



# The Bargains We Make

As owners more frequently incorporate engineers as part of their project initiation team (and increasingly rely on engineers to take a project from concept through to fruition), engineers involved in the preparation of design and contract documents must be aware that the decisions they make regarding the drafting of these documents could have significant legal liability issues for the owner, the contractor and the engineer.

In addition, the drafting of the ultimate construction contract (frequently provided by the owner's engineer) can affect the quality of bids received, the number of bids received, and the competitive nature of the procurement process. Engineers must carefully consider the contractual framework for construction or supply contracts they propose as part of their consulting services so that the needs of their client are reflected in the contracts. Based on recent case law, failure to do so may lead to a claim against the engineer.

Who is responsible when a contractor builds a project or supplies materials strictly in accordance with an owner's design and specifications and the project or materials are found to be defective? Perhaps surprisingly to our readers, the answer is this: It depends on the language of the contractor's warranty. The British Columbia Court of Appeal (*Greater Vancouver Water District v North American Pipe & Steel Ltd*) recently held a supplier fully responsible for a defective product when it was the owner's specifications and design that were defective. The reason was that the contractor had specifically agreed the product would be "free from all defects arising at any time from faulty design in any part of the Goods."

Even when the contractor does not prepare the specifications or design and does not give any guidance to the owner on the suitability of the specifications or design for the intended project, the contractor may still be liable for the failure of the product to be fit for its intended purpose or for defective design or both, depending on the warranty language.

## The Facts

The GVWD's engineers prepared detailed design specifications for the supply of water pipe, that were included in a tender. The tender documents permitted a tenderer to submit a bid based on the tender specifications, or on terms that differed from those specifications. North American Pipe & Steel (NAP) did not request any clarification about the specifications, nor did NAP submit a variation, apparently because they felt that doing so would render its tender non-compliant.

After NAP was awarded the contract, it proposed changes to the coating specifications, the specifications that ultimately proved defective. The GVWD did not accept the proposed changes.

NAP supplied the pipe according to the owner's specifications. After installation, the pipe's coating began to delaminate, and was found to contain voids and thin areas.

## The Supply Contract

The Supply Contract contained two key provisions:

1. **A fitness for purpose warranty** – "The Supply Contractor warrants ... that the Goods...will conform to all applicable Specifications...and, unless otherwise specified, *will be fit for the purpose* for which they are to be used."



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2. **A no defective design warranty** – “The Supply Contractor warrants and *guarantees that the Goods are free from all defects arising at any time from faulty design in any part of the Goods.*”  
(*Emphasis added*)

**The Trial**

The “serious defects in the coating” were caused by a general cohesive problem between coating layers arising directly as a consequence of supplying pipe that met the requirements of the owner’s specifications. The judge determined that the pipe was supplied in accordance with the owner’s specifications and also was fit for its intended purpose (prior case law confirms that defects in a product do not necessarily render it unfit for its intended purpose).

NAP was in a catch-22. How could NAP supply the pipe to meet the owner’s specifications (as required by the first portion of the fitness for purpose warranty) when this would mean that the pipe would be defective and a breach of the no defective design warranty? This apparent unfairness was given

considerable weight by the judge particularly since NAP had not been involved in the development of the specifications, nor had it been asked for design input.

To reconcile this perceived unfairness, the judge qualified the design warranty to apply only to design that NAP prepared. As NAP did not perform any design for the pipe, NAP was not in breach of this qualified warranty.

**The Appeal**

The Court of Appeal disagreed. On a plain reading of the Supply Contract, NAP had agreed to provide two *separate* things: (i) pipe manufactured to the owner’s specifications; and (ii) pipe free from defects arising from faulty design.

The Court acknowledged that the practical conflict between the provisions is inescapable when the design is defective (there really is a catch-22), but the Court concluded that the Supply Contract could not be clearer as to NAP’s obligations.

The Court affirmed that the general rule is that defects caused by an owner’s specifications are not the responsibility of the contractor, *unless* the contractor expressly guarantees that the construction would be fit for a specific purpose, *or* a warranty can be implied by the owner’s actual reliance on the contractor’s skill and judgement.

The history of specification development does not matter where the contractual language is clear. The parties will be held to the bargain they struck, including with respect to risk allocation (whether fair or not). The Court made it clear that, absent certain restrictively defined reasons such as unconscionability (rare in commercial contracts) or fraud, it is not the court’s job to protect parties from the bargains they have freely entered into.

**Lessons Learned**

This case is an important reminder to all involved in the construction industry that the courts will strive to enforce *all* the language of contractual documents, even if the result may appear unfair. The following should be kept in mind by anyone involved in the preparation or review of specifications, designs and contracts:

1. Members of the owner’s team preparing specifications or the contract should pay particular attention to the warranties. Is the risk sharing appropriate given the circumstances? Keep in mind that perceived unfairness in risk allocation may lead to fewer bidders and reduced competition, and/or, higher prices, as well as increased time to negotiate and close the ultimate contract. Balanced documents will result in more appropriate risk allocation, better pricing and clearer responsibilities. If the documents are clear and balanced from the beginning, expensive dispute resolution can be avoided.



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2. For engineers and contractors alike, it is important that the ultimate contract to be entered into be read carefully, paying particular attention to warranties. Too often, the business review of a contract focuses only on payment, schedule and length of warranty, while skipping over the “meat” of the warranty provisions on the assumption that it will only require the contractor to perform its work in a good and workmanlike manner. This assumption is dangerous.
3. If the Supply Contract had not contained the no defective design warranty, and external engineers had prepared the specifications and design, a lawsuit against the engineer may well have followed.
4. Members of the contractor’s team should very carefully consider the scope of the warranties. It should not be assumed that compliance with the owner’s specifications and design is a defence if the specifications or design do not work.
5. If, during procurement, questions arise about the applicability or appropriateness of the

specifications or design, clarification should be sought from the owner. This is especially important when the ultimate contract imposes liability on the contractor for design defects even where it is the owner that is supplying the specifications and design.

6. The assumption that the contractor will not be responsible for faulty design if an owner supplies the specifications and design, ie, “If you tell me exactly what you want and I build it, you cannot recover from me later if it is wrong,” is also dangerous. In light of the result in the NAP case, all parties may benefit from legal advice on the wording and interpretation of warranty clauses. ☒

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Peta Wolmarans comes to CH2M HILL with the recent Halcrow acquisition. Peta is a senior transportation and land use planner with 20 years of project experience gained in Canada, the UK, and internationally. She specializes in sustainable transportation solutions which involve the integration of land use and transportation planning.



### Bernard Abelson, P.Eng. – Business Development Lead

Bernard Abelson is a professional engineer with more than 23 years of experience in transportation engineering, marketing, business development, and operations. His experience ranges from transportation planning to detailed design, working with clients in both the public and private sector. Although based in Vancouver, Bernard is responsible for business development throughout Canada for CH2M HILL’s Transportation Business Group.



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