

DEFECTIVE DESIGN SPECIFICATIONS

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Design (as opposed to performance) specifications in a contract must be free from design defects. Whenever a contract provides a contractor with design specifications, the contract carries an implied warranty that the specifications are free from design defects. When the contractor relies on these defective specifications and experiences additional costs in completing the project, it is entitled to an equitable adjustment. *Wu & Associates, Inc. v. General Serv. Admin*, CBCA 6760, Nov. 10, 2021 is an excellent example of the principle.

Wu had a contract for elevator modernization at a federal building in New York. Prior to award, a bidder submitted a pre-award request for information (“RFI”), and received a response from the General Services Administration (“GSA”).

RFI 37: There is quite a challenge with the unknowns around the false floor on 17. In looking at the type of Imperial machines needed for the low rise/mid rise part of the project, and the size of the machines, even after planning on breaking them down, the weight of the heaviest piece, adding in some weight for material handling equipment, will be approximately 4000 lbs. Can the building engineer comment on the viability of moving that material down the 17th floor hallway and the type of floor protection he would recommend in order to distribute the weight?

Response 37: This would be “Means and Methods” by the contractor. It may be a challenge but requires careful planning. On the 17th floor, proper skids are required over the raised floor to distribute the load.

Both the RFI and the GSA response were incorporated in the contract.

Wu had an engineering analysis prepared that concluded that skids were “not a feasible solution.” Wu submitted a change order request which was denied by the GSA, stating that removal and replacement of machinery and materials required by the contract were the contractor’s responsibility, with no additional government cost. Wu submitted a claim, but GSA denied it stating that the contractor was responsible for all means and methods employed in the contract. Wu appealed the denial to the Civilian Board.

The Board held as follows:

- Wu’s interpretation of RFI 37 was reasonable. This RFI set forth what was required to successfully distribute the load of the elevator equipment for moving. Skids would not work.
- GSA’s interpretation that the use of skids was a “recommendation” was not consistent with the plain language of RFI 37. It was a design specification.
- The GSA’s design specification was defective, and Wu relied on the specification in RFI 37 when he performed.
- Wu was entitled to recover under the FAR Changes clause because of the extra costs associated with the defective design specification in RFI 37

Takeaway. Always ask your contracting officer questions about clarification of ambiguities or design specifications *prior* to a bid submission. If a design specification is defective, and you rely on it, you should be entitled to an equitable adjustment. Note: *performance* specifications which merely advise what the government seeks (e.g. build a car that can go 100 mph, or an airplane that can go Mach 2, without giving specific specifications), do not carry an implied warranty that the specifications are free from defects because they do not contain *design* specifications (e.g. build a car that is 25 feet long, using a Chevrolet 432 cubic inch engine, and giving other specific requirements and specifications.)

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