

# Contractor Versus Design Professional:



## Who's responsible?

by Timothy R. Hughes

The Virginia Supreme Court recently issued an opinion offering substantive direction to counsel involved in construction litigation over the respective rights and responsibilities of contractors and design professionals. In *D.C. McClain v. Arlington County*<sup>1</sup>, the Supreme Court reaffirmed its historical position that the express contractual intent of the parties governs their relationship. Further, the *D.C. McClain* case offers guidance in the difficult apportionment of design versus construction responsibility.

### *Construction Contracts Versus*

#### *Design Specifications*

Construction contracts are typically based on either design specifications or performance specifications. Design specifications provide highly detailed instructions to the contractor on the precise way to construct the project.<sup>2</sup> A number of construction litigation cases based upon the case of *United States v. Spearin*<sup>3</sup> ruled that contractors are entitled to recover damages incurred as a result of defective design work in design specification contracts. Design specifications are viewed as having an implied warranty, which, if followed, will produce satisfactory results.<sup>4</sup>

Virginia Law recognized this principle in ruling that a construction contractor following plans and specifications furnished by the owner is not responsible to the owner for damages arising solely from defective plans and specifications.<sup>5</sup> In *Chantilly Construction Corp. v. Commonwealth of Virginia*, the Virginia

Supreme Court used a similar analysis in reversing the trial court's decision to grant a motion to strike barring a contractor's claim for damages.<sup>6</sup> Citing *Spearin*, the court in *Chantilly* found the contractor presented sufficient evidence of a defective design specification in a highly detailed specification for pavement mixture testing for the contractor's claims, including delay damages, to survive a motion to strike.<sup>7</sup>

In contrast, performance specifications merely dictate the desired end result. Rather than issuing detailed instructions to the contractor, performance specifications require that the contractor exercise ingenuity over means and methods to determine the proper way to reach the final goal.<sup>8</sup> Contracts can contain mixtures of performance design-based specifications in particular elements of construction.<sup>9</sup> Courts applying performance-based specification analysis have held that performance specifications do not contain implied warranties and barred actions for damages based on allegedly defective specifications.<sup>10</sup>

### *The D.C. McClain Case*

In *D.C. McClain*, the Virginia Supreme Court affirmed the trial court's ruling setting aside a jury verdict awarding substantial damages to the contractor. The Court reasserted its bedrock principles that contracts provide the rule of law for the relationships of the parties. Finally, the Court restated that the question of contractual interpretation and enforcement lies with the court rather than the trier of fact.

The case involved construction of a single-span, cast-in-place post-tensioned bridge in Arlington County. The bridge was to rest upon abutments that were constructed by an adjoining landowner. The contractor claimed that a number of alleged design errors in the project documents caused damage to the bridge. The county and its engineering consultant (the "A/E") argued that the methods of post-tensioning was a performance specification. The design provided only the final shape of the bridge and its capacity. How the contractor achieved these contract objectives was up to the contractor.

What were the contractor's claims? First, the contractor said that there was not enough space behind the bridge abutments to fit the hydraulic jacks required for the post-tensioning process. At trial, the contractor asserted that an easement was necessary to cut through the backwalls of the abutments to permit post-tensioning. The contractor claimed that the design was unbuildable due to the unavailability of the necessary easement.

Second, the contractor asserted further design errors based upon dimensional discrepancies in the elevations of the abutments shown on the drawings. These discrepancies were discovered by the contractor after the start of construction of the bridge.

Third, the contractor claimed that it suffered damages because of an allegedly defective shop drawing that was approved by the county and A/E on the project. After construction on the project began, the contractor decided to use a post-tensioning methods utilizing cut-outs, or block-outs, into the surface of the bridge to fit the post-tensioning jacks. The contractor submitted shop drawings for the block-out-method that were reviewed and approved by the A/E and stamped by the county. The method eventually proved unworkable as the block-out method would have lead to shear failure, placing excessive loan on inadequate temporary shoring and a collapse during construction onto the street below.

Upon discovery of the problem with the block-out method, the project ground to a halt. A debate ensued over whether the block-out method was a contractor responsibility or the result of a defective design specification. After issuing several notices of default, the county terminated the contractor. The contractor sued the county for wrongful termination and damages based upon the allegedly defective design. The county, in turn, filed a counterclaim against the contractor as well as third party claims against the contractor's surety and the A/E.

#### ***The Court's Ruling***

Reviewing each of the contractor's claims, the Court rejected the arguments of the contractor based upon the clear and unambiguous terms of its contract with the county. Testimony at trial revealed that the contractor knew of both the requirement for a temporary easement to post-tension the bridge and its unavailability before the contract was executed. The clear terms of the contract provided that the contractor was required to obtain all easements not shown on the drawings and no post-tensioning easement was shown on the plans.

The Court also held that the contractor was barred from recovering damages based upon dimensional discrepancies found during construction, noting that the contract required the contractor to verify all field dimensions before proceeding with the work. This provision was in the contract to avoid the very problems that the contractor now claimed as damages.

Based upon the clear terms of the contract, the contractor was responsible for the accuracy of all shop drawings. The contractor was not relieved of its requirement to comply with the contract documents and complete the bridge based upon the review and approval of the shop drawing by the county and the A/E. The Court also quoted in its entirety the shop drawing review and action stamp of the design professional which indicated that approval did not relieve the contractor of its responsibility for the accuracy of its shop drawings. The Court's ruling in this regard significantly undercuts the often used argument of contractors that A/E shop drawing action shifts responsibility from construction to design.

Finally, the Court held that the contractor could not recover damages on its claim for wrongful termination, rejecting the contractor's argument that the lower court committed reversible error by taking the question away from the jury. The contract stipulated the importance of time and the contractor failed to complete the bridge within the allotted schedule. Further, the contractor admitted that the bridge was buildable with an easement and the contract required it, not the county, to obtain such easements.

#### ***D.C. McClain as a Model***

The *D.C. McClain* case offers important guidance to counsel involved in construction litigation. The Court construed many contractual terms that have widespread use in the construction industry and have seen little direct interpretation by Virginia's highest court. Contracts using the critical terms of easement acquisition, verification of field conditions, and shop drawing review and approval are a necessary component of the risk allocation of the parties on a construction project. Each of these terms directly impacts the fundamental question of design versus construction responsibility. By interpreting and enforcing these types of contractual provisions, the Court has offered substantial direction to construction litigation attorneys grappling with the thorny question of design versus construction responsibility.

The importance of the D.C. *McClain* case is underscored by its procedural posture. By affirming in whole the trial court's ruling setting aside a substantial jury verdict, the Virginia Supreme Court has again sent the clear message that it will enforce the express terms of construction contracts that dramatically impact risk allocation. This background, coupled with the nature of the contractual terms interpreted and enforced, dictates that attorneys involved in future construction related representation follow the direction of the *D.C. McClain* case and carefully reviewed and interpret the contractual allocation of design and construction responsibility.

#### **ABOUT THE AUTHOR**

Mr. Hughes is an attorney with the law firm of Carr, Goodson & Lee, P.C. where practice focuses on representation of parties involved in a variety of construction related matters in the Commonwealth of Virginia and the District of Columbia. Mr. Hughes and Mr. James F. Lee, Jr., of Carr, Goodson & Lee, P.C., represented the A/E in the trial and appeal of the *D.C. McClain v. Arlington County* case.

## Endnotes

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- 1 249 Va. 131, 452 S.E.2d 659 (1995).
- 2 *See e.g., J.L. Simmons Company, Inc. v. United States*, 412 F.2d 1360, 1362 (Cl. Ct. 1969).
- 3 248 U.S. 132, 39 S. a. 59, 63 L. Ed. 166 (1918).
- 4 *Simmons*, 412 F.2d at p. 1362.
- 5 *See e.g., Greater Richmond Civic Recreational, Inc. v. A.H. Ewing'sSons, Inc.*, 200 Va. 593,595-96, 106 S.E.2d 595 (1959).
- 6 6 Va. App. 282,369 S.E.2d 438 (1988).
- 7 6 Va. App. at 292-95, 369 S.E.2d at pp. 444-46.
- 8 *Simmons*, 412F.2d at 1362.
- 9 *See e.g., Aleutian Constructors v. United States*, 24 Cl. Ct. 372, 379 (1991).
- 10 *Id.* At pp. 378,381.