ct.App 1968), the purchaser of a residence sued the corporate builder of the house because the recreation room had a ceiling of only six feet nine inches above the floor, while the county building code required at least seven and one-half feet from a floor to a ceiling in a house. The court, in holding for the purchaser, ordered the builder to refund the $10,000.00 deposit, as the purchaser refused to buy the house. The court, in ruling that the Montgomery County building code was an implied condition of the contract in the instant case stated:

A general statement of the law applicable is found in 17A C.J.S. Contracts §330 (1963):

Generally, unless a contract provides otherwise, the law applicable thereto at the time and place of its making, including constitutional and statutory provisions and judicial precedents, is as much a part of the contract as though it were expressly referred to and incorporated in its terms; and the same is true of the law of the place where it is to be performed. The reason for this rule ordinarily is that it is presumed that the parties had such law in contemplation when the contract was made. Municipal ordinances have been held to come within the rules just stated.

Additionally, the court held that the standard for voiding the purchase was not the applied warranty of habitability, as the house was in fact habitable. Rather, the holding focused on the breach of the implied warranty that the house would comply with the building code.

In the instant case the appellant was paying $95,000 for his home, a substantial sum by any standard. It is logical to assume that he intended to spend an appreciable amount of time in this recreation room which was being equipped with a fireplace and bookshelves. Judge Mathias, with consent of counsel, visited the residence and inspected the recreation room. In his opinion he stated, ‘The
expanse of ceiling gave the impression of being extraordinarily low but not to the point where the room was unusable.’ We do not think that usability was the test to be applied. The dwelling was not being constructed for Lilliputians. The ordinance specified 7-1/2 feet for ‘habitable’ rooms; there has been no contention raised that the recreation room was not intended by all parties to be a ‘habitable’ room.

In Virginia, the rule is applied in *Adams v. Tri-City Amusement Co.*, 124 Va. 473, 98 S.E. 647 (1919), where a building contractor was found not liable for a defect in not having walls of a building heavy enough to stand in wet ground, where he followed the plans and specifications furnished by the architect as agent of the owner.

**IV. Impossibility of Performance**

The doctrine of impossibility of performance is a very ancient legal concept with its roots in the early common law. As early as 1536, the Court of King's Bench held in the case of *Westminster v. Clerke*, 73 Eng. Rep. (K.B. 1536) that if a party to a contract undertakes to deliver a product to a foreign country on a certain date, and subsequently a law is passed forbidding exportation to that country, that party is discharged from his duty. Thus, the doctrine of impossibility has its inception in the concept of “impossibility of law.”

Later cases found other causes of impossibility of performances -- acts of God, destruction of the subject matter, the death of a necessary party, the nonexistence of a specifically contemplated means of performance, or the nonexistence of anything else which the parties contemplated would be in existence and necessary for contract performance. The common law also distinguished between impossibility that occurred as the result of events before entering the contract and those that occurred after entering the contract.

The doctrine of impossibility which evolved over the centuries in general commercial law is recognized in construction situations as a valid excuse for a contractor’s failure to perform. Legal impossibility is considered to include not only actual impossibility, but also commercial impracticality, often referred to as practical impossibility. This latter situation occurs when a task is *not actually impossible* to perform, but circumstances are such that performance can be accomplished only by the contractor incurring unreasonable and commercially impracticable costs. When this is the case, the contractor will not be compelled to perform.
In the previous section, cases have been cited illustrating the contractor’s recovery for delay damages and extra work caused by defective specifications. Recovery in these instances is based on the owner's breach of the implied warranty of its specifications. In these cases, the contractor may recover increased costs incurred as a result of coping with defective specifications, but ultimately is able to complete the contract and produce a workable product. In contrast, defective specifications may also result in impossibility of performance, and the contractor is not ultimately able to perform the contract, or is excused from performing because such performance would require unreasonable costs. The theory of implied warranty of specifications is also relied upon in these cases, but more as a factor to assign the risk of impossibility to the owner.

The majority of cases dealing with impossibility of performance arise from defective specifications. As the specifications are drafted before the contract is agreed upon, these cases are not concerned with supervening impossibility; i.e., impossibility because of an event occurring after the contractor has signed, but with the legal rights of the parties when they discover the conditions are not as they believed they were at the time the contract was signed. One can analogize this situation to that of a mutual mistake of an underlying fact. The question then focuses upon a determination as to which party assumed the risk that the conditions would be different from those anticipated.

A. Actual Impossibility

Actual impossibility is often referred to as absolute, strict, physical, technical impossibility, or impossibility in fact. All these terms denote an objective standard of impossibility; i.e., the contract could not have been performed, according to its terms, by anyone, either because of unrealistic performance requirements or faulty specifications. Thus, if a contract can be performed by others, the contractor in question cannot raise the defense of actual impossibility as an excuse.

An example of actual impossibility is the case of *Chugach Electric Ass'n v. Northern Corporation*, 562 P.2d 1053 (Alaska 1977). A contractor was required to repair a dam and protect the face of the dam with a layer of rock. The rock was to be quarried by the contractor at the opposite end of the lake from the dam site, then hauled across the lake when it was frozen to a sufficient depth to carry such loads.

When the contractor began hauling operations in the winter of 1966-1967, it encountered dangerous conditions which made it unsafe to cross the lake. In March, 1967, the contractor advised the owner of the unsafe condition, but the owner insisted on continued performance.
After repeated unsuccessful attempts to haul the rock, in which the contractor lost some equipment through the ice, contractor suspended work and notified the owner - who apparently approved the suspension. The owner responded to the contractor's request for advice that, unless the contractor completed the rock hauling operation by April 1, 1967, it would be terminated for default. The contractor, believing that the ice would permit safe operation, renewed the hauling. Almost immediately, two trucks broke through the ice, killing the two drivers. The contractor suspended work and notified the owner that it considered the contract terminated.

The contractor filed suit against the owner to recover $140,000 (the difference between its costs of attempting to perform the contract and the amount it had been paid by the owner). In affirming the Trial Court's award to contractor of $9,000 in damages and $14,000 in attorney's fees, the Alaska Supreme Court held that the contractor was entitled to recover the extra costs it incurred at the owner's insistence from the time it notified the owner of its belief that the ice haul method was impossible, until it knew, or should have known, that it was impossible to perform the contract by that method. *Hol-Gar Mfg. Corp. v. U.S.*, 360 F.2d 634 (Ct. Cl.); *L.W. Foster Sportswear Co. v. U.S.*, 405 F.2d 1285 (Ct. Cl.)

The Court rejected the argument that the Trial Court erred in treating the two construction seasons (1967 and 1968) separately, and awarded it none of its extra costs of performance during the 1968 winter. The Trial Court reasoned that: (a) there was no water overflow problem in 1968, (b) the ice was frozen to a depth which all experts felt would support the trucks, (c) both contractor and owner believed in 1968 that the ice haul method was feasible, and (d) neither had actual knowledge of impossibility until the trucks fell through the ice. Under these circumstances, the Court held that the contractor was not entitled to any extra costs it may have incurred during 1968 (presumably because the owner was not insisting that contractor perform a task which the owner knew, or had been notified, was impossible).

### B. Practical Impossibility

Practical impossibility is also referred to as commercial impossibility, commercial impracticality, commercial senselessness and economic senselessness. These terms signify a subjective test of impossibility; i.e., even though a contract may possibly be capable of being performed, to do so would cause the contractor to suffer “extreme or unreasonable difficulty, expense, injury or loss.” Restatement of Contracts, §454.

It has been suggested that a workable definition of practical impossibility would be to say that a desired goal is not possible within the basic objectives contemplated by the parties -- as
evidenced by the contract itself and the surrounding circumstances.

The case of *John W. Beck v. J.M. Smucker Co.*, 561 P2d 623 (Ore. 1977) illustrates this concept. A well located in defendant's packing plant became practically unusable because of large quantities of sand in the water. The contractor, who had originally drilled the well over a decade before and was familiar with sand problems in wells in the area, proposed to solve the problem by drilling of a small additional well.

The contractor assumed that the depth of the well was 140 feet. There were no records to indicate the depth of the original well. After the contractor's proposal was accepted, contractor began cleaning out the well and discovered that it was actually 220 feet deep. The contractor proceeded digging the well without informing the owner. However, because the well was deeper than he originally assumed, the method was not successful in solving the problem, and contractor ultimately concluded that correction was a practical impossibility. At that point, the owner decided to use city water, and contractor discontinued further work.

The contractor filed a mechanics lien suit, to recover the cost of the labor and material it furnished in its unsuccessful corrective effort. The Trial Court rejected this claim and granted the owner's counterclaim for recovery of an advance partial payment to contractor.

The State Supreme Court found the facts of this case “somewhat unique” because contractor did not obtain absolute confirmation of the impossibility of correcting the sand condition until it had completed the work promised. Nevertheless, he did learn of the well’s greater depth during the first two days on the job. The Court reasoned that a reasonable person with contractor's experience and expertise would have conducted a further investigation and conferred with the owner before proceeding. Further investigation would undoubtedly have revealed the impracticability or impossibility of achieving the contract's basic purpose.

The Court discussed that under the circumstances, assumption of risk had shifted. Since the contractor acquired knowledge of facts which would warn a reasonable person about an impossibility in time to avoid useless performance, but nevertheless continued with the useless performance despite that knowledge, the contractor was considered to have assumed the risk of impossibility and the owner was relieved of the duty to pay for the useless performance. Accordingly, the Supreme Court affirmed the Trial Court’s action.

V. Summary

We have seen that when an owner and its design professional drafts specifications which
purport to indicate to the contractor the details of construction, i.e., design specifications, the burden is on the owner to issue specifications that if followed will result in the project functioning as designed. This implied warranty of design specifications has its origin in federal procurement law and has been adopted in many states. Defective specifications may result in the project being impossible to construct as designed or cause the contractor to incur increased costs in order to correct and comply with the specifications.

VI. Quiz

1. Contract specifications
   a) are always clear and understandable
   b) are usually very confusing and difficult to understand
   c) may be interpreted differently by the parties to the contract.

2. If the contract specifications are defective
   a) the contract will simply be impossible to perform
   b) the contractor may incur additional costs to perform that were not included in the bid
   c) the contractor should refuse to go forward

3. Defective specifications may include
   a) erroneous dimensions
   b) unavailable materials
   c) both a and b above

4. Design specifications contain
   a) the specific details the contractor needs to build the project
   b) only a description of the end result
   c) a direction to the contractor to design the project.

5. Performance specifications
   a) contain penalties that the contractor must pay if he fails to build the project correctly.
   b) describe how certain components of the project will perform while leaving the design of these components to the contractor.
   c) are always clear and capable of being met by the contractor.

6. When an owner drafts design specifications
   a) the contractor is obligated to check the design to make sure the project can be
built according to the design before the contractor submits its bid.
b) the owner warrants that if the design is executed by the contractor the
construction will perform as required.
c) the owner relies upon the contractor to build the project correctly even if the
design is not correct.

7. An owner must draft specifications
   a) that are perfect and without any error.
b) with reasonable care and the owner is not accountable for minor errors.
c) broadly and require the contractor to add details as necessary.

8. The owner’s warranty of design specifications
   a) only applies to federal contracts.
b) has been adopted by almost every state by state courts.
c) must be clearly stated in the contract or the contract accepts the burden of
   performing regardless of the specifications.

9. When a specification is actually impossible to perform
   a) no one can perform it.
b) this means that the contractor has tried and cannot perform it.
c) it is always obvious from the contract documents.

10. A specification that is practically impossible to perform
    a) is one that can almost be performed.
b) may actually be performed but at a cost that is not economically reasonable.
c) must be attempted several times before the contractor is relieved of the
    obligation to perform it.