

**Written provisions for determining defects guide repair process
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Most would agree that construction defects should be avoided. However, the construction process is complex and defects will periodically occur. How the owner and contractor are required to deal with defects usually depends upon the terms of the written contract between the parties. Industry and other construction contracts involving commercial projects often contain provisions that spell out the obligations of the contractor in the event of a defect. Examples of subjects addressed include how to determine whether a defect exists, when the defect must be corrected, how the defect must be corrected, options for correcting the defect (repair, replacement, or damages), whether the contractor is obligated to pay for any damages suffered by the owner beyond the correction of the defect, cut-off periods for claims relating to certain defects, and exclusions.

The Michigan Court of Appeals recently addressed one of the above provisions and provided an important lesson for contractors.

In this case, a cement company was engaged to install new concrete for a roadway in the City of Ferndale. Two years after the work was completed, the City, through its project engineer, requested that the contractor completely replace a defective portion of the concrete roadway. The contractor believed that only a partial repair of the concrete was necessary. Consequently, the contractor refused to perform the requested work even though it was informed by the engineer that testing indicated that the patching proposed by the contractor would be a temporary repair that would result in future maintenance expenses for the City.

The City then hired another contractor to perform the work and filed a lawsuit against the contractor seeking to be reimbursed for the cost of the repair.

The trial court ruled that partial-depth repair proposed by the contractor would have fully corrected the repair and that the full-depth repair required by the City was not commercially reasonable.

Yet on appeal, the Court of Appeals reversed the trial court and ruled in favor of the City. The basis for the reversal was the Court's finding that the contract included a provision that required the contractor to promptly correct all defective work including removal of the defective work and replacement with work that was not defective if directed to do so by the City's engineer. The provision also required the contractor to pay for all costs and damages incurred by the City arising from the defective work including the cost of repair or replacement work of others.

The contract said that if the contractor failed to correct the rejected defective work within a reasonable time after written notice from the City's engineer to correct the defect, the City could provide a second written notice to the contractor to correct the work. Seven days after the

second notice, the City was permitted to correct and remedy the defective work and charge any such costs to the contractor including damages.

The Appeals Court rejected the contractor's position that the engineer's decision requiring complete replacement of the work was commercially unreasonable. The court stated that there was no language in the contract that required that repairs be "commercially reasonable" and therefore the courts cannot read this standard into contracts where they do not specifically exist in the contract.

While the Court of Appeals decision is unpublished and therefore not binding on other courts, it contains several important lessons for owners and contractors.

For owners, this provision indicates the benefit of such a provision – although had the engineer ruled that patching was a sufficient repair, it can be presumed that the owner would most likely have been bound by the engineer's decision – a result that might have been objectionable to some owners.

For contractors, this court case is a warning to be cautious when responding to repair directions by an architect or engineer with authority to determine how defective work should be corrected. Failure to comply with the design professional's direction may cause the contractor to lose the right to repair the work itself, usually a much less costly option. It may also expose the contractor to damages incurred by the owner. These damages may include the cost of correction of the work by a third party and other losses which in some cases may include attorney's fees and expenses of the owner.

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