IS A PROPERTY OWNER REQUIRED TO ACCEPT ITS CONTRACTOR'S OFFER TO REPAIR CONSTRUCTION DEFECTS

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A question that frequently arises after a construction project is whether a property owner should accept its contractor's offer to repair construction defects. The scenario goes something like this. Shortly after a contractor completes a construction project, the property owner discovers the contractor's work is defective. The contractor makes an offer to remedy the defect. The owner refuses to accept the contractor's offer and hires a different contractor to repair the defects. A lawsuit follows. *Can the owner recover damages for the cost to repair the defects?*

We start by looking at Chapter 558, Florida Statutes, Florida's Construction Defect Statute. The Statute requires a property owner give contractors, subcontractors, suppliers or designers responsible for alleged construction defects sufficient notice and an opportunity to cure before a lawsuit is filed. However, the statute does not require an owner accept a contractor's offer to cure and there are no consequences to the owner under the statute if he rejects the offer to cure.

A recent Florida decision by the Third District Court of Appeal addresses what happens if there is a contract requiring that the contractor is given notice and a right to remedy its alleged defects. In *Underwater Engineering Services, Inc. v. Utility Bd. of City of Key West*, 194 So. 3d 437 (Fla. 3d DCA 2016), the court reversed a judgment for damages where the Utility Board of Key West ignored its contractual duty to give its contractor, Underwater Engineering Services, notice and an opportunity to cure non-conforming maintenance work on fifty-seven concrete pillars supporting electric transmission lines of the seven-mile bridge in the Florida Keys. After the project was completed, the utility design board discovered defects in the concrete coating of the pillars. The board hired a new contractor to repair or replace the concrete collars around the base of the pillars and sued the original contractor for failing to properly pour several of the concrete collars according to the project specifications.

The case proceeded to a five-day nonjury trial. The trial court held that the contractor was liable for the defects because it did not properly pour eight concrete collars according to the utility board's specifications. The appellate court, however, reversed holding that the contract required notice and an opportunity to cure, and the contractor should have been given the opportunity to repair the non-conforming work. The utility board recovered none of the costs to repair the contractor's defective work.

Consider a contractor with a contractual right to remedy the defect, like the contractor in *Underwater Engineering Services,* but is given notice of the defect by the owner, makes an offer to repair, and the offer is rejected. *Could the owner hire another contractor to perform the repairs and recover the repair costs as its damages in a lawsuit against the original contractor or will the owner be in breach of contract?* There may be circumstances in which a refusal to allow a contractor to make repairs is excused. For example, the contractor's proposed repairs may be inadequate to fully resolve the problem or the contractor's proposed repairs are accompanied by a demand to release claims for damages or a refusal to reasonably warrant the repair work. There may be a history of defective or untimely work by the contractor justifying the rejection of a contractor's offer to repair. Finally, a rejected offer to repair may be excusable if the defects and resulting

damage involve the work of several construction parties, the contractor’s offer to repair addresses only part of the problem, but complicates or impedes remediation of other defective work.

In conclusion, a property owner’s decision to accept or reject a contractor’s offer to repair construction defects should not be taken lightly. Issues involving notice of construction defects, offers to remedy defective work and rejection of offers to repair are complex, case specific, and require careful analysis of the parties’ contract and applicable Florida statutory and common law.

For more information on this topic, please contact Jeff Wertman on the firm’s Dispute Resolution Team.

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