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PERFORMANCE SPECIFICATIONS:

THE ISSUES, THE PROBLEMS AND SOME SOLUTIONS

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I. INTRODUCTION

The legal distinction between performance specifications and design specifications are straightforward. The practical, legal and conceptual consequences of the distinction are also straightforward. However, once we move from the conceptual realm to the complexity of modern construction reality, the application of the concepts blurs. Inconsistent specifications and conflicts between design and performance specifications lead to conflicts. Whether or not a given specification is a performance specification may not be determined until a court or board reaches a finding. Whether the design feature or the performance feature prevails also may await a court's or board's finding. Even among the courts and boards the decisions are inconsistent. The inconsistencies, conflicts and confusions result in an unintended allocation of construction risk to the detriment of all parties.

II. DEFINITIONS AND DISTINCTIONS OF “PERFORMANCE SPECIFICATION” VERSUS “DESIGN SPECIFICATION”

* **A. Performance Specifications** describe an end result, an objective or standard to be achieved, and leave the determination of how to reach the result to the contractor. Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987).

* **B. Design Specifications** set forth in detail the materials to be employed and the manner in which the work is to be performed, and the contractor is required to follow them as one would a road map and without deviation. L.L. Simmons Co. v. United States, 412 F.2d 1360 (Ct. Cl. 1969).

C. Mixed or Composite Specifications -- The slippery slope: In any given case specifications usually will be mixed and contain elements of both design and performance specifications. “Certainly one can find numerous government contracts exhibiting both performance and design specifications.” Utility Contractors, Inc. v.

United States, 8 Cl. Ct. 42 (1985). See also, Costello Industries, Inc., ASBCA No. 28731, 89-3 B.C.A. (CCH) ¶ 22,090 (1989); Mega Constr. Co. v. United States, 29 Fed. Cl. 396 (1993); Engineering Technology Consultants, S.A., ASBCA No. 46300, 92-3 B.C.A. (CCH) ¶ 25,133 (1992). This results not in a clear distinction but in gradual transitions. Some courts have recognized this fact. “On occasion the labels ‘design specification’ and ‘performance specification’ have been used to connote the degree to which the government has prescribed certain details of performance . . .” Zinger Constr. Co. v. United States, 807 F.2d 979 (Fed. Cir. 1986) (emphasis added). “The real issue is not whether the drawings and diagrammatic notes in their entirety should be labeled design specifications or performance specifications, but how much discretion the specifications gave [the contractor] in the placement of the electrical feeder system.” Blake Constr. Co. v. United States, 987 F.2d 743 (Fed. Cir. 1993) (emphasis added). This gradual transition can be a very slippery slope. This slippery slope will be confronted in most disputes concerning performance specifications.

D. Changes during performance of the project can result in a transformation of a performance specification into a design specification. Changes during performance of the project can result in a transformation of a performance specification into a design specification. In P.J. Dick, Inc. v. General Services Admin., GSBCA Nos. 11697, 12132, 94-3 B.C.A. (CCH) ¶ 26,981 (1994), the concrete control joint specifications originally provided placement for a maximum area of 200 square feet. GSA’s architect approved a change to “joints will be located from column to column with a diamond shape around the column.” The contracting officer approved the change order with a credit to GSA. Serious cracking of the concrete occurred. The GSBCA noted that the initial specification allowed the contractor discretion concerning the placement of the joints and, therefore, was a performance specification; but that the modification did not allow discretion as to placement and, therefore, was a design

specification. As a consequence the risk of cracking from poorly placed control grouts fell upon the government.

E. Brand name or equal: The classification of brand name or equal specifications present a fascinating puzzle for interpretation. The specification of a brand name product is a most striking example of a design specification. Everything is determined. The manufacturer's technical literature contains the detail to exclude all discretion. However, a brand name or equal specification, because it allows the contractor discretion to propose an alternative to the brand name, has been treated as an example of a performance specification.

As the AGBCA stated in Eslin Co., AGBCA No. 90-222-1, 93-1 B.C.A. (CCH) ¶ 25,321 (1992):

When a brand name or equal purchase description is used the specification becomes, in reality, a performance specification. The standard of performance applicable to the "or equal" is that it must be functionally equivalent to the brand name product, but not necessarily the same in every detail.

In the Eslin Co. case, the government had provided for "Pella Clad TD Double-Hung and Pella LD units" or equal. It had not listed the salient characteristics, but had listed a series of "Performance Criteria" for the windows including compliance with manufacturing standards, water tightness, air leakage and wind loads. It refused the contractor's requested "or equal" because it failed to have a 1 3/8 inch sash, a feature only Pella met unless the windows were specially manufactured. The AGBCA interpreted "or equal" to mean "functionally equivalent." In the absence from the specification of a list of salient features required to meet government minimum standards, the AGBCA treated the "Performance Criteria" as the salient characteristics. As a result of the Board forcing the specifications to be performance specifications, the government failed to obtain part of what it claimed it needed, i.e. aluminum clad windows.

While retaining the rule that a brand name or equal specification is a performance specification, the following two cases illustrate just how unpredictable application of the

rule can be. Aerodex, Inc. v. United States, 417 F.2d 1361 (Ct. Cl. 1969) also treats a “brand name or equal” specification as a performance specification. However, under the circumstances the characterization of the specification as performance did not resolve the problem. The contract required the use of thermal resistors: “Western Electric Company’s Part No. GA51387, Items 1B and 2B” or “approved substantial equal.” The only brand name product proved unavailable, and the contractor was forced to use the “approved substantial equal.” The government was not capable of providing sufficient description of the physical characteristics so that the brand name could be duplicated. The government also could not provide additional information on how the brand name was made, either method or materials. Ultimately, the contractor located a manufacturer that would manufacture an equal. However, it turned out that there was no available testing procedure or equipment that could perform the tests required to demonstrate compliance with the performance requirements. The government and the contractor ultimately created a test procedure that was acceptable. The contractor made a claim for the costs involved in the delay due to developing the testing procedures. The government denied the claim asserting the “approved substantial equal” described only by test results was a performance type specification which shifted responsibility for correct testing procedures to the contractor. The Court, however, stated:

It is not enough for the Government to say, as did the Board before it, that because it was a performance-type specification, the contractor was obligated to select whatever method it desired to produce the required result. This oversimplifies the burden . . . Aerodex, Inc., supra 417 F.2d at 1370.

The Court balanced the duty of the contractor to inquire concerning the procedures, against the duty of the government to inform the bidder that it did not have procedures. Ultimately, the Court decided that the contractor was entitled to a change for the government’s delay in providing information on an acceptable testing procedure.

The very recent case of Florida Bd. of Regents v. Mycon Corp., 651 So.2d 149 (Fla. 1 Dist. App. 1995) presents an unexpected twist and extension of the analysis. The project involved three circular stair towers. The specifications required:

. . . provide a skin plate with a smooth, non-corded ‘true radius’ forming surface, equal to that manufactured by Symons . . .

Mycon used the entire Symons forming system. Mycon failed to complete on time and the owner withheld liquidated damages and damages for substandard concrete work. Mycon argued that the specification was a proprietary specification, i.e. a design specification, and since the system failed to produce the desired results, the owner not Mycon was responsible. The owner asserted that the specifications were not proprietary and Mycon could have used a different framing system that would produce the correct results. The trial court had instructed the jury that (1) while Mycon was not required to use the Symons system, the system was an approved product and (2) if Mycon had properly assembled the Symons forming system, substantially performed its obligations, but was unable to achieve the results because its specifications were insufficient, Mycon was entitled to prevail.

The appellate court agreed that if the contractor had been required to use a proprietary product and the product did not perform as specified, the contractor would not be liable, but it disagreed that an approved product had the same effect as a proprietary one. The Court stated:

. . . a contract provision calling for the quality of the product to be the equivalent of a specific manufactured product is a performance specification involving no implied warranty, unlike a design specification...

Mycon Corp., supra 651 So.2d at 153. The contractor argued that the specification was a representation that the use of the Symons forming system would allow construction in accordance with the contract. The Court did not agree that the specification required the use of the Symons forming system. It noted that the specification concerned only the “skin plate” and there simply was no requirement to use the Symons forming system or

an equal. With the allowance of “or equal” the specification becomes a performance specification giving the contractor the discretion to select methods or products.

These three cases present a common analysis of “brand name or equal.” A specification of a brand name or proprietary product alone is a design specification. The specification of a brand name product comes with all of the detail of that product. This is why brand name specifications are quintessentially design specifications. However, according to the usual analysis the specification of a brand name “or equal,” the addition of “or equal” results in a performance specification. This analysis is too simplistic. Theoretically, whether the discretion to provide an “equal” results in a performance specification should not be determined by the fact that the specification allows “equals” but by the degree of discretion allowed for selecting the “equal.” After all, if the “equal” must be so totally equal to the brand name in materials, measurements and tolerances, it should still be a design specification. On the other hand, if the brand name is listed with the specification of a set of characteristics or salient features relating to the end result by which the “equal” may be judged, the specifications may begin to allow the contractor sufficient discretion to be characterized as performance specifications. FAR 10.004 (b)(3) requires the federal government to specify which features of the brand name are necessary to meet minimum government requirements. However, it is the authors’ view that the listing of salient characteristics alone is insufficient to convert the specification to a performance specification, unless the salient characteristics concern end results, objectives or standards to be achieved.

III. LEGAL CONSEQUENCES OF PERFORMANCE SPECIFICATIONS

The principal consequences of the use of true performance specifications are (1) that there will be no owner’s warranty of the sufficiency of the plans and specifications, (2) that the liability for design failures is shifted from the owner and the designer to the contractor, and (3) that risks arising in performance, such as the risk of unforeseen conditions or necessary changes, are shifted to the contractor. These three issues,

warranty, design risk and performance risk are not clearly distinguishable. As we shall see some courts discuss performance specifications in terms of design risk, others in terms of warranty, while others mix the language of both. Regardless of language, an enormous shift in the allocation of risk occurs with the use of performance specifications.

A. No Warranty of Plans and Specifications.

1. United States v. Spearin, 248 U.S. 132 (1918): While Spearin is usually cited as the foundation case for the existence of the owner’s warranty that work performed in accordance with plans and specifications will be acceptable and not defective, it also stated the rule applicable to performance specifications.

“The general rules of law applicable to these facts are well settled. *Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.* [citations omitted] . . . But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for consequences of defects in the plans and specifications. [citations omitted]” [italics added]

2. *The general rule:* The government does not warrant the accuracy or adequacy of performance type specifications, but only to design specifications such as detailed measurements, tolerances, materials and elaborate instructions regarding how to perform the contract. Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1582 (Fed. Cir. 1987); Aleutian Constructors v. United States, 24 Cl. Ct. 372 (1991). The general rule applies even to the performance portion of mixed specifications as the court in Aleutian stated:

Even though a contract may contain some design specifications, when a crucial element of the contract requires the contractor to use its own expertise and ingenuity, a Spearin warranty does not arise as to that element of the contract.

In Tempo, Inc., ASBCA Nos. 37589, 37681, 38576, 95-2 B.C.A. (CCH) ¶ 27,618 (1995) the government specification required fabrication of precast concrete floor and roof units:

3D3 ¶ 6 . . . for design load conditions and spans indicated and for additional loads imposed by openings or support of the work of other trades. Design of the units and joints shall conform to ACI 318 [“Building Code Requirements for Reinforced Concrete”] and shall consider all loading and restraint conditions . . .

However, the government went ahead to specify hollow core plants of a certain length, width and layout. When the floor topping was placed on the planks, its weight was insufficient to flatten the camber and the contractor had to increase the width of the topping at the walls by up to 1 5/8 inches. The added thickness had repercussions for other parts of the construction, including steel stairways, window heights, etc. Contractor made a claim for the additional costs which the Government rejected, arguing that the camber problems were the contractor’s under paragraph 3D3 ¶ 6. In other words, 3D3 ¶6 was a performance specification and, as such, the contractor had the responsibility for any defects not the government. The ASBCA accepted the contractor’s claim stating:

The Government’s position might have merit had the selection of plank lengths, widths and layout been left to Tempo. In that event, it is more likely that the risks and responsibilities of coping with camber in the design of the planks and other installations dependent on that characteristic would have belonged to Tempo under a performance specification such as Para. 6 of section 3D3. Having decided to supersede that responsibility with a design-type specification of the factors that control camber, the Government effectively took over that portion of the design and, coincidentally, assumed the cost and performance time consequences of that decision.

The case well illustrates how the analysis of a specification as design or performance can result in the addition or disappearance of the owner’s warranty of the sufficiency of the plans and specifications.

3. *The remains of the warranty:* While performance specifications do not carry a warranty of the sufficiency of the plans and specifications, the courts have frequently left a small piece of the warranty intact. We noted that in Spearin, supra, the United States Supreme Court stated the principle as: “Where one agrees to do, for a fixed sum, *a thing possible to be performed*, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.” (emphasis

added) The requirement that the performance required by a performance specification should be possible to perform has been generally accepted. In Concrete Placing Co. v. United States, 25 Cl. Ct. 369 (1992), the Claims Court noted:

Only in the relatively rare case where the specifications call for a performance which is impossible to achieve can a contractor obtain an equitable adjustment for defective performance specifications.

See, also, Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991).

In Ruscon Constr. Co., ASBCA No. 39586, 90-2 B.C.A. (CCH) ¶ 22,768 (1990) the ASBCA had before it a contract to install a Halon fire suppression system which would (1) comply with NFPA 12A, (2) produce a maximum of 6% Halon initially and 5% after 10 minutes in the fire area, and (3) “System shall be a total flooding, single shot central storage type...” The contractor was unable to do a central storage type system and sought compensation for extra costs of changing to a system located at each of the protected rooms. The contractor claimed that the central storage system could not possibly also comply with (2). The ASBCA held that while it might be impossible for the system the contractor was installing to comply, other systems could, i.e. the specification was possible of performance. Contractor was denied price adjustment. See, also, Regan Constr. Co. & Nager Electric Co., PSBCA 633, 80-2 B.C.A. (CCH) ¶ 14,802 (1980).

Contrary to the established exception for impossibility, in S & D Mechanical Contractors, Inc. v. Enting Water Conditioning Systems, 71 Ohio App. 3d, 228, 593 N.E. 2d 354 (1991), the court ruled against the subcontractor despite the fact that there was no resin on the market that could satisfy the water softening requirements. The court interpreted the specific specifications as requiring performance and the mere fact that they were impossible to comply with did not relieve the sub-contractor from liability.

B. Design Liability Shifts to the Contractor

1. Factors Shifting Liability

a. Drafting Specifications

In analyzing the question of liability, a tribunal will first make the inquiry: Which party specified the method and means of performance and otherwise accepted the risk of non-performance? The party that drafts the specifications and designs the product normally runs the risk that those specifications will be possible to perform and that the product will be as required. Oak Adec v. United States, 24 Cl. Ct. 502 (1991); J. A. Maurer Inc. v. United States, 202 Ct. Cl. 813, 485 F.2d 588, 594-95 (1973).

For example, in Oak Adec the contractor substantially participated in the drafting of the specifications by attending several forums held by the government, commenting on the proposed specifications, and actively participated in the design process. In fact, plaintiff's advertising states "Oak Adec personnel have been active in the development of the Basic Guide Specification Procedures and Methods utilized throughout the industry." Thus, when Adec discovered that the specifications were defective and commercially impossible to perform, the court had little sympathy for its complaint.

b. Superior Knowledge

Another factor affecting whether risk shifts is the owner's superior knowledge of potential deficiencies. To be applicable, the superior knowledge doctrine requires a finding that the government had special knowledge central to performance and the bidder had no means of ascertaining for itself. Drillers, Inc. EBCA No. 358-5-86, 90-3 BCA (CCH) ¶ 23,056 (1990). This doctrine comes into play only when "the balance of knowledge is so clearly on [the owner's] side that the owner cannot remain silent." Id. As was stated in H. N. Bailey & Associates v. United States, 196 Ct. Cl. 176, 177-78, 449 F.2d 376, 382-83 (1971):

The government violates its contractual obligations if it permits the contractor to bid for a project and subsequently undertake a course of action and pursuance thereof which the Government knows to be defective, provided that the Government possesses knowledge that is vital to the successful completion of the contract, and provided that it is

unreasonable to expect the contractor to obtain the vital information from any other accessible source.

c. Change in Design.

Contractors also need to be aware that a design specification can become a performance specification if the contractor persuades the owner to change the specifications to comply with the contractor's ideas. In such situations, the contractor assumes the risk that performance under its proposed specifications may be impossible. Austin Company v. United States, 161 Ct. Cl. 76, 81 (1963), cert. denied, 375 U.S. 830 (1963).

d. Shop Drawings

The difficulty a contractor can get into utilizing the shop drawing process is highlighted in Aleutian Contractors v. United States, 24 Cl. Ct. 372 (1991). In Aleutian Contractors the contractor submitted its sub-contractor's proposal to change the fully adhered membrane roof system fastened with continuous metal batons to a non-adhered membrane system fastened with eight inch round disks. This proposal was made as part of a shop drawing request for a no cost change. As the contractor soon found out, the proposed design change was unworkable and effectively prevented the contractor from recovering its damages. This is an offshoot of the earlier discussed concept of he who designs the product bears the risk of non-performance.

As usual, the shop drawing process is one large mine field for contractors. In KAM Electrical Enterprises, VABCA No. 2492, 89-1 BCA ¶ 21,558 (1989), the board ruled that the government's approval of shop drawings did not make it liable for errors and did not shift responsibility from the contractor. In announcing this rule, the board reiterated its previous statements that the mere approval of the contractor's submitted data, which did not conform to the contract requirements, does not relieve the contractor of the obligation to comply with contract requirements.

KAM Electrical Enterprises stands in contrast to the ruling in Montgomery Ross Fischer and H. A. Lewis, a Joint Venture, GSBCA No. 7318, 85-2 BCA ¶ 18,108 (1985) (“Joint Venture”). In Joint Venture, the contractor transmitted shop drawings for the heating system which substituted butterfly valves instead of the specified gate valves. The architect’s stamp stated:

Review is only to check for conformance with the design concept of the project and general compliance with the Contract Documents. . . Changes to Contract Documents requirements are not authorized except by Change Order or separate written authorization.

Within the stamped notarization, the government by check mark, indicated, “no exceptions taken.” After the butterfly valves were installed, the government demanded that they be removed. Following removal, the contractor submitted a claim for additional costs. The board approved the cost request because the board found that “when a contractor submits shop drawings that vary the specifications and can concurrently call out the change by conspicuous separate writing, approval of the shop drawings constitutes approval of the variance.” The board was clearly bothered by the government’s attempt to unilaterally change the design and paraphrased the government’s position to “all is approved, except which we may later decide to disapprove. Now get to work.” Thus, the government’s approval of shop drawings may very well shift the burden back onto the government should there later be a problem.

e. Comparative Negligence.

Another factor in determining liability is the relative negligence of the owner and contractor. In Clovis Heimsath & Associates, NASA BCA No. 180-1, 83-1 BCA ¶ 16,133, adopted the comparative negligence doctrine and ruled that a contractor is liable for its own negligence, but not for damages attributable to the negligence of the government. However, it has been held that the comparative negligence doctrine has no applicability where the government’s only responsibilities were design review and

construction monitoring. See William Tao & Associates, Inc., ASBCA No. 32986, 89-2 BCA ¶ 21,588.

Similarly, application of the comparative fault doctrine was rejected in Brunson & Associates, Inc., ASBCA No. 41201, 94-2 BCA (CCH) ¶ 26,936. In Brunson & Associates, the court declined to find any comparative negligence because plaintiff designed and constructed the fabric structure and its efforts included selecting the fabric. The board rejected the notion that the Corps of Engineers was negligent for reviewing the plaintiff's design. This board's decision was based in part on the contractor's superior knowledge of the design elements. The board found that the government's involvement simply did not merit imposition of comparative fault.

2. Composite specifications.

The distinction between design and performance specifications is not absolute. Contracts may have both design and performance characteristics. In Blake Construction Co., Inc. v. United States, 987 F.2d 743 (Fed. Cir. 1993), the court quoted from numerous decisions finding that it is rare that a contract is purely a design contract or a performance contract. The court stated:

It is not only possible, but likely that a contractor will be granted at least limited discretion to find the best way to achieve goals within the design parameters set by a contract. On occasion, the label "design specification" and "performance specification" have been used to connote the degree which the government has prescribed certain details of performance upon which the contractor could rely. However, those labels do not independently create limit or remove a contractor's obligations. These labels merely help the court discuss the discretionary elements of a contract. It is the obligations imposed by the specifications which determine the extent to which it is "performance" or "design," not the other way around.

The court continued by saying, "the real issue is not whether the drawings and diagrammatic notes in their entirety should be labeled design specifications or performance specifications, but how much discretion the specifications gave [the contractor] in the placement of the electrical system." Id. In Blake the appellate court

reversed the Claims Court and found that the plan's depiction of the overhead conduits required that electrical conduits be installed overhead and not underground. While the electrical subcontractor had the discretion, it did not have complete discretion to install the electrical system wherever it wished.

The difficulty in addressing the exact scope of composite specifications is reflected in Haehn Management Company v. United States, 15 Cl. Ct. 50 (1988); and Costello Industries, Inc. ASBCA No. 28731, 89-3 BCA (CCH) ¶ 22,090. Both Haehn and Costello involved the sealing of concrete joints at military airfields. In Haehn, eleven tests were specified to be performed and the sealant product passed all tests. The Navy orally notified Haehn that the samples had passed the tests and that the contractor could begin using the sealing product without waiting for receipt of the written test results. After the sealing work was complete and the contractor left the job site, the sealant began to bubble and have other problems. The Navy demanded that the contractor return to the site and correct all deficiencies. The contractor did this, but demanded to be paid.

Upon review, the court sided with the contractor. The court agreed that it was a mixed specification, but that it was predominantly a design type specification. The court ruled in this fashion despite the fact that the contractor participated in a panel discussion during development of the specification. The court opined that it was a design specification because the contract specified detailed measurements, tolerances of materials, and prescribed in detail both the type of equipment to be used and the methodology for performing the sealant work. Accordingly, the court found that the contractor was entitled to additional payment for its efforts to address the sealant issues.

In direct contrast to Haehn is Costello Industries. In Costello Industries, despite having substantially the same facts as Haehn, the court ruled that the specification was more of a performance specification because the government approved the joint sealant

based not on its acceptability as shown by various samples passing government tests, but rather because the contractor provided a certificate of performance.

Haehn and Costello highlight the extreme fact-intensive nature of this area. The Haehn court seemed to place great weight on the fact that the government tested the samples prior to their being utilized, while in Costello the board found for the owner because the contractor provided a certificate indicating the material's conformance with government specifications. In fact, the Haehn case seemed to turn on the court's appreciation of the efforts of the contractor as for anything else.

C. The Interrelationship Between Design-Build and Performance Specifications

The concepts of design-build and performance specifications are closely allied. Both doctrines provide the contractor a great deal of discretion in constructing the product. In some cases it may be simply a matter of semantics. However, the two doctrines are not identical. In a design-build contract the contractor is given free reign to design. In a performance specification the owner provides some of the design but the contractor is required to complete contract performance utilizing the contractor's own means and methods.

Just as in a design-build contract, when a contract contains performance specifications thereby allowing the contractor discretion to select the means and methods, the contractor is not entitled to recover the cost of changing to the correct means or methods, if its initial selection of the means or methods was wrong. This rule applies to unforeseen conditions.

One example of this is Stuyvesant Dredging Company v. United States, 834 F.2d 1576 (Fed. Cir. 1987), where the court ruled that the claimant was not entitled to additional compensation despite the fact that substantially different soil conditions were encountered during the dredging process. The court ruled that the contract was a performance specification and that the plaintiff was obligated to perform the work in any

method it deemed appropriate. The mere fact that the plaintiff encountered different site conditions did not warrant changing the outcome. Difficulty in completing performance is not something which entitles a contractor to additional compensation. The risk is on the contractor to complete performance with the government warranting nothing.

One exception to this rule is when the owner decides to require a specific means or method which is different from that planned by the contractor. In such situations, an owner may find that its involvement with the method of construction has just changed the specifications from performance based to a design specification and entitles the contractor to damages. One such example is P. J. Dick Inc. v. General Services Administration, GSBGA No. 11679, 12132, 94-3 BCA (CCH) ¶ 26,981. P. J. Dick, presents the issue of what happens when an owner begins to be involved with performance specification. Originally the contract called for crack control joints “subdividing areas into 200 square foot maximum.” In interpreting this specification, the court stated, since that dimension was the maximum, the specification gave P. J. Dick the discretion to place crack control joints subdividing areas of less than 200 square feet. Therefore, this specification is probably described as a performance specification. Subsequently, the owner changed the specifications to require crack control joints only at the center lines of commons. After the concrete was poured and finished, it began to deteriorate and crack in a number of locations. In ruling that the contractor was not responsible for the cracking, the court said that the contract modification “transformed the contract into a design specification which P. J. Dick was obliged to follow, with GSA warranting result.”

Contracts to refurbish or upgrade facilities are many times performance based design-build contracts. The mechanical controls industry frequently uses “performance contracting” which is a contract to meet stated objectives of energy savings (i.e. performance specifications). There are no specifications, only performance objectives established and dollars saved. Thus, a contractor faced with this situation has unfettered

discretion in performing its contract. Similarly, the contractor has unlimited liability should the performance fall short of the required level. In those situations, the contractor needs to be aware that it may be required to design all systems in recognition of contract specifications.

IV. RECOGNITION OF PERFORMANCE SPECIFICATIONS

A. Performance Specification Language

In performance specifications, the first rule to remember is that the owner has no obligation to organize the drawings or specifications in any particular manner. In such situations, it is incumbent on the contractor to review the plans and specifications in great detail and make all necessary inquiries to clarify any ambiguities.

A particular contractor should pay particular attention to the language in the contract setting forth requirements to comply with certain performance tests. The contractor may be required to comply with the performance tests despite the impracticality or even impossibility of performance.

One such example is shown by S & D Mechanical Contractors, Inc. v. Enting Water Conditioning Systems, 71 Ohio App. 3d, 228, 593 N.E. 2d 354 (1991), where the court ruled against the subcontractor despite the fact that there was no resin on the market that could satisfy the water softening requirements. The court interpreted the specific specifications as requiring performance and the mere fact that they were impossible to comply with did not relieve the sub-contractor from liability.

The contractor, in reviewing the specifications, needs to look for the following phrases:

- wherever or whenever necessary
- schematic or diagrammatic only
- as required for [stability or similar result]
- as required for a complete project, whether or not shown on specified occasions or drawings.

- XYZ or equal
- shall comply with or meet [testing requirements]

All of the foregoing language should clearly indicate to the contractors bidding on the project that the owner is not warranting that the proposed project is practical or even possible to perform. As a result, the contractor should diligently review all records to determine the feasibility of the project.

This area is one of the peculiar areas in contract law where labels may not be determinative of the issue, and can in fact be misleading. There is only one salient characteristic of a performance specification, and that is discretion. The ultimate question facing any court in interpreting a contract to determine whether we are dealing with performance specifications or design specifications is the amount of discretion that a contractor has to perform the work.

Arguably, this is the wrong question, because it drives an analysis of the wording in an isolated specification.

Design specifications describe in precise detail materials to be employed and the manner in which the work is to be performed; and they afford no discretion to the contractor . . . “ (emphasis added). Dillingham Construction, N.A., Inc. v. United States, 33 Fed Cl. 495 (1995).

In contrast, performance specifications set forth an objective standard to be achieved, and the contractor is expected to use its ingenuity in achieving that objective or standard of performance (Dillingham Construction, N.A., Inc. v. United States).

The question is, therefore, how much discretion does a contractor have? Arguably very few contracts are totally devoid of any performance specification aspects. Virtually every contract has some aspect where a contractor is expected to use its ingenuity, creativity, and, of course, discretion to achieve the objective goal. Consider the following specification from the Dillingham case:

Contractor is to provide the complete design and is free to provide any design that meets applicable codes, the design Build Criteria, and the Electrical specifications.

The issue in this case was whether the electrical specifications were design specifications or performance specifications. What does it mean to say that the contractor is free to provide any design that meets the electrical specification? The courts used an analysis to determine that the contractor had no discretion to change the electrical specification. Is this language a patent ambiguity in the specification?

Another case, Great American Insurance Company v. North Austin Municipal Utility District, (1995 W.L. 358834 (Tex.)) is a dispute between the owner, the contractor and the surety. The specification in question reads as follows:

The thickness of the sides [of the dry well] shall be determined by the structural requirements for the depth of burial involved but shall be a minimum of 1/4" thick."

The contract involved the refurbishment and relocation of an existing dry well. The contractor removed the dry well and shipped it to a subcontractor for refurbishment. The drawings and specifications didn't include any indication that the sides should be thickened. The other modifications were made and it was installed in a new location. The walls met the 1/4" thickness required by the contract specification. Naturally, about one year after the installation of the dry well into its new location, it buckled inward. The same dry well, with the same thickness, had been in its previous location for over three years without any problem. The question before the court can be essentially characterized as how much discretion did the contractor have to determine the thickness of the dry well walls?

A question that the court failed to consider was whether the design was inadequate (should the minimum thickness have been more than 1/4"). After all, if a contractor fails to fully comply with a design, even though the design may be faulty, then recovery against the government is precluded. How can the contractor satisfy this contract if the work description is a performance specification? However, if the

contractor follows the design, even though faulty, the contractor is not responsible for the consequences of the defect in the plans and specifications. (United States v. Spearin, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 62 Al. Ed. 166 (1918), Mega Construction Company v. United States, 29 Fed. Cl. 396 (1993).)

The state of the current law provides little or no guidance to the contractor and subcontractor. The designation of specifications as design or performance will occur after the fact, using definitions that are unattainable, and an analysis that is formalistic in nature. Making determinations of risk allocation without relation to the party's intentions creates a significant risk for all parties.

C. Methods of Advance Clarification:

1. Once a contractor has a contract, it's a little late to request clarification. Unless the defect is latent, the courts will hold a contractor responsible to provide what it has contracted to provide. The contractor is bound to build according to the plans and specifications prepared by the owner.

So even though there is an implied warranty that the specifications, if followed, will produce a satisfactory product, this concept applies only to design specifications and not performance specifications. (United States v. Spearin)

What about specifications that have the characteristics of both design and performance specifications? Unfortunately, many of the rules and definitions regarding design or performance specifications were written as though the parties could clearly distinguish between the two. In the real world, most contracts have elements of both design and performance specifications, and the distinctions are at best blurred. Even when contracts use labels, such labels do not create, limit or remove a contractor's obligations to perform. (See Mega at 418.) In the event certain details in a drawing are considered more in the nature of a performance specification than a design specification, the court may find that the contractor assumed performance specification obligations.

What happens when the contractor asks for clarifications? Can the answer then transform a performance specification into a design specification? None of these questions can be answered absent a context. However, it's possible through the shop drawing process, and submittals for approval, to theoretically alter a performance specification into a design specification. Because, even though the contractor has used its ingenuity and creativity to develop a performance specification, it is being approved and resubmitted by the owner's representative, which then expects performance to the submittal. However, since the contractor participated in the development of the specifications, there would be no implied warranty.

When in doubt, contractors should ask. There is almost no risk in asking whether there are any performance elements in a specification, and to that extent what are the parameters. Likewise, if a contract is represented to be a performance specification project (a design build project), then the question should be whether there are any design specification elements which must be followed.

The theory of estoppel should prevent any owner from defending or prosecuting a claim based on a characterization which varies from a representation which was relied upon by the contractor.

D. Methods of Risk Allocation:

One of the clear problems is that design specifications with performance elements actually obscure the allocation of risk. The authors believe that the use of the performance specification concept can too easily be used by designers as a defense against claims for defective specifications. The formalistic and mechanical analysis that looks at discretion and fails to look to the party's intentions is altering the intended allocation of risk. The rules are not clear. The courts are inconsistent when determining whether a specification is a performance specification or a design specification. This leads the contractors and subcontractors with very little real guidance, and greatly increases the risk.

The best question to ask is still, how much discretion do I have to perform the work? And, what portion of the work is limited by design specifications, or subject to performance specifications?

V. PERIPHERAL ISSUES ARISING WITH THE USE OF PERFORMANCE SPECIFICATIONS

A. Design Professional Issues:

Another interesting question relating to this aspect of the work is to what extent may a licensed designer transfer design responsibility and liability to an unlicensed person (the contractor)? Is such a transfer of design responsibility legal, and if so why? Most states have strict licensing requirements before someone can actually perform design services within a state. To what extent will state laws allow designers to continue to try to transfer responsibility or risk and avoid responsibility?

Design build is the ultimate performance specification. The contractor assumes responsibility for a total design. But short of a complete design build, what are the obligations of the professional designer?

For example, in the American Insurance case cited above, the court found that the designer transferred design responsibility to the contractor, who dutifully transferred the responsibility to a supplier. As a matter of public policy, how can an unlicensed supplier become responsible for a defective design?

Additionally, from a surety standpoint, how can a surety be held liable for the costs associated with an arguably improper delegation of responsibility?

B. Surety Issues:

VI. CONCLUDING REMARKS

The distinction between performance specifications and design specifications are superficial in their application. While the definitions are clear, application of those definitions to real specifications is inconsistent and negatively affects the allocation of risk between the parties.

The analysis of contract specifications against the definitions for performance and design specification ignores the party's intentions with respect to allocation of risk, and ignores the reasonable expectation of contractors when relying upon design specifications prepared by licensed engineers and architects.

Ultimately, the after the fact allocation of risk through the characterization of specifications as "performance" alters responsibility for design and becomes a defense used by architects and engineers for claims of defective design. Additionally, they shift the burden for design from the licensed professional to an unlicensed subcontractor or supplier. This is not the desired result from either a public policy standpoint or from the standpoint of the owner. What owners would want to rely on designs prepared by an unlicensed party, when they have already hired an engineer to prepare designs? Shifting this burden to contractors, subcontractors and suppliers results in little comfort to an owner who can no longer rely on the protection of errors and omissions insurance since such insurance is not and cannot be carried by a non-designer.

The formalistic and inconsistent analysis used by the courts today have actually altered the Spearin doctrine, altered the allocation of risks between the parties after the fact, created uncertainty, and will inevitably lead to higher prices for the owners. The fact that the courts do not even necessarily allow the parties to rely on their use of labels (labeling specifications as either performance or design), leaves contractors with little option but to assume the worst possible scenario or consequence. Many courts have basically said that contractors cannot rely on the terms and conditions of the contract to determine their obligations, but must wait for a court to decide the scope of those obligations after the fact.

Owners and architects are using these characterizations as a way to defend against claims for defective specifications, and contractors are using the characterizations as a way to avoid legitimate claims by owners for defective construction.

Ultimately, some sense of propriety needs to be reestablished, the public policy and wisdom of the Spearin decision needs to be reestablished, and the parties need to clearly define their intentions in a way that will be enforced through the courts. Ultimately, the parties should be able to express their intentions and then live with the consequences of those intentions in the contracting process.

VII. THREE CASE STUDIES FOR DISCUSSION

- A. Case One**
- B. Case Two**
- C. Case Three**