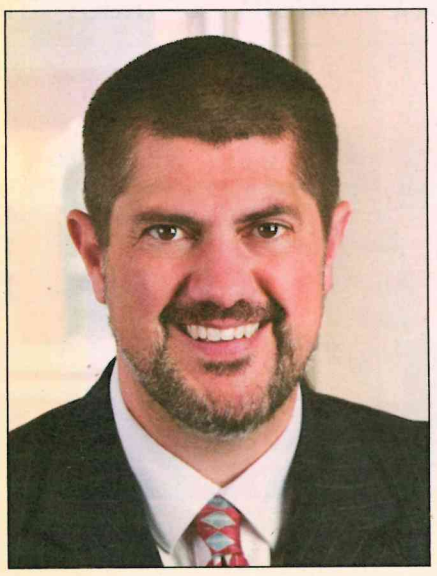
Construction and the Law

The Curious Matter of the Dallas Fort Worth Airport Project



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In Bernstein Shur's monthly construction newsletter, my colleague, Conor Shankman, wrote about a case that the Fifth Circuit Federal Court of Appeals decided in mid-April. The case, involving the Dallas Fort Worth International Airport revealed the court's interesting view on an owner and contractor being told that they had a duty to work together to resolve a design defect dispute. Because this case seems unusual and contrary to commonly understood obligations on a construction project, I am further explaining this case for this month's issue.

Dallas Fort Worth (DFW) and INET Airport Systems (INET), the contractor, entered into a contract for work on one of the terminals at the airport. Part of the project concerned pre-conditioned air and rooftop air handling units that would provide cold and warm air to passenger boarding bridges and to aircraft parked at terminal gates. INET competitively bid the project and certified that its bid constituted evidence that it was familiar with the site, the proposal, the plans, specifications and contract forms and was satisfied that its bid conformed to those project documents. The contract contained other normal contractual provisions including that INET could not substitute other products without permission, that it had to inform DFW immediately of any apparent errors or omissions in the plans and specifications, and finally that any extra work should be covered by a written change order issued by DFW with agreed-upon changes for performing the change order work, executed by both sides after they reached agreement.

During the project INET expressed concern to DFW that a type of liquid that was specified to be used in the rooftop units might not function correctly. INET believed that ice would build up on the outer surfaces of the rooftop units and on the surface of the coils themselves thus keeping the coils from performing as required. INET raised this issue early on and had submitted a request for information asking how to proceed. The record indicates that although there were apparent discussions, no actual resolution was reached. In the meantime, the project fell behind; INET failed to meet the substantial completion deadline and was assessed liquidated damages.

Then came the lawsuit, with both sides suing each other. In the lawsuit, the court was asked to allocate who had the risk of design defects in the plans and specifications. The court indicated that under Texas law, contracting parties could allocate the risk of design defects, or deficiencies in the plans and specifications to an owner rather than the contractor if there was clear contractual language indicating an intent to shift the burden of risk to the owner. Curiously, the court found that although the risk of defects in the plans and specifications was allocated to DFW, the court concluded that INET had duties under its contract to cooperate or take other actions to help resolve the discrepancy between the contractual requirements and design specifications regarding the liquid specified to be used in the units. Specifically, the court focused on the fact that INET had a duty to inspect the plans and specifications and inform the owner of any discrepancies, assume full responsibility for compatibility of equipment and parts, and that it had agreed to strictly perform to the design plans and specifications in the contract. Then the court focused on the change order provision and essentially placed an affirmative duty on both parties to cooperate and issue a change order if necessary to correct the defects. Because that did not happen, the court would have to determine who bore responsibility the change order never being executed. The court indicated that although there was evidence of the parties attempting to agree on addressing INET's concerns, the task of weighing that evidence was not ultimately for an appeals court.

This is a curious and somewhat confusing outcome. Although the contractual provisions on this project were normal and were not unique by any stretch of the imagination, the appeals court essentially concluded that an affirmative obligation was owed to enter into a change order to resolve the design defect. The contractor normally is protected by the Spearin Doctrine and only has to build to the owner's plans and specifications, something usually supplied to the owner by a designer. Here the court essentially concludes that once a design defect was found, the change order provision became a mandatory provision and both sides were required to enter into a change order. Because no change order was actually executed in this case, the court sent the case back for a trial judge or jury to conclude who was responsible for not resolving the design defect regarding the air units once it was identified on the project.

Whether this case is an anomaly or is relied upon by other courts going forward remains to be seen. If this case is the start of a trend of assessing responsibility for the failure of parties to reach a change order, it is likely that those drafting and negotiating construction contracts will alter some of the normal provisions regarding them and the identification and responsibility for design defects.

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