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***CLAIMS AND DEFENSES OF CONTRACTOR/SURETY BECAUSE OF  
ARCHITECT/ENGINEER'S ACTS OR OMISSIONS***

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## **CLAIMS AND DEFENSES OF CONTRACTOR/SURETY FOR BECAUSE OF ARCHITECT/ENGINEER'S ACTS OR OMISSIONS**

### **ALABAMA**

Commercial Contractors, Inc. v. Sumar Contractors, Inc., 302 So.2d 88 (Ala. 1974). Subcontractors were awarded amount due under contract despite its grade work's insufficiency where it followed design specifications. The court said the subcontractor was not required to reinforce the area, despite its knowledge that such reinforcement was necessary, because it did not expressly guaranty the sufficiency of the grading. Furthermore, the subcontractor's express guaranty to visit and inspect the site did not encompass the sufficiency of the plans.

Mass Appraisal Servs., Inc. v. Carmichael, 404 So.2d 666 (Ala. 1981). Collateral documents were included in construction of contract to render ambiguity over allocation of costs latent.

United States Fidelity & Guar. Co. v. Jacksonville State Univ., 357 So.2d 952 (Ala. 1978). Contractor was liable for defective work of its subcontractors despite architect's specification of material used. Contractor's guaranty of workmanship encompassed the acts of the subcontractors, and it was read broadly enough to include responsibility for an epoxy orally specified by the architect.

### **ALASKA**

Lewis v. Anchorage Asphalt Paving Co., 535 P.2d 1188 (As. 1975). Contractor awarded payments due under paving contract despite defects in work. Although contract had express guaranty that "all work was to be completed in a workmanlike manner according to standard practices," the warranty was modified due to the contractor's required following of detailed plans and specifications. The court also stated that a contractor had a duty to warn owner that no suitable result could be obtained with its specifications.

### **CALIFORNIA**

Katz v. Bedford, 19 P. 523 (Cal. 1888). Where property owners watched work daily, as it progressed without objection, and upon completion with knowledge of the project's condition made partial payment, the court held that whether or not the owners actually accepted the work, their conduct estopped them from contesting payment on the project.

Mannix v. Tryon, 91 P. 983 (Cal. 1907). A plastering subcontractor was not held liable for splotchy result where the specifications detailed the character and quality of material to be used. Although an express warranty to deliver the project "in an undamaged state," was in the contract, that warranty was not deemed to follow into the subcontract. Further the court dismissed the idea that an implied warranty existed in the subcontract from the requirement that the subcontract be performed in a workmanlike manner. The court said that although the usual result is a white wall, since the subcontract had such detailed material requirements, the liability for the result was on the owner.

Sparling v. Housman, 214 P.2d 837 (Cal. Ct. App. 1950). Payment, alone, for project is

insufficient to operate as a waiver, even when owner had knowledge of defects at time of payment.

United States v. Rogers & Rogers, 161 F.Supp. 132 (S.D. Calif. 1958). Architect was denied summary judgment on contractor's counterclaim against it in action by materialmen and laborers. The architect's defense that the contractor was not a party to the contract was denied since privity was not necessary for the contractor's claim of negligent performance of duties.

## **COURT OF CLAIMS**

Aleutian Constructors v. United States., 24 Cl.Ct. 372 (1991). Contractor denied equitable adjustment based on claim of breach of implied warranty of sufficiency of specifications where it persuaded government to change its design specifications, and change resulted in roof blowing off in a wind storm.

Big Chief Drilling Co. v. United States, 26 Cl.Ct. 1276 (1992). Drilling contractor was entitled to recover for both equitable adjustment for changes ordered to correct mistakes, but also for money spent in attempting to comply with government's design specifications.

Dillingham Constr., N.A., Inc. v. United States, 33 Fed. Cl. 495 (Cl. Ct. 1995). Contractor denied claim for equitable adjustment rising from government's insistence on complete compliance with its electrical specifications, despite bid solicitation that mentioned only performance specifications. The court reasoned that despite the bid solicitation, the electrical specifications were precise, and the method used was not among the listed allowable options. Thus, despite method used producing satisfactory result, government was nevertheless entitled to the electrical installation for which it contracted.

Ehlers-Noll, GMBH v. United States, 34 F.3d 494 (Ct. Cl. 1995). The government impliedly warrants that if its specifications are complied with, the result will be satisfactory. In addition, the government warrants that its specifications are possible to meet, and if they are not, the government has breached its implied warranty of the sufficiency of its specifications.

Fry Communications, Inc. v. United States, 22 Cl. Ct. 497 (1991). Contractor entitled to transaction charge for both deletions and subsequent additions where contract language ambiguous. Although there was some contractual support for construing a single "change" as equal to a deletion and an addition, there was specific language that defined both additions and deletions, individually, as "transactions," and the contractor was contractually entitled to charge for each transaction.

Ehlers-Noll, GMBH v. United States, 34 Fed.Cl. 494 (Cl. Ct. 1995). Design specifications provided by government contain an implied warranty that, if complied with, they will produce a satisfactory result. The court also stated that the government warrants that the specifications are possible to meet, and if they are not, the government has breached its implied warranty of the specifications.

GAF Corp. v. United States, 19 Cl. Ct. 490 (1990). Asbestos manufacturer was unable to avail itself of implied warranty of specifications, and thus indemnity from government, incident to suits by shipyard workers. The court reasoned that since the manufacturer failed to show that the products it sold the government differed materially from those it sold commercially, the government had no superior knowledge of the defects, and thus, the manufacturer did not rely on the specifications.

Gresham, Smith & Partners v. United States, 24 Ct.Cl. 796 (1991). Subcontractor unable to recover costs incurred in providing double roofing where contract stated both that double roofing was required, but also that the roof should be installed according to the manufacturer's instructions. Since this ambiguity was obvious, it was patent. Since it was patent, the subcontractor had a duty to inquire as to the true requirement prior to performance.

H.B.Zachry Co. v. United States, 28 Fed. Ct. 77 (1993). Contractor was denied equitable adjustment where contractor supplied roof not in compliance with design specifications. The court held that even if the contract was ambiguous, it would have been patently so, such that the contractor had a duty to inquire at the inception of the contract, when making its bid. The contractor's failure to do so resulted in its acquiring the risk that its interpretation was wrong.

International Transducer Corp. v. United States, 30 Fed. Cl. 522 (Cl. Ct. 1994). Incorporation of regulations into contract conflicted sufficiently with design specifications to render entire ambiguity patent, such that contractor was denied adjustment for increased unit costs.

J.L. Simmons Co., Inc. v. United States, 412 F.2d 1360 (Ct. Cl. 1969). Contractor was not liable for pilings failure where it followed specifications furnished by government. The court reasoned that the government has a presumed expertise when it furnishes specifications, and that such expertise results in an implied warranty that following the specifications will produce a satisfactory result. The court further said this implied warranty was not overcome by general clauses that required the contractor to check the plans, or even to "assume responsibility for the work until completion and acceptance."

Newsom v. United States, 676 F.2d 647 (Ct. Cl. 1982). Contractor was denied recovery for work performed beyond what it had interpreted the contract to include. Although the specifications required the construction of second floors on three buildings, the drawings required a second floor on only one. The court held this error to be "so glaring as to raise a duty to inquire."

Ordnance Research, Inc. v. United States, 609 F.2d 462 (Cl. Ct. 1979). Contractor entitled to equitable adjustment for costs and damages incurred due to explosions which occurred due to government's defective design specifications. The court said, "Specifications having major safety defects are fully as much in breach of the implied warranty as defects in the...commercial possibility of performance."

Southland Enters., Inc. v. United States, 24 Cl. Ct. 596 (1991). Contractor entitled to equitable adjustment where erosion was the result of the government's defective design, and where contractor requested that it be permitted to use a different material, but the government refused. The court also found persuasive a government's construction chief's testimony regarding "the idiot who designed [the project]."

Southland Enters., Inc. v. United States, 24 Cl. Ct. 596 (1991). Contractor entitled to equitable

adjustment where erosion result of government's defective design specifications, not contractor's failure to take adequate precautions.

Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49 (1992). Contractor entitled to recover where it complied as fully as possible with the government's 500 pages of detailed specifications. The court stated that specifications, that covered "virtually every aspect of...facility" were design specifications, and contractor's compliance with specifications induced government's implied warranty of sufficiency of specifications.

United Pacific Ins. Co. v. United States, 497 F.2d 1402 (Ct. Cl. 1974). Surety which took over project was entitled to recover for extra work where government demanded certain performance although the contractual language was ambiguous. The court stated its preference for construing a contract such that all provisions are given effect and harmonized and placed the burden of the ambiguity on the drafter of the contract, the government.

Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17 (1992). Government contractor, a supplier of defoliant, was unable to avail itself of the government's implied warranty of sufficiency of specifications because it failed to prove government's specifications subjected it to tort liability. The court reasoned that: (1) dioxin, the design specification at issue, had never been scientifically proven to cause the injuries that the third parties, veterans, alleged; and (2) the government had immunity from liability to the veterans under the government contractor defense.

## **DELAWARE**

Gilbane Building Co. v. Nemours Foundation, 606 F.Supp 995 (D. Del. 1985). Subcontractors stated a valid claim for negligent misrepresentation where they alleged that the owner's knew or should have known the subcontractors would rely on inaccurate plans and specifications. The court also noted that the requirement of scienter was unnecessary for a claim for equitable relief from fraud.

Ridley Inv. Co. v. Croll, 192 A.2d 925 (Del. 1963). Contractor not liable, even if it was obligated under the contract to provide a structure free from defects, where it informed owner of impossibility of result desired using specifications provided, and owner disregarded warning.

## **DISTRICT OF COLUMBIA**

Bell v. Jones, 523 A.2d 982 (D.C. 1987). Although surveyor was held liable for negligently and erroneously locating property lines and corner angles, its negligent certification was deemed not a negligent misrepresentation. The court stated that the surveyor did not know the intended use of the survey, a requirement to pleading negligent misrepresentation.

Phenix-Georgetown, Inc. v. Chas. H. Tompkins Co., 477 A.2d 215 (D.C. 1984). Construction manager not entitled to summary judgment in suit by owner for failure of warranty that work was of good quality. The owner's claim was not waived despite its acceptance of the work because the defect was latent, not easily discoverable.

## **FEDERAL CIRCUIT**

Al Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1988). Implied warranty not

available to contractor who neither fulfilled the specifications nor tried and failed, but chose to change the specifications after his changes were rejected by government.

Blake Constr. Co., Inc. v. U.S., 987 F.2d 743 (Fed. Cir. 1993). Contractor's judgment for equitable relief for extra costs incurred in installing electrical conduits to the government's satisfaction was reversed. The court reasoned that despite both performance and design specifications being present in the contract, where the contract consistently designated the placement of the electrical conduits, the specifications were design rather than performance. The court stated that the contractor was required to comply with the specifications. Since the specifications were impossible to literally comply with, the contractor was to inquire of the government as to its preference.

Blount Bros. Corp. v. United States, 872 F.2d 1003 (Fed. Cir. 1989). Army Corps of Engineers was denied a downward adjustment of contract where it designated gravel of a certain color and size, that was commercially impracticable to acquire at bid price.

Community Heating & Plumbing Co., Inc. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993). Contractor denied equitable adjustment where possible ambiguity existed. Although the court refused to characterize the conflicting specifications as even an ambiguity, it did state that if it was ambiguous, then it would have been patent since the contractor requested clarification. The government's reply did not clarify the ambiguity, but the court held that it was the contractor's duty to get clarification or proceed at its own risk.

Edward R. Marden Corp. v. United States, 803 F.2d 701 (Fed. Cir. 1986). Contractor was denied equitable adjustment, despite latent ambiguity in contract, where contractor failed to show it relied on lower cost option.

Froeschle Sons, Inc. v. United States, 891 F.2d 270 (Fed. Cir. 1989). Although a contractor was unaware of an inconsistency in drawings when it bid on a project, reliance was still found enough to support a claim for equitable adjustment where the subcontractor relied on the inconsistency in making its estimate, and the contractor relied on the subcontractor's estimate in making its bid.

Fruin-Colnon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990). Contractor was denied equitable adjustment because although it showed that it relied on its subcontractor's reasonable interpretation during performance, it failed to show that it relied on the interpretation during bidding.

Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992). Contractor's claim for equitable adjustment allowed where ambiguity over whether word "issued" applied to OSHA regulations already in effect only, or also to regulations to be promulgated. The court determined that the ambiguity was latent, and therefore, to be construed against the drafter, the government.

Hughes Comm. Galaxy, Inc. v. U.S., 998 F.2d 953 (Fed. Cir. 1993). Non-construction contract case. The court stated that where specific and general provisions in a contract are in conflict, "those that relate to a particular matter control over the more general language," and used that language to impose the extra costs incurred by a satellite owner on the government for changing its launch schedule.

Interstate General Government Contractors, Inc. v. Stone, 980 F.2d 1433 (Fed. Cir. 1992).

Contractor was denied equitable adjustment for its installation of more expensive of two fans possibly required in contract. Since the contract, at different places, designated two different brands of fan, it contained an ambiguity. Since the ambiguity was obvious, it was patent. The court held that where a patent ambiguity exists, the contractor had a duty to inquire of the true meaning of the contract.

Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994). Contractor was denied an equitable adjustment pursuant to a contract to provide a chiller system. The contractor asserted a latent ambiguity existed in the contract, rendering performance possible only by it incurring extra expense. The court declined to determine whether the ambiguity was patent or latent and stated that even if it were latent, the contractor's interpretation, that a cooling system with 150 tons of capacity less than that required in the specifications was unreasonable.

Lear Siegler Mgmt. Servs. Corp. v. U.S., 867 F.2d 600 (Fed. Cir. 1989). Contractor was denied an increase in contract amount, despite ambiguity in contract as to meaning of "vehicular maintenance work order." The court did not reach the question of whether the ambiguity was latent or patent, and denied the increase on the basis that the contractor did not rely on its interpretation of the ambiguity in making its bid, but on its past experience with similar work.

Neal & Co., Inc. v. United States, 945 F.2d 385 (Fed. Cir. 1991). Contractor was entitled to recover extra expense where costs were incurred due to government's failure to specify bond breaker. The court held the omitted specification was a defect of design rather than of performance.

National Surety Corp. v. United States, 31 Fed. Cl. 565 (Fed. Cl. 1995). Surety was awarded damages from the government for costs it incurred in fulfilling its obligations under its performance bond. The surety was damaged due to the government's release of retainages not in compliance with the requirements of the contract. Although the government had the authority to release the retainage upon the approval of a schedule by the Contracting Officer, the Officer had the authority to release the retainage. Nonetheless, a project arrow diagram was required to be submitted and approved. The failure of the government to require the submission of the diagram, and approve such, prejudiced the surety. Finally, the surety did not need to prove reliance "to recover expectancy damages in the amount of retainage that the government should have withheld."

Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987). Contractor was denied equitable adjustment where technical provisions stated average density of material and expressly warned that the values were not indicative of maximum or minimum densities. The court stated the contractor unreasonably relied on technical provisions as they were performance specifications, not design specifications, such that no implied warranty of sufficiency of specifications existed.

United States v. Turner Constr. Co., 819 F.2d 283 (Fed. Cir. 1987). Contractor was entitled to equitable adjustment for a QAC transmitter not listed in specifications but eventually installed, and for the expense of substituting the more expensive transmitter. The court found that the word, "etc." at the end of a list of parts was insufficient to describe the more expensive transmitter, rendering the ambiguity latent. The court also found that although the contractor questioned the omission, it was informed that the expensive transmitter was not needed and relied on that reply in making its bid.

## **FLORIDA**

A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). A contractor has a cause of action in negligence for an architect's negligent performance of his contractual duties, even in absence of privity; however, the contractor, generally does not have an action as a third-party beneficiary under the contract, absent a contractual duty that is intended to benefit the contractor. The court enumerated six instances in which a contractor has a cause of action against a negligent performance of an architect/engineer's duties, including: (1) negligent preparation of plans or specifications, including corrected plans and specs; (2) negligently caused delays in preparing corrected plans and specs; (3) negligently failing to provide final acceptance/certificate of completion; (4) where the architect had a duty to supervise the contractor's performance, and negligent performance.

Bradford Builders, Inc. v. Sears, Roebuck & Co., 270 F.2d 649 (5th Cir. 1959). Despite general contractual performance specifications, the subcontractor was held not liable for damages arising out of interference with electrical cables. The court held that the owner was responsible for any defects arising out of its design specifications, and that responsibility could not be "overcome by the usual clauses requiring builders to visit the site, to check the plans, to inform themselves of the requirements of the work...and to assume responsibility for the work until completion and acceptance."

E.C. Goldman, Inc. v. A/R/C Assocs., Inc., 543 So.2d 1268 (Fla. Ct. App. 1989). Roofing subcontractor was denied opportunity to raise negligence claim against inspectors of school construction project, who recommended that the roof not be accepted, due to absence of privity. Furthermore, since the subcontractor was not intended to be a third-party beneficiary, the subcontractor had no contractual claim.

Florida Board of Regents v. Mycon Corp., 651 So.2d 149 (Fla. Dist. Ct. App. 1995). Although the instant case concerned an approved product and not a proprietary specification, the court stated that where a contractor has no discretion and is bound to use a specified product which cannot perform as specified, the contractor is not liable if the product is defective.

H&S Corp. v. United States Fidelity & Guaranty Co., 667 So.2d 393 (Fla. Ct. App. 1995). A completing contractor and its surety did not have a cause of action for negligent misrepresentation against the project engineer that prepared an initial report on the site conditions. The court found that the contractor could not have relied upon the report since its representative visited the site and stated he "did not believe the original report." Further, the report was not "false or misleading" as to the conditions of site in the area where the borings were made when they were made.

McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Elec., Inc., J.F., 582 So.2d 47 (Fla. Ct. App. 1991). Subcontractors could not recover purely economic damages from architect who had no duty to supervise construction. The court found stated that the subcontractor was too far removed from the contract for the architects to reasonably foresee their reliance. Further, Florida courts have previously allowed recovery when the architect had supervisory duties.

Metric Sys. Corp. v. McDonnell Douglas Corp., 850 F.Supp. 1568 (N.D. Fla. 1994). Applying California law due to contractual provision, a subcontractor's breach action for termination of contract was denied. The court stated that since the contract required the subcontractor to continue working pending dispute resolution, even the contractor's "impossible to work with" nature was insufficient to

justify stopping performance. The court further stated that impossibility was not shown by inconsistent design specifications where subcontractor failed to demand resolution of them.

Orlando v. H.L. Coble Constr. Co., 282 So.2d 25 (Fla. Dist. Ct. App. 1973). City's implied warranty of suitability of its plans was inapplicable where contractor expressly warranted work would meet performance requirements. Although provisions required the contractor to perform according to the detailed plans, another contained the performance warranty, and a third stated that the warranty was to control over the technical specifications.

School Bd. of Pinellas County v. St. Paul Fire & Marine Ins. Co., 449 So.2d 872 (Fla. Dist. Ct. App. 1984). Where board accepted work after a reasonable inspection, surety was liable for repair of latent defect.

Spancrete, Inc. v. Ronald E. Frazier & Assocs., P.A., 630 So.2d 1197 (Fla. Ct. App. 1994). A subcontractor's negligence and breach of oral contract claims against an architect for negligent supervision were denied. The claims were insufficiently pled; specifically, the negligently claim was not allowed since the exception to the economic loss rule, that the contractor foreseeably relied to its detriment on the architect's supervision, did not apply to subcontractors.

Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., 235 So.2d 548 (Fla. Dist. Ct. App. 1970). Masonry contractor not liable to general contractor despite provision requiring workmanship and materials be of good quality, where bricks specified in contract and used had latent defects. The court held that since the masonry contractor was required to purchase certain bricks, that contractual provision qualified the general "good quality" provision.

## **GEORGIA**

Caribbean Lumber Co., Inc. v. Anderson, 422 S.E.2d 267 (Ga. Ct. App. 1992). A contractor's summary judgment motion was reversed in an action by it for compensation for extra work performed. The contract bestowed broad authority on the engineer to determine all question relating to the materials used, the work and fulfillment of part or all of the contract. The engineer's estimates and decisions were to be conclusive upon the parties and final. However, the court found that summary judgment was inappropriate because the extra work was not authorized in writing as required by the contract, and that specific provisions regarding unsuitable material may have modified the engineer's broad authority.

## ILLINOIS

Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335 (7th Cir. 1335). Contractor's claim of an implied indemnity contract between it and the owner and architect was denied. The court distinguished the construction cases in which implied indemnity is found, which often involve the supply of defective materials. The court said that the situation is then akin to implied indemnity in products liabilities cases. The court specifically noted that indemnity is implied when the fault of the breach is not the defendant's.

People v. Graham, 524 N.E.2d 642 (Ill. App. Ct. 1988). State agency was denied recovery for purely economic loss resulting from architectural and engineering firms negligent performance of professional duties. The court said the owner's loss of "the benefit of his bargain is not an interest tort law protects," and that since the real injuries relate more to a finished product that did not meet the owner's expectations, the claim of negligent performance of professional services would unduly circumscribe precedent.

## INDIANA

Argonaut Ins. Co. v. Cloverdale, 699 F.2d 417 (7th Cir. 1983). Without explaining why, the court held that an engineering firm hired by town pursuant to a contract was not an agent of the town, but an independent contractor. Thus, the town was not responsible for any negligence in the firm's issuance of certificates of completion before the work was actually complete. The court noted that the insurance company was in a better position to prevent errors than the town, and that the insurance company should have objected to the choice of engineer at the inception of the contract.

Board of Comm'rs v. Branham, 57 F. 179 (D. Ind. 1893). Surety discharged despite its principal's overstatement of work done where owner failed to make estimates of work actually complete prior to making payment.

## IOWA

Peter Kiewit Sons' Co. v. Iowa S. Utils. Co., 355 F.Supp. 376 (S.D. Iowa 1973). Engineer not negligent where no evidence that it failed to adequately and competently administer the contract, and where no evidence that it failed to properly test and inspect the project.

Van Buren County v. American Sur. Co., 115 N.W. 24 (Iowa 1908). County not charged with constructive knowledge of contractor's improper substitution of lighter materials even though its certifying engineer knew of the improper materials.

## KANSAS

Glass v. Wiesner, 238 P.2d 712 (Kan. 1951). Implied warranty of fitness inapplicable where contractor warned owner that designs provided would not produce result desired such that contractor entitled to recover final payments from owner.

Seaman Unified Sch. Dist. No. 345 v. Casson Constr. Co., 594 P.2d 241 (Kan. Ct. App. 1979). Engineering company was not negligent despite its instructions and actions causing severe water damage to school. Company was required to prevent debris from falling in drain and placed tape over it which prevented water from draining. The court said the company had a duty to protect the drain from debris clogs even after it had left the site, such that it was required to leave the tape; the company had no duty to return to the site to ensure the removal of the tape.

## KENTUCKY

St. Mary's College v. Meagher, 11 S.W. 608 (Ky. Ct. App. 1889). Where contractor fraudulently misrepresented the extent of work completed, and owner paid, surety was discharged due to owner's failure to inspect work prior to payment, as required in contract.

## LOUISIANA

American Fidelity Fire Ins. Co. v. Pavia-Byrne Engineering Corp., 393 So.2d 830 (La. Ct. App. 1981). Surety awarded judgment against engineering company for its negligent inspection of work and negligent certification of payment which resulted in economic loss to the surety. The surety was denied recovery against the owner ( a municipality) since the city retained an amount sufficient to meet the contractual retainages requirements, and the city's payments to the contractor were made in good faith reliance upon the engineering company's certificates.

Calandro Dev., Inc. v. R.M. Butler Contractors, Inc., 249 So.2d 254 (La. Ct. App. 1971). Engineer deemed not negligent where it disclosed visible defects on several of its visits to site, despite failing to discover a defect in street paving work. The court opined that the engineer was not negligent where the defect could have been best prevented by hiring either an independent inspector or a testing laboratory, but the owner refused to procure either.

Covington v. Heard, 428 So.2d 1132 (La. Ct. App. 1983). In an action against it for a latent defect, a contractor was granted summary judgment where he proved that he complied with design specifications. The contractor had a choice between using plastic, clay, or solid wall pipe. Since the contractor chose plastic, the contract required it to use one meeting the requirements of a particular brand. The court stated the contractor was not required to prove the fault or insufficiency of the specifications, just compliance with them, and that where a contractor uses a particular, brand name material specified in the contract, it is "immune from the defects therein."

Farrell Constr. Co. v. Jefferson Parish, 693 F.Supp. 490 (E.D. La. 1988). Contractor stated a claim in negligence against an engineer for inadequate plans and specifications despite contractual provision that stated engineer had no duty or responsibility to the contractor because the provision did not specifically preclude "negligence." In addition, the provision did not protect the engineer from liability of plans and specifications prepared prior to the contract.

Houma v. Mun. and Indus. Pipe Serv., Inc., 884 F.2d 886 (5th Cir. 1989). Surety's indemnity claim against engineering firm was allowed due to firm's failure to monitor project. Firm sent untrained, unskilled personnel who failed to notice deficiencies that should have been obvious to any reasonably well-trained and observant person.

Milton J. Womack, Inc. v. State, 509 So.2d 62 (La. Ct. App. 1987). Owner not liable for architect's

negligently prepared plans; however, the architect was the agent of the owner when acting as the supervisor of the project.

M.S. Rau, Inc. v. Gibson Roofers, Inc., 657 So.2d 102 (La. Ct. App. 1995). A roofing contractor was required to pay damages to an owner, despite the owner's acceptance of the roof without inspection. The court said that although the contract stated, "final payment of failure by Buyer to inspect the work ... shall automatically constitute acceptance," since the roofing contractor failed to fully perform the work required under the contract, the owner did not waive his right to damages. The court stated that since the contractor breached first, the owner's failure to inspect did not "negate the contractor's liability" for its breach of contract.

Nat'l Am. Bank of New Orleans v. Southcoast Contractors, Inc., 276 So.2d 777 (La. Ct. App. 1973). Contractor's surety unable to assert estoppel of owner contesting completion of work, despite owner's premature payments made upon architect's certificates of completion. In determining whether an accord and satisfaction had been reached, such that the owner would be estopped from claiming the work certified had not been completed, the appellate court distinguished between cases where the project at acceptance was substantially completed, and the project at issue, which all knew was not substantially completed when the certificates, and payments, were made. The court further distinguished between payments made in good faith upon architect's certificates, as expressly required in the contract, and an owner's violation of express provisions in making premature payments. Finally, since all of the parties knew the project was not substantially complete when the payments were made, the court found that the surety could not have relied to its detriment upon the certificates of completion.

New Orleans Aviation Board v. Vicon, Inc., 529 F.Supp. 1234 (E.D. La. 1982). Contractor was not relieved of liability for latent defects despite engineer's final acceptance. However, the engineer was also held liable for its failure to properly inspect and certify work.

## **MASSACHUSETTS**

Fontaine Bros., Inc. v. Springfield, 617 N.E.2d 1002 (Mass. App. 1993). A contractor was denied extra compensation where the architect determined that the problem incurring the extra work was anticipated. The specifications regarding the problem contained language, "necessary to permit construction," which placed the burden of the extra work on the architect. The court refused to review the architect's determination since the contractor failed to allege, and there was no evidence of, fraud, bad faith, arbitrary or capricious action, or action by the architect outside his authority.

## **MICHIGAN**

Ramada Dev. Co. v. United States Fidelity & Guaranty Co., 626 F.2d 517 (6th Cir. 1980). Subcontractor's surety not discharged despite contractor's premature payments for work which the contractor knew had not been completed due to contractor's good faith belief that the subcontractor would be able to complete the job once it received the payments.

## MINNESOTA

Allen v. Eneroth, 137 N.W. 16 (Minn. 1912). Surety not discharged where obligee/owner made payments in good faith reliance on forged receipts provided by contractor.

## MISSISSIPPI

Columbus v. Clark-Dietz and Assocs.- Eng'rs, Inc., 550 F.Supp. 610 (N.D. Miss. 1982). Architect held liable to city and contractor for its failure to exercise ordinary professional care in its design of a city project. The court further stated that the architect's duty was non-delegable, rendering architect's reliance on third-party information irrelevant.

Owen v. Dodd, 431 F.Supp. 1239 (N.D. Miss. 1977). Architect's summary judgment motion was denied in an action by a contractor for negligent preparation of plan and specifications. Again, privity was not necessary for the contractor to recover economic damages.

## MISSOURI

Sandy Hites Co. v. State Highway Comm'n, 149 S.W.2d 828 (Mo. 1941). In dicta, a contractor may recover if he builds what he was contractually required to build, despite the finished product being insufficient for the owner's purposes.

Aetna Ins. Co. v. Hellmuth, Obata, & Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968). Surety's claim against architect for architect's failure to properly supervise construction project allowed. The court stated that if architect knew, or should have known, that the contractor, who had already been paid, was not paying its subcontractors and materialmen for work done and supplies delivered, the architect had a duty to correct the situation.

Aylward v. Baer, 745 S.W.2d 692 (Mo. Ct. App. 1988). An individual sued the city and the electric company from injuries arising out of a vehicular accident. The electric company was not liable to the extent it followed the city's specifications and was immune from suit to the extent the city was, despite its failure to comply with the plans.

Barrett v. Jenkins, 510 S.W.2d 805 (Mo. Ct. App. 1974). In dicta, court stated that contractor does not guaranty that others plans are sufficient, and no matter the result, the contractor should be paid when he does what he agreed to do.

Beattie Mfg. Co. v. Heinz, 97 S.W. 188 (Mo.Ct.App. 1906). Owner was not entitled to delay damages, and contractor was entitled to recover for extra work, where contractor was delayed due to awkward pitch of floor upon which contractor was to construct a building. The contract required the owners to provide the surface upon which plaintiff was to build, and the contract imposed no duty upon the contractor to ascertain whether the floor was level prior to preparation of the building.

Bernard McMenemy, Inc. v. State Highway Comm'n, 582 S.W.2d 305 (Mo. Ct. App. 1979). Contractor seeking recovery for misrepresentation established it by showing that conditions encountered at site differed from those represented by commission such that extra costs were incurred, and commission was not immune from tort liability.

Bruton v. Sellers & Marquis Roofing Co., 168 S.W.2d 101 (Mo. Ct. App. 1943). Contractor not entitled to recover where state's architect refused to accept roof built according to state's specifications. State was allowed to refuse acceptance, despite performance according to specifications, because contractor promised the roof would not leak.

Bryant v. Murray-Jones-Murray, Inc., 653 F.Supp. 1015 (E.D. Mo. 1985). Architect's motion to dismiss action against it for failure of professional duty denied. The district court distinguished between the negligent rendition of professional services and the negligent manufacture or provision of a defective product.

Business Men's Assurance Co. of Am. v. Graham, 891 S.W.2d 438 (Mo. Ct. App. 1995). Owner allowed to recover damages from incomplete/defective work due to architect's failure to perform its contractual duties of properly designing and certifying work. However, the court held there was no basis for owner's negligence per se claim because the statute relied upon, RSMo. §327.411, regarding an architect's seal, was not designed to prevent the owner's economic injury resulting from the architect's failure of its duty.

Clark v. Humansville, 348 S.W.2d 369 (Mo. Ct. App. 1961). Contractor presented a proper case for misrepresentation, despite failing to plead either scienter or negligence. The court stated that misrepresentation is not an action in fraud or deceit, thus scienter is not a prerequisite to recovery.

Continental Bank & Trust Co. v. Am. Bonding Co., 605 F.2d 1049 (8th Cir. 1979). Surety not discharged where costs exceeded the initial cost estimates because costs were attributable to original plans.

Cox v. Freeman, 321 F.2d 887 (8th Cir. 1963). City and its engineer not liable to contractor for balance due since an agreement between the parties resulted in an accord and satisfaction. The parties disputed the amount owed for the project, agreed upon an amount, the engineer tendered payment, and the contractor used payment to its advantage. The engineer was also discharged by the accord and satisfaction under tort theory.

Dillard v. Shaughnessy, Fickel and Scott Architects, Inc., 884 S.W.2d 722 (Mo. Ct. App. 1994). A general contractor was required to indemnify architects and engineers on a construction project for attorney's fees incurred by the architects and engineers in defending a suit by an employee of a subcontractor for injuries sustained at the site. The court stated that the contract required the indemnification of the architects and engineers for that portion of the damages caused by the contractor's or subcontractor's negligence, despite any negligence of the architects or engineers. Further, since OSHA cited the subcontractor for serious safety violations, there was an indication that the contractor's subcontractor's negligence was responsible for the entire claim (which was to be determined on remand).

Eveready Heating & Sheet Metal, Inc. v. D.H. Overmyer, Inc., 476 S.W.2d 153 (Mo. Ct. App. 1972). Contractor does not guaranty the sufficiency of another's plans and should be paid when he

complies with them.

Hall v. Union Indem. Co., 61 F.2d 85 (8th Cir. 1932). Owner held liable where architect waived contractual provision of requiring complete performance prior to payment, partly because the provision was also for the surety's benefit.

Hart and Son Hauling, Inc. v. MacHaffie, 706 S.W.2d 586 (Mo. Ct. App. 1986). A contractor was awarded the amount of progress payments authorized by an architect but unpaid by the owner, as well as its expected profits, despite its not finishing the project. The court said that the owner's refusal to make payments upon the architect's certificate, despite her contractual duty to do so, justified the contractor's halting of work. Further, the owner's subsequent refusal to allow the contractor to finish the work was such an injury that the contractor was entitled to its expected profits.

Ideker Inc. v. State Highway Comm'n, 654 S.W.2d 617 (Mo. Ct. App. 1983). Contractor recovered due to government's incorrect assertion that project would be a "balanced job." The court stated the elements of positive misrepresentation as: (1) positive representation by governmental entity; (2) of a material fact; (3) that was false or incorrect; (4) lack of knowledge by the contractor that the representation was false or incorrect; (5) reliance by the contractor on the false representation; and (6) damages sustained as a direct result of the misrepresentation.

Julian v. Kiefer, 382 S.W.2d 723 (Mo. Ct. App. 1964). Payment of labor and material bills without architect's certificate that materials were purchased and work done, resulted in owner's waiver of completion issue. The court opined that the owner's payments were inferred by the contractor that the certificate requirement was waived, and that the payments made at the contractor's request did not counter the owner's waiver.

Massachusetts Bonding & Ins. Co. v. John R. Thompson Co., 88 F.2d 825 (8th Cir. 1937). Surety not discharged despite original plans being completely substituted where underlying contract wasn't changed, and any increased risk to the surety could have been offset by additional premiums.

Massman Constr. Co. v. Lake Lotawana Ass'n, 210 S.W.2d 398 (Mo. Ct. App. 1948). Contractor was not entitled to extra compensation for rock excavation where engineer's estimate of excavation, which was agreed by the parties to be binding, did not encompass the extra work. The court indicated that such estimates may be impeached for mistake, bad faith, or fraud.

McCarthy Bros. Constr. Co. v. Pierce, 832 F.2d 463 (8th Cir. 1987). Contractor denied fee, despite architect's certificate. Although AIA general conditions were incorporated into the contract partially financed by HUD, the court held that the FHA form, which required a HUD representative to certify when the project was substantially complete, controlled. Since the HUD representative did not so certify, the project was not yet substantially complete.

North County Sch. Dist. v. Fidelity & Deposit Co. of Md., 539 S.W.2d 469 (Mo. Ct. App. 1976). Pursuant to school district suit against contractor for leaky roof, court stated that the burden to show that the contractor did not follow the specifications was on the district.

Phoenix Assurance Co. of N.Y. v. Appleton, 296 F.2d 787 (8th Cir. 1961). Contractor's surety not entitled to judgment against city that its principal had substantially completed project. Although engineer certified the work, and the contract stated that determinations of architect would be final and

conclusive, the contract was ambiguous as to whether the city also had to accept the work prior to an accord and satisfaction. The court interpreted the ambiguous contract to require the city's acceptance prior to the project being deemed substantially complete.

Public Water Supply Dist. No. 8 of Jefferson County v. Maryland Casualty Co., 478 S.W.2d 293 (Mo. 1972). Surety obligated to compensate for deficiencies of contractor where engineer, upon whose certificate completion of the project would be determined, refused to certify his final acceptance.

Richardson v. Collier Bldg. Corp., 793 S.W.2d 366 (Mo. Ct. App. 1990). General contractor was barred from recovering damages from subcontractor who failed to do required soil compaction tests. Subcontract required contractor (or its on-site agent) to notify subcontractor of when tests needed to be done. On-site job superintendent's authority to require tests, in light of his knowledge of their not being done, rendered the superintendent an agent of the general, such that the superintendent's knowledge was imputed to the general. Therefore, the general's continued construction after learning that the tests were not done was deemed a failure to mitigate damages, thus barring its recovery.

Sanders Co. Plumbing v. Independence, 694 S.W.2d 841 (Mo. Ct. App. 1985). Contractor able to sue city for money's due after contractor completely complied with city's plans and specifications.

Stiers Bros. Constr. Co. v. Moore, 158 S.W.2d 253 (Mo. Ct. App. 1942). Where engineer's estimates deemed to be conclusive and final absent fraud and mistake, contractor was unable to litigate issue of amount of excavation, since the contractor failed to assert fraud or mistake.

Webb-Boone Paving Co. v. State Highway Comm'n, 173 S.W.2d 580 (Mo. 1943). Where engineer authorized use of excavation method that could not be used once subsurface conditions were discovered, commission not liable for extra costs incurred by excavator for the engineer's misrepresentation because the contract expressly stated the engineer was without authority to change the plans.

Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967). Surety's indemnitor had actionable claim against architect where owner paid upon architect's certificates of work completion and material payment when work was not complete and some of the materials had not been delivered. The Supreme Court held that the architect failed its contractual duty to certify for materials actually purchased and work actually done, and that the architect's failure resulted in less funds available to be used by surety to pay for completion upon the principal's default.

Will v. Carondelet Savings & Loan Ass'n, 508 S.W.2d 711 (Mo. Ct. App. 1974). Building owner failed to show that defects were not due to specifications such that contractor and subcontractor were entitled to recovery.

## **MONTANA**

United Pacific Ins. Co. v. Flathead, 499 F.2d 1235 (9th Cir. 1974). Contractor was entitled to final payment, despite defects and general guaranty of workmanship that was to survive final

acceptance of engineer where the contractor corrected deficiencies during guaranty period. The court noted that a later acceptance of corrections precluded defense of owner, since owner failed to claim defects were latent.

## **NEBRASKA**

Cillessen Constr. Co. v. Scotts Bluff City Hous. Auth., 348 N.W.2d 418 (Neb. 1984). Contractor unable to avail itself of equitable estoppel because it failed to show that the housing authority's conduct amounted to a false representation or concealment, and that it relied upon that representation. The court stated the elements of equitable estoppel: (1) false representation of material facts, or which is calculated to convey the impression that the facts are not those which the party subsequently asserted; (2) the intention or expectation that such conduct will be acted upon by, or influence, the other party; (3) actual or constructive knowledge of the "real" facts. Other party's (4) lack of knowledge of truth of facts; (5) good faith reliance on the conduct or statements of the party to be estopped; and (6) action or not of a character as to change the position or status of the party claiming estoppel, to his injury, detriment, or prejudice.

RaDec Constr., Inc. v. School Dist. No. 17, 535 N.W.2d 408 (Neb. 1995). An architect's determination was held to have no reasonable basis, and thus was not determinative of the rights of the parties where the architect failed to consider the presented costs of the claimant/contractor, only the costs presented by the owner, and that the architect did not attempt to verify that its figures bore a "reasonable relationship" to the actual costs.

## **NEW JERSEY**

Board of Educ. of Clifton, v. W.R. Grace Corp., 609 A.2d 92 (N.J. Super. Ct. App. Div. 1992). School district sought damages from contractor who used asbestos in the construction of schools. The court held that although a contractor was responsible for failing to prevent "glaring defects that a contractor of average skill and of ordinary prudence would know...would likely cause injury," the contractor was not liable for the costs of removing the asbestos specified by the board and its architect in 1952.

## **NEW YORK**

Barelo Homes, Inc. v. Tudomawr Corp., 625 N.Y.S.2d 599 (N.Y. App. Div. 1995). A developer's claim against its paving contractor for costs incurred in augmented the thickness of a road was denied. The original contract provided that the Town Inspector of the Superintendent of Highways were to accept the work, and the Superintendent accepted the work upon completion. The court said that the determinate of the Superintendent of Highways was binding on the parties.

James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc., 461 N.Y. S.2d 483 (N.Y. App. Div. 1983). Subcontractor was unable to recover damages for breach of warranty, fraud, breach of contract, and negligence against project architect and engineer, but was able to state a claim against the project manager for negligent supervision. Again, the architect and engineer owed no duty, contractual or otherwise, to the subcontractor; but the project manager had duties of care including management, supervision, and inspection of construction.

MacKnight Flintic Stone Co. v. New York City, 54 N.E. 661 (N.Y. App. Div. 1899). Express guaranty that contractor would provide boiler room absolutely water and damp proof was modified by plans and specifications provided by owner such that contractor was not liable when room was not water proof. The court reasoned that since the contractor had no right to depart from the plans, the warranty should be read with the caveat, "provided it could be done [using the plans]."

## **NORTH CAROLINA**

Burke County Public Schs. Board of Ed. v. Juno Constr. Corp., 273 S.E.2d 504 (N.C. App. 1981). A roofing contractor was unable to assert that the owner was estopped from claiming defects after an architect's final certification because the contract did not make the architect's final certificate "conclusive as to performance," but, rather, provided for arbitration of disputes between owner and contractor.

Charlotte v. Skidmore, Owings and Merrill, 407 S.E.2d 571 (N.C. Ct. App. 1991). Architect was not absolved from liability despite contractor's deviation from plans. The court said it was reasonable for the jury to find the city was injured by the deviation and the design specifications.

Davidson and Jones, Inc. v. New Hanover, 255 S.E.2d 580 (N.C. App. 1979). Architect's summary judgment motion was reversed. The court stated that both a contractor and a subcontractor could recover for purely economic loss foreseeable from the breach of the architect's common law duty of care.

Greensboro Housing Auth. v. Kirkpatrick & Assocs., Inc., 289 S.E.2d 115 (N.C. App. 1982). Contractor was protected from liability to housing authority for damages, not only because it followed the plans and specs, but also because both the housing authority and its agents, the architect and the engineer, certified acceptance of the project.

Top Line Constr. Co. v. J.W. Cook & Sons, Inc., 455 S.E.2d 463 (N.C. App. 1995). Contractor was granted summary judgment, and was awarded from its masonry subcontractor, the amount it was backcharged by the owner to repair defective masonry work. The masonry subcontractor was paid as its work progressed, and the subcontractor contended that since the contractor inspected the work, it was estopped from asserting its claim; however, the subcontract provided that the architect's determination would be final, and the architect termed the work, "the worst he had ever seen."

## **NORTH DAKOTA**

Bechtold Paving, Inc. v. Kenmore, 446 N.W.2d 19 (N.D. 1989). Contractor entitled to balance due under contract where architect executed a final inspection and acceptance. The court reasoned that since the contract made the architect the sole judge of quality and acceptance, the certificate was binding on the parties.

Mayville-Portland Sch. Dist. No. 10 v. C.L. Linfoot Co., 261 N.W.2d 907 (N.D. 1978). Contractor's refusal to correct work after so ordered by project architect was deemed a breach of contract. The court stated that when an architect's certificate of substantial completion is required, and the contractor expressly warrants the work, the risk of loss from defective work is on the contractor.

## OHIO

First Nat'l Bank of Akron v. Cann, 503 F.Supp. 419 (N.D. Ohio 1980). Architect held liable to owner for materially breaching contract. Architect failed to inspect and monitor progress on job, despite contract requirement of inspection, but nonetheless signed certificates of completion that the work was done according to the plans, to the best of the architect's knowledge. The court found that both actions constituted breach of contract.

## OKLAHOMA

Wiebener v. Peoples, 142 P. 1036 (Okla. 1914). Proper jury instruction stated, "[owner's] cannot now be heard to complain of ... defects in the work of construction of which they had knowledge at the time and to which they made no objection or in which they acquiesced."

## PUERTO RICO

Taber Partners I v. Insurance Co. of N. Am., 875 F.Supp. 81 (D.P.R. 1995). Contractor was denied its summary judgment motions regarding apparent defects on a construction project and the date at which the project was completed. The contractor claimed that the architect's certificates of payments, and the owner's subsequent payments, rendered its performance complete and free from defects as of the date of certification. The court refused the motions due to specific provisions in the contract that stated the contractor was not relieved from liability by the "activities or duties of the architect," and that no action of any of the parties would constitute a waiver of the rights and duties under the contract.

## RHODE ISLAND

Designed Ventures, Inc. v. Housing Authority of Newport, 132 B.R. 677 (D.R.I. 1991). Again, an action in tort does not need privity, such that a surety may maintain a cause of action against an architect for negligently releasing progress payments to contractor. The surety need prove: (1) the architect's negligence; (2) such negligence was the proximate cause of the loss sustained by surety.

Fanning & Doorley Constr. Co. v. Geigy Chem. Corp., 305 F.Supp. 650 (D. R.I. 1969). Contractor entitled to receive balance due for completion of project where it incurred extra expense due to extra work incident to bad design specifications. Despite the existence of a general provision in the contract which required contractor to assume responsibility for work until completion, since contractor would have been in breach of contract had he deviated from the design specifications, the more specific, design specifications controlled the more general performance specifications. The caveat to this rule: contractor may be responsible for damages where it expressly warranted the work would be sufficient or free from defects.

Fondedile v. C.E. Maguire, Inc., 610 A.2d 87 (R.I. 1992). Contractor was denied additional compensation for extra work required to complete a sea wall. The court reasoned that since the contractor knew of the poor site conditions that occasioned the extra work, it did not rely on information provided by the owner.

Menard & Co. Masonry Bldg. Contractors v. Marshall Bldg. Sys., Inc., 539 A.2d 523 (R.I. 1988). Sub-subcontractor was entitled to payment for overtime work where subcontractor's project

manager expressly authorized the work. The court stated that the project manager's express assurance of payment waived the subcontractor's contractual right to modifications being in writing.

## **SOUTH CAROLINA**

Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85 (S.C. 1995). Contractor was allowed to maintain actions for negligence and for breach of implied warranty of sufficiency for the design and supervision of a water tank construction project. The Supreme Court stated that: (1) the economic loss rule does not apply where "duties are created by contract;" (2) the party who assumes responsibility for designing and overseeing a project for another impliedly warrants the sufficiency of the design and the quality of the construction; and (3) such warranty exists despite the parties lack of privity.

## **SOUTH DAKOTA**

Mid-Western Electric, Inc. v. DeWild Grant Reckert & Assocs. Co., 500 N.W.2d 250 (S.D. 1993). Electrical subcontractor was awarded damages against engineering firm for professional negligence. The court did not address the subcontractor's distance from the contract, and merely reiterated that it must be foreseeable that the subcontractor would have followed the specifications, and that it could be harmed by any negligently prepared specifications.

Rosebud Sioux Tribe v. A&P Steel, Inc., 874 F.2d 550 (8th Cir. 1988). Indian tribe estopped from asserting defects in irrigation work where it did not mention defects at time of final inspection although it did object to other work at that time which was remedied by contractor.

## **TENNESSEE**

Campbell County Bd. of Ed. v. Brownlee-Kesterson, Inc., 677 S.W.2d 457 (Tenn. Ct. App. 1984). Although contractor was liable to school district for many deficiencies in its work, it was not liable for deficiencies caused by inadequate sub-soil. The contractor on three occasions tried to call the inadequacy to the architect's attention, but the architect, the agent of the owner, replied, "build it and shut up."

Christ Lutheran Church v. Equitable Church Builders, Inc., 909 S.W.2d 451 (Tenn. Ct. App. 1995). Contractor liable for negligent supervision of its agent, and could not eliminate its contractually required supervisory responsibility by claiming on-site supervisor was not its agent, but owner's.

## TEXAS

Emerald Forest Util. Dist. v. Simonsen Constr. Co., Inc., 679 S.W.2d 51 (Tex. Ct. App. 1984). Contractor was held liable for defective work, despite defect arising from inadequate design specifications. Contractor expressly warranted that it would correct any defective work within one year of completion, without cost to either the district or the engineer. Also, contractor was contractually required to inspect site and acquire clarification from engineer prior to submission of its bid, and it failed to do so.

Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1, 902 S.W. 2d 488 (Tex. Ct. App. 1993). Contractor and its surety were held liable for defective work in the installation of a well, despite detailed design specifications. The specifications for the thickness of the well were vague, "the sides be sufficient 'for the depth of burial,'" and the contractor expressly guaranteed the "means methods, techniques, sequences and procedures of construction." The court said that the district's implied warranty of sufficiency of specifications did not absolve the contractor from liability in light of the nature of the thickness specifications, and the contractor's express warranty.

I.O.I. Sys., Inc. v. Cleveland, 615 S.W.2d 786 (Tex. Ct. App. 1980). City was denied recovery on its counterclaim against a contractor for defective placement of sewer pipe, despite contractor's express warranty of work. The engineer instructed the contractor to put extra materials into the sewer trench, but refused to put it in writing as required by the contract. The contractor chose to forego the extra materials. The court said although the contractor should have known of the inadequacy of its work, the city's action was time-barred since it was filed more than four years after the completion of the project.

Midland v. Waller, 418 S.W.2d 915 (Tex. Ct. App. 1967). Contractor and its surety were not liable for damages and expenses incurred since owner granted architect authority to supervise and approve work and recommend payment, and owner paid-in-full upon architect's recommendation. The court stated the architect's certificate was conclusive on the parties.

Sands Motel v. Hargrave, 358 S.W.2d 670 (Tex. Ct. App. 1962). Since specifications could not be performed in manner consistent with customary plumbing practices, and owner was warned of such, workmanship standard was modified such that standard was satisfied if workmanship was as close to that of ordinary workmanship as the plans would allow. The court stated that a contrary interpretation would hold the plumber to an impossible obligation that it never intended to undertake.

Southern Surety Co. v. Sealy Indep. Sch. Dist., 10 S.W.2d 786 (Tex. Ct. App. 1928). Surety denied recovery of final payment and had costs assessed against it where latent defects appeared after architect certified a project as complete. The court reiterated that the architect's certificate is conclusive evidence of completion absent fraud, mistake, or accident, but added that an obligee may impeach the architect's acceptance. The court further stated that where the architect was not responsible for supervising the work, only for periodic inspections, fraudulent concealment of material defects was sufficient to invalidate the final acceptance; the court implied that the contrary to this, where an the architect is superintendent of the project, fraudulent concealment would not invalidate the certificate.

## UNITED STATES SUPREME COURT

## **United States Supreme Court**

United States v. Spearin, 248 U.S.132, 39 S.Ct. 59, 63 L.Ed. 166 (1918). Contractor was within its rights to refuse to continue work, and was entitled to recover for damages incurred as result of government's defective design specifications which failed to disclose dam in sewer, and prescribed method of severing and re-routing sewer pursuant to construction of a dry-dock. Justice Brandeis stated that the government's specifications imported a warranty that if the sewer was constructed according to the government's detailed plans, the result would be sufficient. Additionally, that warranty was not overcome by general clauses in the contract that required the contractor to examine the site, check the plans, and assume responsibility for the work until it was accepted.

## **VERMONT**

Fairman v. Ford, 39 A. 748 (Vt. 1898). Where a contractor warranted a water tight roof, that warranty was modified by the owner's defective construction requirements, which never could have produced a water tight roof.

## **VIRGINIA**

Continental Ins. Co. v. Virginia Beach, 908 F.Supp. 341 (E.D. Va. 1995). Surety was discharged pro tanto due to city's material deviations from contract by making payments for materials without making inspections. In addition, surety was able to recover its costs for a consulting engineer hired to review and analyze defect repair requests.

C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade and Douglas, 411 F.2d 1379 (4th Cir. 1969). Determination that engineer was negligent, but contractor that physically caused damage to another contractor's property was not, was based upon an improper jury instruction and was reversed. Despite the architect's approval of plans that resulted in damage to the property of another contractor, the court found that the details of the work which caused the damage was the responsibility of the first contractor, and that the damage was possibly the result of improper installation.

Sweeney Co. of Md. v. Engineers-Constructors, Inc., 823 F.2d 805 (4th Cir. 1987). Subcontractor seeking damages for wrongful termination of contract used architect's certificates as evidence that work was substantially complete. The court stated that the certification process could not be simply a "rubber-stamp" process, but that the architect's inspection need not be exhaustive and continuous.

## **VIRGIN ISLANDS**

General Trading Corp. v. Burnup & Sims, Inc., 523 F.2d 98 (3rd Cir. 1975). Architect liable to both contractor and owner for negligent performance of professional duty where it certified and sanctioned unacceptable roof, pursuant to its supervisory duty. Architect was also liable for failing to ensure that designs were in conformance with local building codes.

Whitfield Constr. Co., Inc. v. Commercial Dev. Corp., 392 F.Supp. 982 (D.V.I. 1975). Where contractor warned of defects and attempted to correct them with the owner's agent, an engineer who had partially inspected work, the contractor was not liable for the defects.

## WASHINGTON

J & J Electric, Inc. v. Gilbert H. Moen Co., 516 P.2d 217 (Wash. Ct. App. 1973). Prime contractor not estopped from collecting from subcontractor's surety, despite prime's making premature payments to original sub and incorrect estimates of cost of correction in second subcontract. The appellate court found the premature payments did not prejudice the surety where enough retainage remained to care for the slight deficiencies in the paid-for work, and that surety did not rely on the prime's estimates of correction since it conducted an independent inquiry into those costs.

Teufel v. Wienir, 411 P.2d 151 (Wash. 1966). Despite AIA *standard* guaranty, contractor deemed not liable where inadequacy of wall for purpose intended was due to design, not due to faulty material or workmanship. The court distinguished between the broad standard guaranty and one where a contractor guarantees the satisfactory operation of all materials installed, for which there would be liability.