

Carefully Review All Construction Documents Before Commencing Work

By: Michael J. Rosenthal, Esq.

On a traditional bid-built project, a contractor's agreement to construct an owner's project does not warrant the design and constructability of the owner's design. Rather, a contractor must dutifully construct the owner's design, without deviation. While a contractor is not responsible for an owner's flawed design, a contractor, however, must review all construction documents, including, but not limited to, plans, specifications, addenda, as well as any reports (e.g., geotechnical) in order to confirm the owner's design before commencing work. The failure to review and comprehend the construction documents may result in a contractor's unknowing deviation from the owner's design, which is done at the contractor's own risk.

In a recent case, after a project was completed, the owner discovered considerable settling of the floor. Thereafter, the owner commenced an action against the contractor for breach of contract and warranty. The owner claimed that the contractor failed to construct the foundation in accordance with the requirements of a geotechnical engineering report which was a part of the construction documents. The report recommended that a slab on grade concrete floor be constructed, but to limit potential settlement issues, the foundation slab was not to be connected to the pile caps. The contractor argued that it complied with its contractual duty to construct the building in accordance with the specifications and any settling was the result of the owner's defective design.

During the project, the contractor submitted a request for clarification regarding the pile caps and noted that the slab was not directly tied to the pile caps. A formal response with clarification and sketch was issued by the project architect. Thereafter, a change order was approved by the owner and architect addressing the clarification in the request for clarification. The change order directed the contractor to add rebar reinforcement to tie-in the pile-cap, slab and column to each other to provide additional lateral support for the pile caps.

The contractor moved for summary judgment claiming that it followed the design specification and, most notably, the change order. The owner, in opposition, relied upon the report which indisputably recommended that the floor slab not be connected to the pile cap. The trial court granted the contractor's motion and the owner appealed.

The Appellate court, in considering the arguments of the parties, reviewed the entire contract and held that the project manual provided that the report's recommendations were not contractual requirements unless specified. The recommendation at issue (pile caps remaining unconnected to the foundation slab) was not specified as a contractual requirement in the applicable contract documents. Although the contract required the contractor to carefully study and compare the various contract documents relative to the

portion of the work prior to starting same, the Court held that this review was solely for the purpose of facilitating coordination of construction and not for the purpose of discovering errors, omissions or inconsistencies in the design information in the contract documents.

The owner further argued that the contractor was obligated to act as a design professional and to challenge the directive in the change order. The Court held that although the contractor was required to report errors, inconsistencies or omissions discovered, such reporting was in the capacity as a contractor and not as a licensed design professional. The contractor properly raised the issue in the request for clarification and the owner and architect directed the work, which, even if it was contrary to the recommendation set forth in the report, was not contrary to any contractual provision applicable to the contractor. Finally, because the change order was approved by the architect and owner, the Court, in affirming summary judgment, did not believe that there was any alleged dispute with regard to the source of the recommendation responsive to the request for clarification.

Commentary

A contractor's pre-bid review and study of the contract documents must be exhaustive as possible. Often times, contract drawings are severely deficient and a contractor must dissect the other contract drawings to determine how various components of a project fit together. A key piece of information may be buried in an obscure drawing and it is the contractor's responsibility to locate the key piece of information which, failure to do so, could prove costly to the contractor.

This case also reminds contractors to review the contract documents to determine which documents are "for information purposes" and which documents contain the "requirements" for construction. This review is in addition to determining the order of precedence in the event of a conflict between and among the contract documents. Careful attention should also be given to any specification that attempts to shift design responsibility to the contractor.

At the bidding stage it is often difficult and too time consuming to plan for every eventuality. This, however, does not mean that a contractor should only review the drawings and disregard the specifications or other requirements. Even something as innocuous as the specifications for the "method for payment" for specific work items should be carefully reviewed because other items of work may be unknowingly included in the payment for that item.

It is encouraged that contractors readily use the pre-bid question period to seek clarifications if they believe information is missing in the contract drawings. It is better to receive the answer pre-bid because contract interpretation and the meaning of a specific item of work can ultimately lead to costly claims and protracted litigation.

Feel free to contact me to discuss contract review and interpretation and identifying pre-bid ambiguities.