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AGC suggests the following legislative language to address concerns it believes was raised by the Brightwater case (see article on reverse for more background info):

A provision, covenant, promise, agreement, or understanding in, or in connection with or collateral to, a construction contract as defined in RCW 4.24.370, including but not limited to a public work contract as defined in RCW 39.04.010, that requires a contractor to assume responsibility for or transfers the assumption of risk from the Owner to the contractor for the completeness, accuracy, sufficiency, and/or constructability of the plans, specifications, or explicit Owner requirements, except with respect to clearly designated contractor designed scopes of work, is against public policy and is void and unenforceable.

It is anticipated that this would be a new section under RCW 4.24 (Civil Procedure/Special rights of action and special immunities).

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(From AGC newsletter)

State Supreme Court refuses to review Brightwater case; contractors should be aware of increased liability risk

By refusing to review a lower court ruling in the Brightwater tunnel project case, the State Supreme Court laid waste to the traditional and expected allocation of risk on construction projects that had long been applied by Washington Courts. AGC and other construction groups had asked the Supreme Court to consider the Brightwater case, as lower court decisions drastically narrowed the implied warranty which will result in changes throughout the construction industry in Washington.

The Supreme Court's action means contractors will be forced to enter contracts with extreme caution due to the increased risk of liability if the owner's plans are not suitable for the intended purpose. Contractors will have to account for this uncertainty by increasing their bids with contingencies for the unknown, which may result in windfalls to the contractors in the event the plans are successful. In the long run, the cost will be passed on to the taxpayers. This decision has shifted the law in a new direction that will have an adverse impact on the industry for years to come.

In June 2006, King County awarded VPFK (Vinci Construction Grands Projects, Parsons RCI, Frontier-Kemper) a Brightwater Project tunneling work contract. The County specified which boring machine (the Slurry Tunnel Boring Machine "STBM" method) was to be utilized in performing the work. During performance, VPFK's progress was substantially slower than anticipated because the County-specified STBM method was not suitable for the work to be performed under the soil conditions. The STBM ultimately failed, and VPFK's performance was behind schedule.

The County sued VPFK for default. VPFK cross-claimed asserting the County's plans and specifications were defective, in breach of the owner's implied warranty (the Spearin Doctrine). The trial court granted summary judgment to the County dismissing VPFK's claim that the County had breached the implied warranty of plans and specifications.

Division I affirmed that decision holding that because "there was no evidence that a machine other than the STBM could effectively accomplish the task of boring the site specific tunnel drives," the owner's implied warranty did not apply. Additionally, both the trial court and Division I cited VPFK's preference for the STBM method as grounds for the finding that there was no evidence to support VPFK's breach of implied warranty claim.

In the construction industry, one of the most prominent implied warranties is that owners who provide plans and specifications to their contractors impliedly warrant the adequacy of their plans and specifications. That implied warranty had its beginning in the 1918 US Supreme Court decision popularly known as the Spearin Doctrine.

Division I's decision is a severely narrow reading and application of the implied warranty. As Division I has applied the Spearin Doctrine, a contractor will not be entitled to the owner's warranty if it agrees the owner's specification will work. If upheld, the decision will radically alter the landscape of construction contracting and impede the cost-effective procurement of public works construction projects in the State of Washington.

(over)

First, Division I held that because "there was no evidence that a machine other than the STBM could effectively accomplish the task of boring the site specific tunnel drives," the owner's implied warranty did not apply. Any requirement, however, that a contractor establish the existence of a viable alternative to the specified method in order to establish a breach of implied warranty claim is contrary to the central concept of the Spearin Doctrine—that the plans and specifications as provided are warranted as accurate. The existence of a viable alternative to this specified method has no bearing on whether the specified method would result in success. Being required to prove otherwise is inconsistent with this established warranty.

Second, as Division I has applied the Spearin Doctrine, a contractor will not be entitled to the owner's warranty if it agrees the owner's specification will work—a scenario which could occur countless times in the case of latent defects. If that were true, then the only time the warranty could be available would be in cases where the specifications contain a patent defect about which the contractor inquires. Whether the contractor prefers the owner's specified method has no bearing on the existence or extent of the owner's implied warranty.

Third, contractors are required to follow the owner-provided plans and specifications in competitive bidding. Contractors become financially accountable if they veer from the contract drawings and specifications. It is, therefore, inconsistent to also hold contractors responsible for the results when they adhere to the plans and specifications, another effect of this holding. Moreover, Division I's decision undermines the policy purposes behind competitive bidding and, therefore, diminish its effects. If contractors cannot rely upon the implied warranty, they will be required to second-guess the accuracy of the plans and specifications at bid time. Contractors will deem it necessary to increase their bid price or otherwise place contingencies in their bids to protect against the risk of unknown errors and omissions. This will, in turn, increase the cost of construction to project owners and taxpayers.

VPFK submitted an application for review to the Washington State Supreme Court in an effort to reverse Division I's decision and preserve this traditional and expected allocation of risk as has long been applied by Washington Courts. Washington State contractor organizations, such as the Associated General Contractors (AGC), Associated Builders and Contractors (ABC), National Electrical Contractors Association (NECA), and the National Utility Contractors Association (NUCA), all submitted amicus curiae (friend of the court) briefs (AGC Legal Affairs Committee members Mike Grace and John P. Ahlers participated in the writing of those briefs) opposing this drastic change in law.

The Spearin Doctrine, as traditionally applied, is grounded in policy and common law principles that parties should be responsible for their own acts and for conditions uniquely within their control. Such control-based risk allocation incentivizes all parties to work efficiently, reducing overall project costs, and saving taxpayer money. Abandoning this longstanding doctrine and notion of common sense, as was done in Division I's decision and now the Supreme Courts' refusal to review the case, will result in gross inequities and inefficiencies in the construction industry to the detriment of the citizens (taxpayers) of the State of Washington.

- John P. Ahlers and Ceslie A. Blass, Ahlers & Cressman