

Limit on Requirements for Correcting Nonconforming Work

ASCC Position Statement #41

Most project specifications contain provisions for nonconforming work such as the following:

“Concrete work that fails to meet one or more requirements of the Contract Documents and cannot be brought into compliance may be rejected. Repair rejected concrete work by removing and replacing or by reinforcing with additional construction as required by the Architect/ Engineer.”

ACI 301, “Specifications for Structural Concrete,” contains similar language. Many Owners, Construction Managers, and Engineers believe this gives them the right to order removal and replacement without an evaluation of the work. This belief can be a costly mistake as shown by the result of a construction legal battle involving the U.S. Army Corps of Engineers several years ago [Source: *Construction Claims Monthly*, September 1992].

In the case *Granite Construction Co. vs. United States* (1992), the U.S. Court of Appeals ruled that when a contractor substantially—but not strictly—complies with a contract’s specifications, the owner may not require replacement of the work if replacement would amount to economic waste. The owner may only take a credit.

In the case in question, the U.S. Army Corps of Engineers awarded a contract to Granite Construction Co. to build a dam and lock in Aberdeen, MS. The walls of the structure consisted of concrete monoliths with PVC waterstops embedded in the vertical joints to prevent water leakage. After about 10% of the waterstop had been permanently embedded, the Corps inspected the work and determined that it did not comply with contract specifications. The Corps then ordered the waterstop removed and replaced.

Granite Construction acknowledged that the waterstop did not literally meet the specification, but argued that it met the functional needs of the project. Granite also noted that it had cost \$5,752 to install the waterstop, but would require more than \$3 million to remove and replace it. Granite provided expert opinions that the waterstop was sufficient. Nevertheless, the Corps was not convinced and ordered the contractor to remove and replace the waterstop.

The U.S. Court of Appeals ruled that the Corps’ directive was unreasonable. If the cost of correcting defective work is clearly out of line with the project owner’s loss of value on the completed project, the owner’s remedy is limited to a reduction in the contract price that reflects the diminished value of the completed project.

In its decision, the court noted:

“We recognize that the government generally has the right to insist on performance in strict compliance with contract specifications and may require a contractor to correct nonconforming work. However, there is ample authority for holding that the government should not be permitted to direct the replacement of work in situations where the cost of correction is economically wasteful and the [original] work is otherwise adequate for its intended purpose. In such cases, the government is only entitled to a downward adjustment in the contract price...”

“...we hold that the Corps’ requirement that the waterstop be torn out and replaced would result in economic waste. The Corps made no effort to evaluate the quality of the waterstop in relation to the needs of the Aberdeen project. Had it done so, the record shows that the Corps would have discovered that the waterstop was entirely adequate for the project and that its replacement was unnecessary.”

ASCC concrete contractors will work with Owners, Construction Managers, and Engineers in addressing nonconforming work to make sure the original work or the repaired work is adequate for its intended purpose. If you have any questions, contact your ASCC concrete contractor or the ASCC Technical Hotline at 800-331-0668.



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