

The Twelve Deadly Sins: An Owner's Guide to Avoiding Liability for Implied Obligations During the Construction of a Project

Steven B. Lesser and Daniel L. Wallach



Steven B. Lesser



Daniel L. Wallach

Owners of construction projects often incur liability because they fail to recognize and comply with certain implied obligations that arise during the design and construction process. In many instances, the owner is unaware that these implied obligations even exist until project participants file damage claims. Then, it is simply too late to avoid liability.¹ Thus, prior to commencement of a construction project, the owner needs to be aware of implied obligations. This article discusses the twelve most common implied contractual obligations, or “deadly sins,” breached by owners both before and during construction and gives practical tips to avoid liability.

As courts have established lines of demarcation between permissible owner actions and those that constitute a breach of implied obligations, the savvy owner must know where liability begins and ends. Owners must understand conduct that falls into this “danger zone” and then stay out of it. These implied obligations, as discussed below, include:

1. The duty to disclose material information to prospective bidders;
2. The duty to provide accurate plans and specifications;

Steven B. Lesser is board certified in construction law by the Florida Bar. He is Chair of the Construction Law Group at Becker & Poliakoff P.A., Ft. Lauderdale, Florida, and is Immediate Past Chair of Division 12 “Owners and Lenders” for the Forum on the Construction Industry. Daniel L. Wallach practices construction, commercial, and appellate law at Becker & Poliakoff P.A., Ft. Lauderdale, Florida, and is licensed to practice in Florida and New York.

3. The duty to provide accurate site information;
4. The duty to obtain necessary regulatory approvals, permits, and easements;
5. The duty to provide access to the work site;
6. Duties relating to owner-furnished products, materials, or equipment;
7. The duty to timely review contractor submittals and requests;
8. The duty not to deny valid requests for time extensions;
9. The duty to make timely inspections;
10. The duty to maintain the project site in a reasonably safe condition;
11. The duty not to hinder, delay, or interfere with the timely completion of work; and
12. The duty to coordinate the work of multiple prime contractors.

Many of these implied obligations derive from the “implied covenant of good faith and fair dealing” that is imposed in every construction contract.² This implied covenant essentially provides “that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.”³ Generally speaking, an owner will be deemed to have breached the implied covenant of good faith and fair dealing when it acts intentionally, or in bad faith, in an effort to frustrate or delay the performance of the contractor.⁴

Duty to Disclose Material Information to Prospective Bidders

Even before the commencement of a contractual relationship, an owner has an implied obligation to furnish information that will not mislead prospective bidders on a construction project.⁵ For example, in *Jacksonville Port Authority v. Parkhill-Goodloe Co.*,⁶ the municipal owner furnished the contractor with boring reports indicating that there was no significant rock in the area to be dredged. The owner, however, knew otherwise because another dredging contractor on one of its earlier projects encountered extensive rock in an adjacent area. The contract guaranteed that the information provided in the boring reports gave a general indication of the materials likely to be found. The court held that the owner had a duty to furnish information that would not mislead prospective bidders and found that the owner had misled the contractor by providing the boring reports.⁷

Even after a successful bid is made, the owner has an implied duty to notify the contractor when it suspects that an error in the bidding process has occurred. For example, in *Hudson Structural Steel Co. v. Smith & Rumery Co.*,⁸ the court held that an owner is on inquiry notice of an error in the bidding if there is a substantial difference between the lowest bid amount and the second lowest bid, or if the lowest bid is substantially lower than the owner's cost estimate. In such circumstances, the contractor may be able to recover damages from the owner.⁹

In addition to disclosing all pertinent information to the contractor during the prebidding process, the owner has an implied duty during the actual performance of the project to furnish the contractor with material information that may have a bearing on the contractor's work.¹⁰ This implied obligation typically arises when the owner has superior knowledge not available to a contractor from other sources.¹¹ An owner's failure to make appropriate disclosure may entitle the contractor to damages or an equitable adjustment.¹² For example, in *Helene Curtis Industries, Inc. v. United States*,¹³ the owner was aware that the contractor assumed it could perform the contract without utilizing a grinding process. The owner was liable when it failed so to inform the contractor. Similarly, in *City of Indianapolis v. Twin Lakes Enterprises, Inc.*,¹⁴ the owner breached its implied duty of disclosure when it insisted that a contractor continue to dredge a reservoir that the owner knew contained large obstructions previously dumped in that area by the owner.

Owners must be counseled to "come clean" with the contractor by disclosing any information that may mislead the contractor in performing or planning its work. Bid documents or preconstruction meetings between the owner and contractor are the best vehicle to convey this information. Owners should prepare meeting minutes or videotape the discussions and then distribute them to all meeting attendees. These precautionary steps will assist the owner to defeat contractor claims that the owner failed to disclose material facts in its possession.

Duty to Provide Accurate Plans and Specifications (Spearin Doctrine)

An owner of a construction project has an implied duty to provide the contractor with accurate plans and specifications. This principle is referred to as the *Spearin* doctrine.¹⁵ Under *Spearin*, if a contractor builds according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of any defects in the plans and specifications.¹⁶ The *Spearin* doctrine thus relieves the contractor of liability to the owner if the contractor performs in accordance with plans and specifications furnished by the owner, but the completed work is defective.¹⁷ Further, the contractor also can recover for any additional work, extras, or delays caused by the inadequate documents.¹⁸ Accordingly, the *Spearin* doctrine can be used by contractors as both a "shield" and a "sword."¹⁹

A good example of the "defensive use" of the *Spearin* doctrine can be seen in the case of *McConnell v. Corona City Water Co.*,²⁰ where the owner sought to hold a contractor responsible for the collapse of a tunnel under construction. The contractor agreed to timber the tunnel in a thoroughly workmanlike and practical manner, in accordance with the specifications, so as to protect against outward and inward pressure. The court held that since the contractor performed the work according to specifications, the contractor was not responsible for the collapse.

The "offensive use" of the *Spearin* doctrine is exemplified by the case of *Montrose Contracting Co. v. County of Westchester*.²¹ In *Montrose*, a contractor brought suit against an owner in connection with a contract to construct a sewer in a two-mile tunnel, at an average depth of forty feet below the streets of the City of Yonkers. The contractor maintained that the owner erroneously represented that the tunnel work could be performed without the need for compressed air (a "free air" job), with the exception of approximately 600 feet. Performance of the work in the tunnel, however, required compressed air, at an increased cost of nearly \$500,000. The court found that because the specifications clearly indicated that the tunnel was substantially a free air job, the contractor was entitled to damages by relying on defective specifications.

The *Spearin* doctrine applies only if the contractor performs "in accordance with" plans and specifications furnished by the owner.²² Thus, if the owner can establish that the contractor failed to follow the owner's plans and specifications (even if defective), the owner is insulated from any claims alleging defects in the plans and specifications.²³ As an additional precaution, owners should consider retaining independent inspectors to monitor construction to make sure the work performed complies with the plans and specifications. Inspectors promptly discover design defects that can be eliminated or mitigated in the field. In addition, through monitoring, owners can document instances where the contractor deviates from plans and specifications to counter later claims for additional time and money.

Several affirmative defenses to avoid application of the *Spearin* doctrine are available to owners, even if the contractor proves that the plans and specifications were defective. Under the "patent defect" defense, the owner may escape liability under *Spearin* when design defects are "glaring or obvious" or reasonably could have been discovered by the contractor.²⁴ A contractor has a duty to discover defects in the plans or specifications that are reasonably discoverable or patent and to warn the owner of the defects, even if the plans and specifications are supplied by the owner.²⁵ This doctrine applies even where an owner supplies comprehensive design specifications because a contractor is not justified in "blithely proceeding with its work in the face of obvious and recognized errors." Many form contracts require the contractor to advise the owner of any known defects in the contract documents.²⁶

Another defense is to argue that the specification at

issue involves “performance,” not “design.” *Spearin* only applies to design, not to performance, specifications.²⁷ “Design specifications” precisely detail the manner in which the work is to be done²⁸ as opposed to “performance specifications,” which set forth the results to be achieved and allow the contractor to determine how to achieve those results.²⁹ This occurred in *PCL Construction Services, Inc. v. United States*,³⁰ where the court, in rejecting a contractor’s attempt to classify certain specifications as “design,” stated as follows:

The fact that specifications provided some details concerning how the work was to be performed does not convert what would otherwise be a performance specification into a design specification. . . . [W]here a specification does not tell a contractor how to perform a specific task, that part of the specification can be a performance specification even if the rest of the specifications are design specifications.³¹

Performance specifications should be highlighted in the contract documents and showcased at prebid and preconstruction meetings.

An owner can avoid liability under the *Spearin* doctrine by shifting the risk of loss through disclaimers or contractual language making the contractor the explicit guarantor of the adequacy of the plans and specifications.³² The language disclaiming this obligation, however, must be more than just a general or boilerplate disclaimer.³³

When the written agreement between the owner and contractor contains a specific disclaimer that requires the contractor to satisfy itself as to the accuracy of the owner’s plans and specifications, the disclaimer will usually be upheld.³⁴ In *E. H. Morrill Co. v. State of California*,³⁵ the contractor claimed damages because the specifications stated that the dispersion of boulders at the job site varied from approximately six to twelve feet in all directions, including the vertical. During performance of the work, however, the boulders were much closer together, making them more expensive to handle. The owner defended the action, relying upon provisions in the prime contract that described the site and referenced the size and location of numerous boulders. The contract also required the bidder to examine the site along with the plans and specifications and expressly stated there would be no additional compensation for difficulties caused by subsurface conditions. In rejecting this argument, the court held that general clauses requiring a contractor to examine the site, check plans, and assume responsibility for the work would not absolve the government from liability. A properly drafted disclaimer must utilize specific disclaimer language and the language must be cross-referenced to the site representations in the contract.

Although a properly drafted disclaimer clause can benefit the owner, some disclaimers may lead to false confidence and sloppy project administration.³⁶ Sometimes owners disclaim responsibilities even though it

would be in their own self-interest to accept them, such as administering the schedule or coordinating the work. In one case, the project owner expressly disclaimed any obligation to schedule or coordinate the work of multiple prime contractors. The disclaimer was enforced by the court, but the project was completed twenty-five months behind schedule.³⁷ In another case, the project owner disclaimed liability for delay or hindrance in each of its thirty trade contracts. The project was so poorly run that a court refused to enforce the delay disclaimers, ruling that the owner had breached a fundamental contractual obligation.³⁸

Another exculpatory clause that can be employed by owners to overcome the *Spearin* doctrine is a “verification” clause,³⁹ which typically requires the contractor to verify the project specifications for accuracy and completeness.⁴⁰ If a contract contains a “verification” clause, it essentially serves as a warning to contractors that the drawings and specifications must be reviewed with “reasonable thoroughness.”⁴¹ Just as with disclaimers, specificity is critical because broad verification clauses generally will not be enforced.⁴² For example, a clause that read, “Contractor shall verify all dimensions and conditions prior to submission of a bid,”⁴³ was not specific enough to require the contractor to verify the ridge height of an existing roof.⁴⁴

The more specific and detailed the clause, the more likely that the clause will be enforced.⁴⁵ For example, in one case, a contract for fabricating and installing several hundred air-conditioning window units provided the contractor with drawings that contained the admonition that “Contractor shall verify all window dimensions.” When the contractor failed to verify any window dimensions, the contractor was denied an equitable adjustment after it discovered the dimensions on the plans were inaccurate.

“Omissions and Misdescriptions” clauses⁴⁶ “caution bidders that information contained in the contract documents may not accurately depict encountered conditions”⁴⁷ and “places the burden on the contractor to correctly [perform] ‘manifestly necessary’ work . . . despite omissions or mistakes in contract drawings.”⁴⁸ These clauses are intended to exculpate the owner from liability where the subject matter of the contract is misdescribed in some significant respect.⁴⁹

The enforceability of these clauses has been met with mixed results. One case interpreted a clause as protecting the government from liability for defective specifications under a contract for construction of a “turnkey” medical clinic.⁵⁰ When the specifications lacked specific direction regarding the furnishing and installation of motor starters that were necessary for completion of the clinic, the board denied a claim for additional costs because the contractor had been “put on notice that it was to provide the government with a completed facility.” The motors were a “manifestly necessary detail of the work, required to ‘carry out the intent’ of the contract” to construct a

clinic ready for use.

On another occasion, the omissions and misdescriptions clause did not shield the government from liability for defective specifications where the contractor needed considerably more pipe than required by the contract drawings. The contractor recovered because the omission was not obvious.⁵¹

The interpretation of an omissions and misdescriptions clause depends upon several factors, such as whether the omission or misdescription is of a “detail” (as opposed to the work in general),⁵² whether it should have been obvious to the contractor,⁵³ and if it was necessary to carry out the intent of the drawings and specifications.⁵⁴ For example, courts are unlikely to construe an omissions and misdescriptions clause in a way that would exculpate an owner for broadly omitting “work” to be performed by the contractor (no matter how large or small).⁵⁵

The far-ranging liability of an owner based upon the *Spearin* doctrine highlights benefits derived from seeking a peer review of the drawings, specifications, and other documents. Plans should be checked at the earliest possible stage, prior to construction, for compliance with applicable building codes (particularly fire and life safety issues) and the Americans with Disabilities Act (ADA). Otherwise, noncompliance could be costly to correct once construction is under way. In some jurisdictions, it may even be advisable to meet with the building official to review the plans prior to construction to make sure all building codes have been followed.⁵⁶

Duty to Provide Accurate Site Information

The owner also has an implied obligation to provide the contractor with complete and accurate information regarding conditions at the building site.⁵⁷ If the owner has information in its possession regarding adverse conditions at the site, such as unanticipated soil conditions, water intrusion, underground pipe or cable, and other types of impediments to the clearing, grubbing, and grading of the site, the owner has a duty to provide that information to the contractor.⁵⁸ An owner can be liable for a “differing site condition” claim by the contractor even when the nondisclosure is unintentional.⁵⁹

In *Warner Construction Corp. v. City of Los Angeles*,⁶⁰ the City of Los Angeles provided bidders on a retaining wall construction project with the logs of two test borings it had conducted at the job site; the logs erroneously reported the soil composition obtained from the borings. Attached to the logs was a caveat disclaiming any warranty that the test hole information was indicative of conditions elsewhere at the site. The City, however, knew, but did not disclose, that cave-ins had occurred in both test holes, forcing it “to change its drilling methods and to abandon the holes before reaching the planned depth of 50 feet.”⁶¹ When caving occurred in holes that were drilled during construction, and the contractor was forced to change to a more expensive drilling technique

with rotary mud, the City was liable for its nondisclosure of the earlier cave-ins and use of special drilling techniques. The nondisclosure “transformed the logs into misleading half-truths.”⁶²

Most sophisticated construction contracts contain a “changed conditions” or “differing site conditions” clause, under which the owner expressly assumes the risk of unanticipated changes in site conditions. These clauses make it unnecessary for contractors to include large contingencies in their bids to cover the risk of encountering unanticipated adverse subsurface conditions or concealed conditions in existing structures.⁶³ The relief generally available under such a clause includes a time extension and compensation to a contractor for any delay caused by the changed site condition.

An owner can take steps to limit its liability for differing or changed site conditions by including an inspection/investigation disclaimer clause in the contract.⁶⁴ Site investigation disclaimers are designed to shift the burden of risk by requiring the contractor to investigate the site prior to submitting a bid.⁶⁵ Failure of the contractor to properly inspect a site may preclude it from recovering damages. If the differing site conditions are of a type that should reasonably be discovered by a prudent contractor, the use of a site investigation clause could provide a valid defense to an owner. Such a clause does not protect against known site conditions that are not disclosed.⁶⁶

Duty to Obtain Necessary Regulatory Approvals, Permits, and Easements

Generally, the owner has an implied obligation to furnish whatever easements, permits, or other government approvals are reasonably required to enable construction to proceed.⁶⁷ Such terms are necessarily implied from the very nature of the contract and the failure to comply with them constitutes a breach of contract by the owner.⁶⁸ Similarly, if the owner is delayed in securing appropriate access for performance of the work, the date for completion is to be extended accordingly.⁶⁹ For example, in *Lapp-Gifford Co. v. Muscoy Water Co.*,⁷⁰ where the contractor completed a job late because it could not obtain an easement over a railroad right-of-way, the law implied a covenant on the part of the owner that it either possessed or would procure the right-of-way. As a result, the owner was precluded from recovering any delay damages against the contractor.

Duty to Provide Access to the Work Site

At the outset of construction, the owner has an implied obligation to provide adequate and timely access to the construction site.⁷¹ It is well settled “that [a] contractor shall be permitted to proceed with his construction in accordance with the contract and that he shall be given possession of the premises to enable him to do so.”⁷² This implied obligation requires both acquiring the property—whether by purchase or lease—and providing access to the property for the contractor’s equipment and materi-

als.⁷³ When the owner limits access to the construction site, it breaches the implied covenant.⁷⁴ In addition to giving rise to a claim for damages,⁷⁵ an owner's failure to provide timely site access may constitute a material breach of contract that excuses the contractor's continued performance.⁷⁶

This implied obligation remains in effect throughout the course of the contractor's performance⁷⁷ and can be breached even where the owner is not directly responsible for the contractor's inability to gain access to the project site. For example, in *Walter Kidde Constructors, Inc. v. State*,⁷⁸ the owner breached its implied obligation to provide timely site access where the site was occupied by another contractor under the owner's control. If another contractor impedes access to the work area, the owner likely will be deemed to have breached its implied obligation to provide timely and adequate site access to the obstructed contractor.⁷⁹

Owners breach this covenant by issuing a notice to proceed, knowing that a right-of-way has not yet been acquired.⁸⁰ In one case, when a state agency failed to acquire a necessary right-of-way due to public opposition to the project, the agency breached the contract.⁸¹

Site access representations are not limited to the means of access and egress. For example, the contract for construction of a school building stated that a landfill, to be placed by a separate site preparation contractor, would be compacted to certain specifications by a stipulated date. When the discovery of saturated oil prevented the contractor from timely mobilizing its equipment onto the site, the owner was liable.⁸²

A project schedule specified in a contract also can create implied site access warranties. In one case, the contract called for the installation of meters in apartments housing Navy personnel and required the contractor to provide each occupant at least three days' notice in order to obtain access to the apartments. When the contractor encountered problems with occupants who either were not home or were uncooperative and was unable to sequence the various trades in a logical fashion, the government was liable for breach of an implied warranty of site access.⁸³ In another case, when a contract for construction of a federal building required the contractor to commence a phase of its work by a stipulated date, and the site was not available because another contractor had not finished its work, the government was liable.⁸⁴

A project owner's breach of the implied warranty of site access is a well-recognized exception to the enforceability of a "no-damage-for-delay" clause. For example, in *United States Steel Corp. v. Missouri Pacific Railroad Co.*,⁸⁵ the Eighth Circuit held that a railroad company actively interfered with a bridge contractor by issuing a notice to proceed with the knowledge that another contractor's work, upon which the bridge contractor's work was dependent, would not be timely completed. The court found that the railroad company's silence in the face of its knowledge that delay-causing conditions

existed constituted bad faith.

Duty to Coordinate the Work of Multiple Prime Contractors

In many states, including Pennsylvania, Ohio, New York, New Jersey, and North Carolina, the majority of public construction contracts must be let as multiple prime contracts.⁸⁶ In these types of contracts, unless otherwise explicitly provided, the owner has an implied duty to coordinate the work of multiple prime contractors.⁸⁷ As one court aptly observed, if "no one were designated to carry on the overall supervision, the reasonable implication would be that the owner would impliedly assume the duty to coordinate the various contractors to prevent unreasonable delays on the project."⁸⁸ The "duty to coordinate" generally means the duty to coordinate worksite activities among prime contractors and their schedules to ensure timely progress.⁸⁹ For example, in *Websco Construction Corp. v. State*,⁹⁰ a general contractor recovered for delays caused by other prime contractors because "[t]he State had a duty to regulate and coordinate with reasonable diligence the activities of the several prime contractors for the simple reason, if no other, that no one else had the authority to so act."⁹¹

As with other implied obligations, owners may use risk-shifting clauses to avoid liability for delays that occur on multiple-prime-contractor projects. In *Broadway Maintenance Corp. v. Rutgers State University*,⁹² the New Jersey Supreme Court held that the owner has the right to absolve itself of coordination responsibility by contractually designating one of the prime contractors as the responsible party for scheduling and coordination of all project work.

Implied Obligations Relating to Owner-Furnished Products, Materials, or Equipment

An increasing number of construction disputes involve equipment, materials, or other products supplied by the owner.⁹³ Owners frequently specify multiple proprietary products.⁹⁴ By imposing such a requirement, however, the owner warrants that each and every specified product is suitable for its intended purpose.⁹⁵ It makes no difference whether the contractor selected one particular product from among various alternatives.⁹⁶ For example, when a project owner mandated the use of rock from a particular quarry, the owner warranted that both the quantity and quality of that rock would be sufficient for the project.⁹⁷

Similarly, when an owner furnishes a contractor with equipment or material for use on a project, the owner extends an implied warranty that the materials will be suitable for their intended purpose.⁹⁸ And, of course, the owner has a duty to deliver such materials and equipment both in a timely manner and in a sequence that would reasonably permit the contractor to finish the work on schedule.⁹⁹ Failure to timely furnish such materials not only will justify an extension of the completion date for

a period equal to the length of the delay,¹⁰⁰ but also will give rise to a claim for damages. For example, in *Litchfield Manufacturing Corp. v. United States*,¹⁰¹ the federal government breached the contract when it delayed delivering certain equipment required by the contractor to complete its work. Similarly, a contractor can recover damages if the owner-supplied materials are defective and cause delays. For example, in *Saran Industries, Inc. v. Marathon Oil Co.*,¹⁰² an owner was liable to a contractor for supplying defective paint that caused the contractor delays in painting an offshore production platform. As these cases illustrate, owners expose themselves to enormous liability when they elect to order fixtures, furnishings, and equipment directly from suppliers.

Duty to Timely Review Contractor Submittals and Requests

In the typical construction project, a contractor must prepare shop drawings¹⁰³ and other submittals that detail certain aspects of the project and how they comport with the owner's plans.¹⁰⁴ The owner is under an implied duty to review those submittals and return them in a reasonable time so as not to delay the project.¹⁰⁵ If the owner's delay in approving submittals slows the construction schedule, the owner is liable for the contractor damages.¹⁰⁶ In *Sterling Millwrights, Inc. v. United States*,¹⁰⁷ a contractor was awarded a fixed-price contract to construct a chrome-plating facility. The contract documents required the government to review the shop drawings within five days. The U.S. Court of Claims set aside a default termination of the contractor because the overwhelming source of delay in the contract was the government's failure to organize a competent staff to carry out its obligation to make timely shop drawing reviews.¹⁰⁸

Similarly, owners must make timely decisions on other contractor requests such as change orders.¹⁰⁹ If the owner does not timely and reasonably respond to such requests, it could become liable to the contractor for delay damages.¹¹⁰ A particularly egregious example of such dilatory behavior occurred in *Newberry Square Development Corp. v. Southern Landmark, Inc.*,¹¹¹ where the owner delayed in approving change order requests submitted by the contractor, yet ordered that construction not proceed without such orders.¹¹² In addition, the owner repeatedly failed to make payments required by the contract and threatened to "break" the contractor before he would pay him.¹¹³ The court concluded that adequate evidence existed to present to a jury the question of whether the owner actively interfered with the contractor's work.¹¹⁴

Duty Not to Deny Valid Requests for Time Extensions ("Constructive Acceleration")

The owner also has an implied duty not to deny justified time extension requests. If an owner refuses to grant a legitimate time extension request by a contractor, the owner can be liable for breach of contract damages

under a theory of "constructive acceleration." Constructive acceleration occurs when a contractor has a justified claim for an extension of time and incurs additional expenses because the owner refuses to grant an extension and requires the contractor to complete the project by the original completion date.¹¹⁵ In order to prevail on a claim for constructive acceleration, the contractor must prove that (1) an excusable delay entitled it to a time extension, (2) it properly requested a time extension, (3) the project owner failed or refused to grant the requested extension, (4) the project owner demanded that the project be completed by the original completion date despite the excusable delay, and (5) the contractor actually accelerated the work in order to complete the project by the original completion date and incurred added costs as a result.¹¹⁶ A contractor that accelerates its work as the result of the denial of a justified time extension is entitled to recover its increased costs for labor, equipment, overhead, and efficiency, as well as any lost profits.¹¹⁷ In other words, if the owner forces a contractor to continue working in the face of an excusable delay, then the owner will be liable for damages incurred by the contractor. To avoid a finding of constructive acceleration, the owner should always promptly respond to requests for an extension of time.¹¹⁸ In addition, when discussing the matter with the contractor, the owner should avoid using threatening language and should act in a conciliatory manner aimed at ensuring prompt resolution.¹¹⁹ Moreover, the owner should be reasonable when considering requests for extensions of time in the face of excusable and unavoidable delays.¹²⁰ A contractor does not have a claim for constructive acceleration if the owner simply pressures the contractor for rapid completion of the work.¹²¹ Similarly, a letter stating that the owner has an urgent need for the facility "and it is therefore imperative that you take every possible action toward expediting its completion" does not constitute constructive acceleration.¹²²

Duty to Make Timely Inspections

Where the owner performs inspections of the contractor's work, the owner is under an implied obligation to perform such inspections in a timely and reasonable manner.¹²³ For example, in *Russell R. Gannon Co. v. United States*,¹²⁴ although the contract required that certain test procedures on a contract for construction of over 200 dehumidifiers be witnessed by a government inspector, the government did not believe that the work required a full-time government inspector. When the government later required the contractor to provide it with 72 hours' advance notice when inspection services were needed, the court concluded that the government's notice requirement was inconsistent with its implicit obligation to conduct reasonable inspections.¹²⁵

It is often beneficial for owners to retain independent inspectors to inspect construction for quality control purposes, such as building code and contract document compliance. During construction, heightened inspections

may catch construction deficiencies that easily could be rectified and thus mitigate damages. Although this process often may prove beneficial, it also can backfire. This is especially true if the owner's inspector observes work deemed to be nonconforming but fails to apprise the contractor of this fact. In such circumstances, the ignorant owner may be deemed to have violated its implied obligation to notify the contractor on a timely basis of any work deemed to be nonconforming as part of the owner's duty to mitigate its damages.¹²⁶ Additionally, overzealous inspectors hired by the owner may interfere with the performance of work by the general contractor and subcontractors, the consequence of which may be a breach by the owner of its implied obligation not to unreasonably impede the contractor's performance.

Another common problem associated with the use of independent inspectors is that, by their very nature, inspections delay completion of the project. For example, an owner may direct that certain features be redone or modified to conform to some illusory standard beyond those specified in the contract. Coordination is essential among owner-retained inspectors and the construction team to avoid delay to the project.

Duty to Maintain the Project Site in a Reasonably Safe Condition

If the owner is acting as a general contractor, an implied duty exists to keep the job site in a reasonably safe condition,¹²⁷ even if it does not actively participate in the work. For example, in *Lewis v. Sims Crane Service, Inc.*,¹²⁸ an operator of a hoist brought an action against the owner/general contractor, alleging failure to maintain the job site in a reasonably safe condition. A jury instruction that the owner/general contractor had a duty to maintain the construction job site in a reasonably safe condition was proper.

Duty Not to Delay, Hinder, or Interfere with the Timely Completion of Work

Every construction contract has an implied term that the owner will cooperate with the contractor and will not hinder or delay the contractor in the performance of required work.¹²⁹ This implied obligation presents a veritable "minefield" for owners, as it can be breached in so many different ways, through both active and passive conduct. For example, when an owner overzealously inspects work, the delays experienced by the contractor may be viewed as active interference by the owner.¹³⁰ In *WRB Corp. v. United States*,¹³¹ the owner conducted multiple inspections of the same work by different inspectors,¹³² causing conflicting approvals and disapprovals for the same work. The court of claims held that these inconsistent inspections "amounted to an unreasonable interference with the plaintiff in its attempt to perform the contract."¹³³ Similarly, in *Adams v. United States*,¹³⁴ where the government unreasonably rejected a high number of items produced by the contractor, which, in the opinion

of the court, constituted "extremely rigid, unreasonable and arbitrary conduct."¹³⁵


Many fact patterns show how an owner's passive conduct can breach its implied obligation not to hinder, delay, or impede a contractor's performance. An owner may breach this implied obligation through such seemingly innocuous conduct as

- improperly issuing stop work orders;¹³⁶
- prematurely issuing a notice to proceed;¹³⁷
- inundating the contractor with change orders and clarifications that modify the scope of the original contract;¹³⁸
- failing to keep the job site clear of obstructions;¹³⁹
- failing to disclose material information to the contractor;¹⁴⁰
- occupying and using the building prior to completion of the work;¹⁴¹
- failing to furnish necessary revisions to plans and specifications, coupled with the failure to make progress payments;¹⁴² and
- failing to obtain necessary city approvals.¹⁴³

The list goes on and on, and owners must be wary of taking any action (or failing to take action) that adversely impacts a contractor's means and methods of performance.

If the owner's interference rises to the level of "active interference," the contractor will be entitled to delay damages from the owner, notwithstanding the existence of a "no-damage-for-delay" clause.¹⁴⁴ Although most courts have defined "active interference" to include "some affirmative, willful act, in bad faith" that unreasonably interferes with the contractor's performance,¹⁴⁵ an increasing number of courts have concluded that "active interference" can occur through an owner's "negligent" behavior.¹⁴⁶ The judicial expansion of the active interference exception is problematic because the apparent recognition of a "negligence" standard will result in an increasing number of delay claims proceeding to trial, notwithstanding the existence of an otherwise valid no-damage clause. Faced with this changing landscape, it is incumbent on counsel for the owner or general contractor to take a proactive role in protecting their clients' no-damage-for-delay clauses from attack.

Plan to Avoid Litigation

Owners must be mindful of the implied obligations on construction projects. These twelve deadly sins can spell financial disaster for owners that ignore or minimize their importance. At the outset of any construction project, owners' legal counsel should review these vulnerable areas and formulate a plan to address them. It is only through careful planning at the outset of a construction project that owners can avoid litigation and claims. 

Endnotes

1. "To be conscious that you are ignorant is a great step to knowledge." BENJAMIN DISRAELI, SYBIL, 1845.
2. *Munn v. Thornton*, 956 P.2d 1213, 1220 (Alaska 1998). See

also *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (“Colorado, like the majority of jurisdictions, recognizes that every contract contains an implied duty of good faith and fair dealing. . . .” [emphasis added]).

3. *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979).

4. *Howard P. Foley Co. v. J.L. Williams & Co.*, 622 So. 2d 402, 407 (8th Cir. 1980). For example, in *Story v. City of Bozeman*, 791 P.2d 767 (Mont. 1990), a municipality entered into a contract for the construction of two water mains. Two bid schedules were issued by the city. One of the schedules contained a typographical error listing the unit measure of pipe bedding materials as cubic “feet” rather than the customary unit measure of cubic “yards.” Although the error was not discovered until after the contract had been awarded, the owner refused to make any upward adjustment on the contract price, maintaining that the contractor knew or should have known about the typographical error. At trial, the jury concluded that the owner breached the implied covenant of good faith and fair dealing and awarded the contractor \$360,000 in damages.

5. *Ajax Paving Indus., Inc. v. Charlotte County*, 752 So. 2d 143, 144–45 (Fla. Dist. Ct. App. 2000); *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So. 2d 696, 697–98 (Fla. Dist. Ct. App. 1988); *Jacksonville Port Auth. v. Parkhill-Goodloe Co.*, 362 So. 2d 1009 (Fla. Dist. Ct. App. 1978).

6. 362 So. 2d 1009 (Fla. Dist. Ct. App. 1978).

7. *Id.* at 1012.

8. 85 A. 384 (Me. 1912).

9. But this works both ways. If the contractor discovers any conflicts or discrepancies in the bidding documents and fails to notify the owner about them (particularly if the contract contains a disclosure provision), the contractor may forfeit the right to make a claim for extra work. See CONSTRUCTION COMPANY STRATEGIST, at 7 (Oct. 1997).

10. *S. Cal. Edison v. United States*, 58 Fed. Cl. 313 (2003); *Manuel Bros. v. United States*, 55 Fed. Cl. 8, 34 (2002); see generally 3 PHILIP L. BRUNER AND PATRICK J. O’CONNOR JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW, § 9:92 (2006).

11. *Sergeant Mech. Sys., Inc. v. United States*, 34 Fed. Cl. 505, 519 (1995); *Am. Ship Bldg. Co. v. United States*, 228 Ct. Cl. 220, 225, 654 F.2d 75, 79 (1981); *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472, 487–87 (1972); *Helene Curtis Indus., Inc. v. United States*, 160 Ct. Cl. 437, 444 (1963).

12. *Constantine G. Antipas, Contract Clauses*, National Business Institute, 10030 NBI-CLE 21, 25 (2004).

13. 160 Ct. Cl. 437, 312 F.2d 774 (1963).

14. 568 N.E.2d 1073, 1080 (Ind. Ct. App. 1991).

15. See *United States v. Spearin*, 248 U.S. 132, 39 S. Ct. 59 (1918). See generally Annot., 6 A.L.R.3d 1394.

16. *Spearin*, 248 U.S. at 136, 39 S. Ct. at 61; *Martin K. Eby Constr. Co., Inc. v. Jacksonville Transp. Auth.*, 436 F. Supp. 2d 1276, 1308 (M.D. Fla. 2005). See also David D. Gillis & Christopher J. Heffernan, *What Do You Do When the Plans and Specifications Are Deficient?* National Business Institute, Maryland Construction Law, 24363 NBI-CLE 9, 17 (2005).

17. *County Mut. Ins. v. Gyllenberg Constr., Inc.*, 2004 WL 1490326, at *9 (D. Or. 2004) (“The *Spearin* doctrine provides certain protection from liability to contractors who build a structure in accordance with the owner’s plans.”).

18. See *Luria Bros. & Co. v. United States*, 369 F.2d 701, 708 (Ct. Cl. 1966) (“[w]hen, as here, defective specifications delay completion of the project, the contractor is entitled to recover damages for defendant’s breach of this implied warranty”); *James L. Csontos & Claudio E. Iannitelli, What Do You Do When the Plans and Specifications Are Deficient?* National Business Institute, 25159 NBI-CLE 24, 27 (2005) (“As a corollary to the *Spearin* doctrine, should the plans and specifications be found to be defective, inaccurate or unsuitable, the contractor is entitled to recover the extra costs incurred by reason of these

deficiencies under an action for breach of implied warranty.”).

19. 3 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 9.83 (“In addition to supporting an affirmative claim for recovery of additional costs due to attempting to perform with inadequate plans, the owner’s implied design warranty is available to the contractor as a shield against claims brought by the owner.”).

20. 149 Cal. 60, 85 P. 929 (Cal. 1906).

21. 80 F.2d 841 (2d Cir. 1936).

22. See 3 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 9.83 (“It is crucial . . . for the contractor to establish that it relied upon and actually followed the owner’s plans and specifications. It does the contractor little good to prove that the owner furnished defective plans if the contractor failed to follow them.”).

23. See *Tyger Constr. Co. v. United States*, 31 Fed. Cl. 177 (1994); *W.H. Lyman Constr. Co. v. Gurnee*, 131 Ill. App. 3d 87, 475 N.E.2d 273 (Ill. App. Ct. 1985); *Burke County Pub. Sch. Bd. of Educ. v. Juno Constr. Corp.*, 50 N.C. App. 238, 273 S.E.2d 504 (1981).

24. *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 785 (2000). See also Athan E. Tramontanias, *Affirmative Defenses to the Spearin Doctrine: Government Attempts to Avoid the Implied Warranty of Specifications*, Construction Briefings No. 2003-5 (May 2003).

25. *PCL Constr. Servs.*, 47 Fed. Cl. at 785; *St. Paul Fire & Marine Ins. Co. v. Pearson Constr. Co.*, 547 N.E.2d 853, 858 (Ind. 4th Dist. 1989). See also 1 CORP. COUNSEL’S GUIDE TO WARRANTIES, Ch. 11, § 11:10 (2005) (“A contractor is under an obligation to bring to the owner’s attention errors, omissions, or questions of which the contractor is aware or has. If the contractor should fail to do so, but instead continues to proceed with the work, it does so at its own risk. This is equitable because the contractor at that point is in the best position to prevent the loss from occurring.”).

26. AIA Document A201–1997, General Conditions of the Contract for Construction, ¶ 3.2.

27. *Daewoo Eng’g & Constr. Co., Inc.*, 73 Fed. Cl. 547, 2006 WL 2982098, at *18 (Oct. 13, 2006) (“The *Spearin* doctrine has evolved two types of specification, design and performance. Only a design specification produces the implied warranty.”); *Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 716 (Fed. Cir. 1988); *Haehn Mgmt. Co. v. United States*, 15 Cl. Ct. 50, 56 (1988); *Willamette Crushing Co. v. State By and Through Dep’t of Transp.*, 188 Ariz. 79, 932 P.2d 1350 (Ct. App. 1997) (contract completion date was a performance specification as to which an implied warranty did not arise). See also 1 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 4:10 (“Performance specifications, as distinguished from design specifications, enlarge the contract scope beyond merely the information provided by the owner and carry with them no owner-implied warranty of the adequacy of design.”).

28. *J.L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 412 F.2d 1360 (1969).

29. *Haehn*, 15 Cl. Ct. at 56; *Willamette*, 932 P.2d at 1351.

30. 47 Fed. Cl. 745 (2000).

31. *Id.* at 796.

32. See *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906, 911 (E.D. Va. 1989), *aff’d in part, rev’d in part on other grounds*, 911 F.2d 723 (4th Cir. 1990) (language in agreement that owner did not assume “any responsibility for the data as being representative of the conditions and materials which may be encountered” was sufficient to deny contractor recovery for inaccurate information).

33. *United States v. Spearin*, 248 U.S. 132, 137, 39 S. Ct. 59 (1918) (“This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check on the plans, and to assume responsibility for the work until

completion and acceptance.”); *White v. Edsall Constr. Co.*, 296 F.3d 1081, 1086 (Fed. Cir. 2002) (“Like the disclaimer in *Spearin*, the disclaimer in this case is only a general disclaimer.”); 3 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 9:80 (“[t]here is a significant body of law, both federal and state, rejecting attempts to disclaim this warranty with general disclaimers”).

34. *See, e.g., In re D. Federico Co.*, 8 B.R. 888 (Bankr. D. Mass. 1981) (where local redevelopment authority never intended plans and drawings provided to contractors bidding on public works projects to be positive specifications, in that specific disclaimer language was replete throughout plans, and authority asked bidders to calculate risks in their bids, authority could not be held to breach of warranty of accurate disclosure, and, therefore, authority was not liable for cost of extra fittings and adapters when contractor discovered unanticipated underground obstructions); *Bd. of Educ. of Henderson County, Ky. v. Spinazolo Sys., Inc.*, 986 F.2d 1421 (Table), 1993 WL 30493, at *4 (6th Cir. 1993) (unpublished decision) (contractor not permitted to rely on scaled drawings where school board’s bid package included specific disclaimers warning contract bidders not to rely on drawings); *Brant Constr. Co. v. Metro. Water Reclamation Dist. of Greater Chicago*, 967 F.2d 244 (7th Cir. 1992) (by noting that quantities in specifications were an approximation and owner effectively disclaimed warranty for quantity accuracy); *E. Tunneling Corp. v. Southgate Sanitation Dist.*, 487 F. Supp. 109 (D. Colo. 1979). *See also* Robert Smith, *Contract Clauses*, National Business Institute, *Advanced Construction Law in Minnesota*, 24370 NBI-CLE 19, 22-23 (2005) (“specific, unambiguous clauses disclaiming liability for defective specifications have prevented contractors from seeking to rely on the disclaimed information”).

35. 65 Cal. 2d 787 (Cal. 1967).

36. 23:8 CONSTRUCTION CLAIMS MONTHLY 1 (Aug. 2001).

37. *Broadway Maint. Corp. v. Rutgers Univ.*, 447 A.2d 906 (N.J. 1982).

38. *Clifford R. Gray, Inc. v. City Sch. Dist. of Albany*, 716 N.Y.S.2d 795 (N.Y. App. Div. 2000).

39. 1 CORP. COUNSEL’S GUIDE TO WARRANTIES, Ch. 11, § 11:10 (2005) (“The owner may also raise the defense that the contractor assumed the risks of design or expressly warranted that the design would work.”); 3 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 9.80; *Tramontanans*, *supra* note 24.

40. 1 CORP. COUNSEL’S GUIDE TO WARRANTIES, *supra* note 39, Ch. 11, § 11:10.

41. Donald P. Arnavas, *Exculpatory Clauses*, 98-10 Briefing Papers (Sept. 1998).

42. *Tramontanans*, *supra* note 24.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Conner Bros. Constr. Co. v. United States*, 65 Fed. Cl. 657, 678 (2005).

48. *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 302 (2005).

49. 6 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 19:52.63.

50. Arnavas, *supra* note 41 (citing *Jefferson Constr. Corp., A.S.B.C.A. No. 23732*, 79-2 B.C.A. ¶ 14186, and *Santa Fe Eng’rs, Inc., A.S.B.C.A. No. 23263*, 79-1 B.C.A. ¶ 13823).

51. *Id.* (citing *Ames-Ennes, Inc., A.S.B.C.A. No. 15659*, 73-2 B.C.A. ¶ 10113, and *Blount Bros. Constr. Co. v. U.S.*, 171 Ct. Cl. 478, 496 (1965), 7 GC ¶ 300)).

52. *Tramontanans*, *supra* note 24 (“The clause is interpreted to cover only omissions and misdescriptions of the ‘details’ of the work.”).

53. *Id.*

54. *Id.* (“The Omissions and Misdescriptions clause applies

only to details of the work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed. The test . . . to determine whether omitted or misdescribed work is manifestly necessary to carry out the intent of the drawings and specifications is whether a prime contractor or subcontractor, effectively acting for the prime contractor, knew or should have known that the work was necessary.”).

55. *Id.* (observing that the standard omissions and misdescriptions clause [such as the one cited in this article] “contains an ambiguity with respect to the details of the work—a strict reading would result in the clause covering omission of any work, large or small, while covering misdescription of only details. . . . [S]uch a reading would produce an incongruous result.”).

56. *See, e.g., Edward J. Seibert, A.I.A., Architect and Planner, P.A. v. Bayport Beach and Tennis Club Ass’n*, 573 So. 2d 889, 892 (Fla. Dist. Ct. App. 1990).

57. *See Wendward Corp. v. Group Design, Inc.*, 428 A.2d 57, 59 (Me. 1981) (owner’s agent took soil samples at wrong location; as a result, the true subsurface conditions of the actual site were not revealed until construction of the foundation was already in progress). *See also* John Blanton O’Neal IV, *What Do You Do When the Plans and Specifications Are Deficient?* National Business Institute, *South Carolina Construction Law*, 11038 NBI-CLE 19 (2005).

58. Gillis & Heffernan, *supra* note 16, at 53; Kimberly A. Ashby, *Contract Clauses*, National Business Institute, *Advanced Construction Law in Florida*, 25170 NBI-CLE 30, 32 (2005).

59. James L. Csontos & Claudio E. Iannitelli, *What Do You Do When Conditions on the Job Change?* National Business Institute, 25159 NBI-CLE 92, 106 (2005). “A differing site condition” is generally a subsurface or other unknown physical condition at a site that differs materially from that indicated in the contract or from that which is ordinarily encountered, which leads to a material change in the cost of construction.

60. 2 Cal. 3d 285, 293-94, 466 P.2d 996 (Cal. 1970).

61. *Id.*

62. *Id.*

63. 4 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 12:55.

64. Eileen M. Diepenbrock, *Contract Clauses*, National Business Institute, *Advanced Construction Law in California*, 15590 NBI-CLE 29, 49 (2004).

65. *Id.*

66. *Hendry Corp. v. Metro. Dade County*, 648 So. 2d 140, 142 (Fla. Dist. Ct. App. 1994) (citing cases); Ashby, *supra* note 58, at 32.

67. *COAC, Inc. v. Kennedy Eng’rs*, 67 Cal. App. 3d 916, 136 Cal. Rptr. 890 (Ct. App. 1977) (water district owed implied contractual duty to contractor building water treatment plant project to timely secure environmental impact report and all necessary permits); *Nat Harrison Assocs., Inc. v. Gulf States Utils. Co.*, 491 F.2d 578 (5th Cir. 1974) (owner liable to contractor for delay in securing right-of-way for transmission line project). This implied obligation also applies to the owner’s project engineer and chief inspector when they have absolute control to accept or reject the contractor’s materials. *See Schultz & Lindsay Constr. Co. v. State*, 83 N.M. 534, 494 P.2d 612 (N.M. 1972).

68. *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 71 Cal. App. 4th 38, 50, 83 Cal. Rptr. 2d 590, 596 (Ct. App. 1998); *Felix Contracting Corp. v. Oakridge Land & Prop. Corp.*, 106 A.D.2d 488, 483 N.Y.S.2d 28 (App. Div. 1984) (holding owner liable for delay in obtaining timely governmental approvals). *See also* CAL. CONSTR. L. MANUAL § 1:80 (6th ed.) (citing cases).

69. *See, e.g., Maurice L. Bein, Inc. v. Housing Auth. of City*

of Los Angeles, 157 Cal. App. 2d 670, 679, 321 P.2d 753 (Dist. Ct. App. 1958); *D.A. Parrish & Sons v. County Sanitation Dist.*, No. 4 of Santa Clara County, 174 Cal. App. 2d 406, 410, 344 P.2d 883 (Dist. Ct. App. 1959); *McGuire & Hester v. City and County of San Francisco*, 113 Cal. App. 2d 186, 187, 188, 247 P.2d 934 (Dist. Ct. App. 1952). See also 10 CAL. REAL EST. § 27:36 (3d ed.) (citing cases).

70. 166 Cal. 25, 134 P. 989 (Cal. 1913).

71. See *Howard Contracting*, 71 Cal. App. 4th at 50, 83 Cal. Rptr. at 596 (“The rule is well settled that in every construction contract the law implies a covenant that the owner will provide the contractor timely access to the project site to facilitate performance of work.”); *Blinderman Constr. Co., Inc. v. United States*, 695 F.2d 552, 556 (Fed. Cir. 1982) (“[t]he Navy was under an implied obligation to provide such access [to the worksites] so that the contractor could complete the contract within the time required by its terms.”). See also John E. Bulman & John W. DiNicola, *The Owner’s Implied Obligations as They Apply to Scheduling*, 21 CONSTR. LAW. 5 (Summer 2001) (“An owner’s first implied duty is the obligation to provide site access.”).

72. *Hartford Elec. Applicators of Thermalux, Inc. v. Alden*, 169 Conn. 177, 182, 363 A.2d 135 (Conn. 1975).

73. Thomas M. Brownell, *What Do You Do When Contract Performance Is Delayed?* National Business Institute, Virginia Construction Law, 24367 NBI-CLE 148, 154 (2005).

74. *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co., Inc.*, 71 Cal. App. 4th 38, 50, 83 Cal. Rptr. 590, 596 (Ct. App. 1998) (“When . . . access to the site is limited by the owner, the implied covenant is breached.”); *Harry Pepper & Assocs., Inc. v. Hardrives, Co.*, 528 So. 2d 72 (Fla. Dist. Ct. App. 1988) (failure to make construction site available to commence work by an agreed date); *Blinderman Constr. Co.*, 695 F.2d 552 (government owner breached its implied duty of cooperation by failing to assist the contractor in gaining access to family housing units owned by government); *Walter Kidde Constructors, Inc. v. State*, 37 Conn. Supp. 50, 434 A. 2d 962 (Super. Ct. 1981) (holding that owner breached contract by failing to provide timely site access due to occupation of site by another contractor under the owner’s control).

75. See, e.g., *In re Appeal of Roberts Constr. Co.*, 111 N.W.2d 767 (Neb. 1961).

76. *Hartford Elec. Applicators*, 169 Conn. at 183, 363 A. 2d at 139–40 (“A delay caused by an owner may constitute a breach excusing performance as required by the contract.”).

77. Bulman & DiNicola, *supra* note 71, at 5.

78. 37 Conn. Supp. 50, 434 A. 2d 962 (Super. Ct. 1981).

79. Bulman & DiNicola, *supra* note 71, at 5.

80. See, e.g., *Horton Indus., Inc. v. Village of Mowequa*, 142 Ill. App. 3d 730, 740 (App. Ct. 1986) (defendant municipality failed to disclose a very large percentage of underground utility lines and conduits in its plans and specifications); *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (W. Va. 2001) (failure to disclose hidden utility lines); *Dep’t of Transp. v. Herbert R. Imbt, Inc.*, 157 Pa. Commw. 573, 630 A.2d 550 (Pa. Commw. 1993) (agency liable for damages based upon failure to obtain proper right-of-way prior to issuance of notice to proceed); *B.E. Reichenbach, Inc. v. Clearfield County Indus. Dev.*, 18 Pa. D. & C.3d 790 (Pa. Commw. 1981) (defendant industrial development authority that issued a notice to proceed to plaintiff construction contractor before defendant had obtained all necessary rights-of-way held liable to plaintiff contractor for its resulting damages caused by delays in construction). See also Brian W. Erikson, *What Do You Do When Contract Performance Is Delayed? Part II*, National Business Institute, Texas Construction Law, 14051 NBI-CLE 117 (2004) (“Courts hold that the specification of a starting date or the issuance of a notice to proceed constitutes an implied warranty

that the project site is prepared and available for performance of the work in accordance with the contract documents, and that the owner is liable to the contractor for damages resulting from a breach of this warranty.”).

81. *Horton Indus.*, 142 Ill. App. 3d at 740 (citing *Ga. Dep’t of Transp. v. Arapaho Constr., Inc.*, 357 S.E.2d 593 (Ga. 1987)).

82. 27:10 CONSTRUCTION CLAIMS MONTHLY 1 (October 2005) (citing *N. Harris County Junior Coll. Dist. v. Fleetwood Constr. Co.*, 604 S.W.2d 247 (Tex. Civ. App. 1980)).

83. *Id.* (citing *Blinderman Constr. Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982)).

84. *Id.* (citing *Appeal of Renel Constr. Co.*, G.S.B.C.A. No. 5175 (Dec. 4, 1980)).

85. 668 F.2d 435 (8th Cir. 1982), *cert. denied*, 459 U.S. 836, 103 S. Ct. 80 (1982).

86. Michael F. Nuecherlein & Bryan F. Stayton, *An Owner’s Implied Duty to Coordinate*, 21 CONSTR. LAW. 22 (Summer 2001) (citing N.Y. FIN. LAW § 135 (McKinney 1996); N.J. STAT. ANN. § 42:32-2 (West 1996); OHIO REV. CODE ANN. § 153.03 (Baldwin 1997); PA. STAT. ANN. tit. 71, § 1618 (1996); N.C. GEN. STAT. § 143-128 (1996); WIS. STAT. § 66.29 (1997)).

87. U.S. *ex rel. Va. Beach Mech. Servs., Inc. v. SAMCO Constr. Co.*, 39 F. Supp. 2d 661, 674 (E.D. Va. 1999); *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245, 1251 (D.C. Cir. 1979) (“The contracting authority has the duty to invoke its contractual rights to compel cooperation among contractors.”); *Paccon, Inc. v. United States*, 399 F.2d 162, 170 (Ct. Cl. 1968). See generally Nuecherlein & Stayton, *supra* note 86, at 22 (“if multiple prime contracts are silent regarding the obligation to coordinate the work, most courts will hold that the owner has an implied duty to coordinate and manage”); Herbert H. Gray III, *What to Do When Contract Performance Is Delayed?* National Business Institute, Georgia Construction Law, 15609 NBI-CLE 61, 65 (2004) (“On multiple-prime projects, the obligation to coordinate the activities and work of the contractors usually remains with the owner.”).

88. *Broadway Maint. Corp v. Rutgers State Univ.*, 90 N.J. 253, 265–66, 447 A.2d 906, 912 (N.J. 1982).

89. *APAC-Georgia, Inc. v. Dep’t of Transp.*, 221 Ga. App. 604, 607–08, 472 S.E.2d 97, 100 (Ct. App. 1996).

90. 57 Misc. 2d 9, 292 N.Y.S.2d 315 (Ct. Cl. 1966).

91. *Id.* at 10, 292 N.Y.S.2d at 316. See also *Eric A. Carlstrom Constr. Co. v. Indep. Sch. Dist.*, 256 N.W.2d 479 (Minn. 1977) (owner responsible for coordination notwithstanding language in contract).

92. 90 N.J. 253, 447 A.2d 906 (N.J. 1982).

93. See 28:2 CONSTRUCTION CLAIMS MONTHLY 1 (Feb. 2006).

94. See 22:3 CONSTRUCTION CLAIMS MONTHLY 6 (Mar. 2000).

95. *Id.*

96. *Id.*

97. See *Appeal of J-I-J Constr. Co.*, ENG B.C.A. No. 4815 (Sept. 14, 1984).

98. *Saran Indus., Inc. v. Marathon Oil Co.*, 666 F.2d 85 (5th Cir. 1981).

99. See *Ben C. Gertwick v. United States*, 152 Ct. Cl. 69 (1961). See also Bulman & DiNicola, *supra* note 71, at 5; 5 BRUNER & O’CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 15:54 (“the owner . . . is charged by its implied duties of cooperation and nonhindrance to provide its materials or equipment as reasonably needed by the contractor to maintain the progress of the work”).

100. See *MacIsaac & Menke Co. v. Cardox Corp.*, 193 Cal. App. 2d 661, 672, 14 Cal. Rptr. 523 (Dist. Ct. App. 1961); *Milovich v. City of Los Angeles*, 42 Cal. App. 2d 364, 376–78, 108 P.2d 960 (Dist. Ct. App. 1941); *Blair v. Brownstone Oil & Refining Co.*, 17 Cal. App. 471, 472, 473, 120 P. 41 (Dist. Ct. App. 1911).

101. 167 Ct. Cl. 604, 338 F.2d 94 (1964).

102. 666 F.2d 85 (5th Cir. 1981).

103. "Shop drawings" are drawings or illustrations prepared by the contractor that illustrate how specific portions of the work shall be fabricated and/or installed. Michael J. Bond, *Rebuilding the Citadel of Privity*, 30 GONZAGA L. REV. 221, 229 & n.57 (1994-95).

104. Bulman & DiNicola, *supra* note 71, at 7.

105. *Id.*

106. *Id.* (citing Fehlh Haber Corp. v. State, 410 N.Y.S.2d 920 (N.Y. App. Div. 1978)). See Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49, 72 (1992) (government's unreasonable delays in approving shop drawings entitled contractor to equitable adjustment for additional costs and delays incurred); V.C. Edwards Contracting Co. v. Port of Tacoma, 503 P.2d 1133 (Wash. Ct. App. 1972) (unreasonable delay by owner in approving shop drawings).

107. 26 Cl. Ct. 49 (1992).

108. *Id.* at 67-68.

109. See Bulman & DiNicola, *supra* note 71, at 5 (citing Ajax Paving Indus., Inc. v. Charlotte County, 752 So. 2d 143 (Fla. Ct. App. 2000); Horton Indus., Inc. v. Vill. of Moweaqua, 492 N.E. 2d 220 (Ill. 1986)).

110. See, e.g., Newberry Square Dev. Corp. v. S. Landmark, Inc., 578 So. 2d 750 (Fla. Dist. Ct. App. 1991); Metro. Dade County v. Frank J. Rooney, Inc., 627 So. 2d 1248 (Fla. Dist. Ct. App. 1993); J.A. Ross & Co. v. United States, 115 F. Supp. 187 (Ct. Cl. 1953) (contractor entitled to delay damages where government unreasonably delayed in issuing a change order); J.D. Hedin Constr. Co. v. United States, 347 F.2d 235, 252 (Ct. Cl. 1965) (delay attributable to government did not end until change order was issued); Whitmeyer Bros. v. State, 63 A.D.2d 103, 406 N.Y.S.2d 617 (N.Y. App. Div. 1978) (owner issued change orders in a disorderly manner); Wilner v. United States, 26 Ct. Cl. 260, 275 (1992) (delay attributable to owner continued until change order was issued); Dick Corp. v. State Public School Bldg. Auth., 27 Pa. Commw. 498, 365 A.2d 663 (1976) (awarding contractor delay damages for period of time that project was suspended as a result of the owner's failure to issue change order).

111. 578 So. 2d 750 (Fla. Dist. Ct. App. 1991).

112. *Id.* at 752.

113. *Id.*

114. *Id.*

115. Sherman R. Smoot Co. v. Ohio Dep't of Admin. Serv., 736 N.E.2d 69, 79 (Ohio App. 2000).

116. *Id.* (citing Envirotech Corp. v. Tenn. Valley Auth., 715 F. Supp. 190, 192 (W.D. Ky. 1988)).

117. *Id.* (citing Clark-Fitzpatrick, Inc. v. Gill, 1993 WL 853794 (R.I. Super. 1993)).

118. N.Y. CONSTR. LAW MANUAL, § 7:46.

119. *Id.*

120. *Id.*

121. 28:12 CONSTRUCTION CLAIMS MONTHLY 1 (Dec. 2006) (citing Carroll Servs., Inc., A.S.B.C.A. No. 8363 (1964)).

122. *Id.* (citing Carroll Servs., Inc., A.S.B.C.A. No. 8362 (1964)).

123. See generally 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 13:40.

124. 417 F.2d 1356 (Ct. Cl. 1969).

125. *Id.* at 1358.

126. See Susan Linden McGreevy & J. Colby Cox, *Third-Party Testing and Inspection*, PROBATE AND PROPERTY (Sept.-Oct. 2005); 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW, *supra* note 10, § 13:4 ("The owner's observation of the work, whether by its own employees, its design professionals of record, or its retained 'special inspectors,' places an obligation upon the owner to notify the contractor on a timely basis of any work deemed nonconforming. The purpose of the obligation is

to avoid or mitigate damages of both the owner and contractor.").

127. See Bovis v. 7-Eleven, Inc., 505 So. 2d 661, 664 & n.5 (Fla. Dist. Ct. App. 1987).

128. 498 So. 2d 573 (Fla. Dist. Ct. App. 1986), *rev. dismissed*, 503 So. 2d 327 (Fla. 1987).

129. Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696, 697-98 (Fla. Dist. Ct. App. 1988); Synergy Mech. Contractors v. Kirk Williams Co., 1998 WL 938592, at *5 (Ohio App. 1998); Cont'l Cas. Co. v. Bd. of Educ. of Charles County, 302 Md. 516, 531, 489 A.2d 536, 544 (Md. 1985); Natkin & Co. v. George A. Fuller Co., 347 F. Supp. 17, 26 (W.D. Mo. 1972). See generally Ashby, *supra* note 58, at 30; G. Rey Reinhardt, *Construction Contract Clauses*, National Business Institute, *Advanced Construction Law in Idaho*, 16700 NBI-CLE 11, 14 (2004); Davisson F. Dunlap Jr., *Recoverable Damages*, FLORIDA CONSTR. LAW & PRACTICE, Ch. 10, § 10.24 (2003).

130. WRB Corp. v. United States, 183 Ct. Cl. 409, 509 (1968); Adams v. United States, 175 Ct. Cl. 288 (1966).

131. 183 Ct. Cl. 409 (1968).

132. *Id.* at 509.

133. *Id.*

134. 175 Ct. Cl. 288 (1966).

135. *Id.*

136. See Camarco Contractors, Inc. v. State, 33 A.D.2d 717, 305 N.Y.S.2d 207 (N.Y. App. Div. 1969), *aff'd*, 28 N.Y.2d 948, 323 N.Y.S.2d 434 (N.Y. 1971).

137. U.S. Steel Corp. v. Mo. Pac. R.R. Co., 668 F.2d 435 (8th Cir. 1982), *cert. denied*, 459 U.S. 836, 103 S. Ct. 80 (1982).

138. City of Houston v. R.F. Ball Constr. Co., 570 S.W.2d 75 (Tex. Civ. App. 1978); City of Seattle v. Dyad Constr., Inc., 565 P.2d 423 (Wash. App. 1977).

139. Columbia Asphalt Corp. v. State, 70 A.D.2d 133, 420 N.Y.S.2d 36 (N.Y. App. Div. 1979).

140. See JOE F. CANTERBURY & ROBERT J. SHAPIRO, TEXAS CONSTRUCTION LAW MANUAL, § 8:13 (3d ed.).

141. Seglin-Harrison Constr. Co v. State, 30 N.Y.S.2d 673 (Ct. Cl. 1941), *modified on other grounds*, 264 A.D. 466, 35 N.Y.S.2d 940 (N.Y. App. Div. 1942).

142. Newberry Square Dev. Corp. v. S. Landmark, Inc., 578 So. 2d 750 (Fla. Dist. Ct. App. 1991).

143. Harry Pepper & Assocs., Inc. v. Hardrives Co., 528 So. 2d 72, 73 (Fla. Dist. Ct. App. 1988).

144. See generally Steven B. Lesser and Daniel L. Wallach, *Risky Business: The "Active Interference" Exception to No-Damage-for-Delay Clauses*, 23 CONSTR. LAW 26 (Winter 2003).

145. See Peter Kiewit Sons' Co. v. Iowa S. Util. Co., 355 F. Supp. 376 (S.D. Iowa 1973); P.T. & L. Constr. Co., Inc. v. N.J. Dep't of Transp., 531 A.2d 1330, 1343 (N.J. 1987); U.S. Steel Corp. v. Mo. Pac. R.R. Co., 668 F.2d 435, 438 (8th Cir. 1982), *cert. denied*, 459 U.S. 836, 103 S. Ct. 80 (1982) ("As the name implies, active interference requires a finding that defendant committed some affirmative, willful act in bad faith which unreasonably interfered with the contractor's compliance with the terms of the construction contract.").

146. See, e.g., Triple R Paving, Inc. v. Broward County, 774 So. 2d 50 (Fla. Dist. Ct. App. 2000); Blake Constr. Co., Inc. v. C.J. Coakley Co., Inc., 431 A.2d 569 (D.C. Ct. App. 1981); U.S. for Use of Wallace v. Flintco Inc., 143 F.3d 955 (5th Cir. 1998); Felhaber Corp. v. State, 410 N.Y.S.2d 920 (N.Y. App. Div. 1978).