

# Owner-Directed Changes Do Not Convert A Contract Into a Performance Specification Contract

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Owners looking to develop their properties have a number of options to ensure that their desired project is built according to their vision. An owner can hire architects and engineers to develop a fully integrated design package for the contractor to faithfully follow and construct (design specification contract). Alternatively, the owner can establish certain performance specifications and require the contractor to develop and to be responsible for the design to ensure that those performance specifications are met (performance specification contract).

A design specification contract requires the contractor to use the materials, methods and designs dictated by the owner, without bearing responsibility if the owner's design proves inadequate to achieve the intended results. Likewise, the contractor is not responsible for the consequences of defects of such plans and specifications and it is not prevented from recovering contractually-agreed upon payments for work completed in compliance with the owner's design.

Juxtaposed, a performance specification contract affords a contractor the freedom to choose materials and methods employed to achieve a specific result. The contractor owns certain design responsibility in order to achieve the owner's performance requirements. While this type of contract provides more flexibility to the contractor to choose its materials and methods, ultimately, the contractor is responsible for any defects if the completed project does not achieve the owner's designated performance requirements.

Whether a contract is a design or performance specification contract turns on the language of the contract as a whole and the courts will give consideration to factors such as the nature and degree of the contractor's involvement in the specification process and the degree to which the contractor is allowed to exercise discretion in carrying out its performance.

In a recent case, the court was asked to determine whether a contract was a design or performance specification contract after components (including chosen materials) of the construction failed their intended purposes.

The contractor entered into a contract with the owner to perform renovations to a historical building. The contractor, per the contract, was to be paid on a time and material basis, based upon materials specified by the owner's architect. At some point during the project, the owner abandoned the architect's plans and changed the scope of the work.

When the owner stopped paying the contractor's invoices, the contractor commenced an action. The owner answered and asserted a counterclaim alleging that the contractor charged for unperformed labor, unused materials and for renovation costs for work not completed in a workmanlike manner and in violation of applicable building codes.

The case proceeded to trial and the contractor, in defending against the owner's counterclaims, asserted that it was not responsible for any defects that resulted from complying with the owner's plans and specifications and any owner-selected materials.

The Court found that the contract did not expressly state whether the parties entered into a performance or design specification contract, however, it held that the parties were working pursuant to a design specification agreement. In reaching that finding, the Court noted that the owner had an architect prepare plans and specifications and that the contract required the contractor to obtain the owner's written approval for work on the premises. The Court further noted that, at some point, the architect's plans and specifications were abandoned when the scope of the project changed. After that point, the contractor performed pursuant to the owner's express direction. The owner had the final word on materials used and even inspected the completed work.

Ultimately, the court held that the owner was responsible for any defects that resulted from its design and, therefore, could not escape payment to the contractor for the completed work.

### Commentary

Whether a contract is a performance or design specification contract has significant ramifications as to who is responsible for warranting the design and the liability that ultimately follows. As this recent case showed, had the contract at issue been a performance specification contract, the contractor may have been held responsible for the owner's damages because the materials failed to achieve their intended purpose. Because the contract did not require the contractor to furnish a specific result, it was able to avoid liability and was entitled to compensation for the work it completed, as the completed work was in conformance with the owner's design and specific direction.

This case is a lesson for all contractors that a full review of a contract is required before it is executed. While this case was clear that the contract was a design specification contract, there are times that a contract may be mixed and contain performance specification provisions. This means that the design of certain building components can be delegated to the contractor and the contractor may assume design obligations. If that delegated design component fails, the contractor may be held responsible for the owner's damages, including remediation costs.

Feel free to contact me to discuss contract review and interpretation and identifying different types of contracts and obligations.