

Go to waste



BY LARRY CAUDLE

Doctrine designed to handle nonconforming work

The economic waste doctrine, which is a creation of the courts, prevents an owner from demanding repair or replacement of nonconforming work if (1) the work is otherwise substantially performed and is fit for the purpose intended; and (2) the cost of repairing or replacing the work is disproportionately higher than the diminution in the work's value as a result of the nonconformity. Both

requirements must be met in order for the contractor to avoid repairing or replacing the work.

As to the first requirement, the nonconformity must not render the project or particular feature of the project unusable. In *Granite Construction Co. v. U.S.*, 962 F.2d 998 (Fed. Cir. 1992), a contractor constructing a concrete dam for the U.S. Army Corps of Engineers embedded waterstop into concrete that was later determined to be not in compliance with the project specifications. The contractor offered several remedial options in response to the Corps' initial demand that all nonconforming materials be removed and replaced. However, the Corps rejected all of the contractor's proposals and insisted on removal and replacement.

At trial, the contractor admitted that the waterstop, in fact, did not comply with the specifications, but presented expert engineering testimony showing that the material would nevertheless function and perform within the appropriate design safety factors for the project. The expert also testified that at least one of the several remedial proposals the contractor offered would have sufficed. The U.S. Court of Appeals for the Federal Circuit reversed the Corps of Engineers Board of Contract Appeals trial decision and held that the contractor had adequately met its burden of proving that the waterstop—albeit nonconforming—was in substantial compliance. It, therefore, awarded the contractor the difference between the contractor's actual removal and replacement costs and the estimated cost of performing the repair that was deemed adequate.

The second requirement of the economic waste doc-

trine—a significant disparity between the cost of repair/replacement and the diminution in value of the defective work—is typically the very issue that prompts a contractor to question the propriety of repair/replacement of the nonconforming work in the first place. Often, repair/replacement costs become substantial when nonconforming work is discovered after such work is covered or “built upon” by subsequent work, and demolition of otherwise conforming work is necessary merely to access the defective work.

Unfortunately, no hard-line percentage or rules exist concerning the extent of the disparity that must exist between the cost of repair/re-

placement and the diminution in value, and courts vary greatly in their decisions in this regard. Generally, however, as the materiality of the nonconformity increases, courts are more likely to order repair/replacement despite substantial disparities between the cost of repair/replacement and the diminution in value.

When to order rare

The economic waste doctrine is resorted to in the rare instance where removing and replacing nonconforming work makes no sense from a cost/benefit standpoint. When properly applied, the contractor avoids substantial repair or replacement costs that would yield an insignificant benefit, and the owner is adequately compensated via a credit for any decrease in value or life expectancy of the work. For this reason, contractors and owners should investigate the factual scenarios under which courts in their states have applied the economic waste doctrine. 🏗️

By using the waste doctrine, the contractor avoids substantial costs that would yield an insignificant benefit.

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