RESPONSIBILITY FOR SUITABILITY OF DESIGN

By Misty Alexandre

The situation: the Owner wants an improvement constructed for a specific purpose, and knows how they want it done. Put this here, put that there. The Contractor completes the work according to the Owner's design. The natural assumption is that the party designing the specific improvements should be responsible for their fitness for the purpose, right? Not always so.

Although my trunk of war stories is significantly less full than that of your usual writer, Bill Preston, I do recall one situation that served as the perfect example of the question "who is responsible for the design's fitness for the purpose?"

In this situation, the Contractor was hired directly by the Owner to complete specific interior improvements for the Owner's specialty business. The Owner informed the Contractor of the intended purpose of the improvements, but only requested that the Contractor construct the improvements in accordance with the Owner's design. On that basis, the Contractor provided an estimate for the improvements, which included detailed specs for the work and the cost of building plans and permits.

The improvements were completed on time, and in accordance with the Building Code. A permit was also issued, but attached to the permit was a requirement by a regulatory body, stating that the improvements must be altered to comply with specific regulations pertaining to the Owner's specialty business. As such, the Owner claimed that the Contractor was responsible for the extra cost, since the Contractor had not provided a design that was fit for the intended purpose.

The question for the Court was whether the Contractor was required to provide a design that was reasonably fit for the purpose of the specialty business. The Contractor faced a number of risks in this legal action:

1. Since the Contract itself made no mention of who was responsible for the design's fitness for purpose, the Court could have implied a term into the Contract making the Contractor responsible for this. Courts can imply terms like this into a Contract if:

    (a) It reflects common custom or usage in the industry (e.g. "all contractors know that the design must comply with the Building Code");

    (b) It is usual for that particular kind of contract (e.g. "under a construction contract, the contractor is expected to complete the improvement in a workmanlike manner"); or

    (c) It is necessary to give 'business efficacy' to the contract (e.g. "no reasonable business owner would hire a contractor if they didn't look after the use permit!')

2. The Owner did not have any particular design expertise, nor did he have an independent consultant. As such, even though the Owner laid out the design, the Contractor could have been responsible for the design's fitness for purpose <u>if</u> it was demonstrated that the Owner relied on the Contractor's skill and judgment in relation to the design.

3. Even if the Court found no reliance on the Contractor, the Court could imply a term that the Contractor had a contractual obligation to warn the owner that its design is not suitable. Unless the Contracts says otherwise, the Contractor will have an obligation to warn the Owner if the design error is so obvious that a reasonably skilled Contractor should have seen and recognized the error.

And the result in the scenario described above? Based on the facts, the Court held that the Owner showed no reliance on the Contractor's skill and judgment. Further, because the design error related to a specific regulation for the Owner's specialty business, the Court did not find any obligation of the Contractor to warn the Owner.

The Bottom Line: Builders should be extra careful in situations where the Owner is supplying the design. If the Builder encounters this situation, they must be sure they have a written contract (avoid verbal arrangements) explicitly stating that they will not be responsible for the suitability of the design, or for errors in the design. CCDC 2, GC 3.4.1 provides an example of this type of clause, as it states that the Contractor shall review the Contract Documents, but is not liable for damage or costs resulting from errors, inconsistencies or omission the Contractor did not discover (therefore, no obligation to warn if Contractor did not actually discover an error). If this term is altered by a Supplemental Condition, the Builder must be aware that the responsibility for the design's fitness for purpose may be shifting toward them!