



5 Questions to Better Assess Responsibility and Correction for Latent Construction Defects

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When construction defects are detected during the performance of work, it is generally accepted that such faulty workmanship will be corrected by the contractor before the project is considered complete. However, when there is a latent construction defect, determining responsibility after the project has been completed and turned over to the owner for beneficial use is not always clear and can potentially lead to legal action.

Defective construction can be tricky because it may not reveal itself until many years after the project has been completed and placed in use. Whether the defect should have been discovered earlier through the normal construction inspection process will also be of consideration. Note that assigning responsibility to correct such a defect may be limited by warranty or state statute.

Other considerations that may complicate the issue are dependent upon the stage of construction when non-conforming work or faulty workmanship is observed. The owner may be faced with deciding whether to require the contractor to correct the construction defect, retain a separate contractor to correct the defect, seek the recovery of the estimated costs to correct such work or accept the work as non-conforming. For example, water intrusion caused by faulty workmanship on the construction of the building envelope may not manifest itself until a leak is detected within the building. Were it determined that the faulty workmanship could not have been reasonably detected through the normal course of building inspection, it is more likely that the owner will be successful in demonstrating entitlement to recover the costs to correct the defect.

As no two construction projects are the same, there is no single approach to rectifying defective work. Each issue should be viewed based on the specific contract requirements applicable to that project and the actual circumstances that preceded/succeeded the specific event.

The following 5 questions can help begin the process of assessing responsibility for the defect, including late discovery, and thus help determine how best to correct it:

1. Is the defect one of performance whereby the end-product may function but not to the level specified?
2. Will the project stakeholders require inspection and verification of the construction defect to determine liability and/or the corrective measure necessary to bring work into conformance with the specifications?
3. Is the cost to correct the defect prohibitive such that the actual cost of repair will significantly exceed the lost benefit of having the defect corrected?
4. Is there an alternative approach to correcting the defect, that while not consistent with the specifications, it may be acceptable to the owner and comply with the intended function of the product?
5. Should the owner correct the defect first before proceeding to recover the associated costs from the responsible party, as compared to providing an estimate of the cost to correct?

Ultimately, the actions and steps taken subsequent to the discovery of a latent construction defect are as important as the actions that preceded it and/or caused the work to be deemed non-compliant. Establishing the necessary records to demonstrate a causal link puts all parties in position to better assess responsibility and determine the appropriate course for correction.

Resolution Management Consultants, Inc. (RMC) is a nationally recognized consulting firm headquartered in Marlton, NJ. There are two sides to the business: the construction planning and management aspect – helping clients build more successful projects – and the litigation aspect – should matters go to court, providing analysis and testimony as expert witnesses. Founded in 1993 by veterans in the construction, contracting and engineering professions, RMC has assisted numerous private owners, public agencies and contractors in either achieving project goals or resolving cost and time disputes between the contracting parties.

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