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LEGAL BRIEF: THE CRITICAL DISTINCTION BETWEEN DESIGN AND PERFORMANCE SPECIFICATIONS

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by Timothy J. Woolford, Esquire

When owners are not satisfied with the final product at the end of a construction project, they frequently blame the contractor by withholding payment. Many owners believe they hired the contractor to deliver a completed project that will be satisfactory in all respects. In reality, however, the contractor may not be responsible for the unsatisfactory end product. Whether the contractor is to blame depends on whether the project involves a "design" specification or a "performance" specification.

A performance specification requires a contractor to produce a specific result. The contractor is given wide discretion with regard to the design, materials and methods necessary to meet the required standard. Because the contractor is in control of the manner in which the work is carried out, it must ensure that the completed project achieves the desired result. In a performance specification, the risk is on the contractor, and the contractor is liable for all costs to make the system perform as required.

In a design specification, by contrast, the owner (or its design professional) specifies the design, materials and methods that the contractor is required to follow. The contractor must follow the design like a road map. Unlike a performance specification, the contractor is not responsible if the desired result is not achieved. The owner impliedly warrants the feasibility and sufficiency of the design. If additional work is required to achieve the desired result or desired level of performance, the contractor is entitled to additional compensation. The owner cannot withhold payment due to the unsatisfactory result.

It is not always easy to determine whether a specification falls into the design or performance category. There will almost never be a neat label or express characterization one way or the other. The Contract Documents must be carefully reviewed to determine whether the particular specification in question constitutes a design or performance specification. The key inquiry is the amount of discretion given to the contractor. If the contractor is required to strictly follow the plans and specifications, and must obtain approval from the owner or its consultants for any deviation or substitution, it is likely to be considered a design specification. The United States Supreme Court, in the landmark 1918 case of *U.S. v. Spearin*, ruled that when a contractor is "bound to build according to plans and specifications prepared by the owner," it "is not responsible for the consequences of defects in the plans and specifications."

The same rules apply at the subcontractor level. A subcontractor that is required to follow the plans and specifications without deviation will not be responsible for an unsatisfactory result. A subcontractor who is given discretion as to the design and the methods to achieve a certain level of performance will be responsible for an unsatisfactory result. The court case of *Ruthrauff v. Ravin* is instructive. That case involved the construction of an ice rink. The general contractor, Ravin, hired an HVAC subcontractor to install an infrared heating system to heat the bleacher area of the skating rink. After installation, it was discovered that the heaters actually melted the ice below. The general contractor withheld retainage from the subcontractor believing the subcontractor was responsible for the melting ice and that it was required to correct the system at its own expense. The subcontractor objected, claiming that it had been hired to follow the plans and specifications. It obtained written confirmation from the manufacturer of the heaters that they were properly installed in accordance with the



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manufacturer's recommendations, as required by the contract. The GC countered that it had contracted with the Payment Act because the court found that the withholding of retainage was improper.

The *Ruthrauff v. Ravin* case is only one of many cases in which courts struggle to sort out whether a design or performance specification exists. The outcome of that inquiry determines which party is responsible for the unsatisfactory result or deficient performance. The next time that your company is blamed on the basis that you were required to provide a proper and working system, carefully review the contract obligations to determine whether you are truly responsible. In many cases, you will likely find that you are not.

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