

REMAINING RESPONSIBLE

General Disclaimers Don't Work!

A September 2007 US District Court decision reminds contracting parties to keep focused on their responsibilities. For many participants in the marine industry, it can be a firm reminder that broad disclaimers cannot be used to transfer responsibility. There often is an attempt by ship owners and their design consultancies to try to have the shipyard be responsible for many aspects of the design of the ship that is being constructed, despite the fact that the owner's team has put together a lot of design information pre-contract. This court decision should serve to remind all parties that they cannot 'disown' any errors or inconsistencies in their design efforts if those design efforts are part of the information package that is included among the contract documents. Here are the relevant details.

A U.S. ship repairer took on a conversion contract for a vessel owned and operated by a federal agency. Upon conclusion of the conversion, the shipyard filed suit against the agency alleging, among other problems, that extra costs were incurred in accomplishing the work because the government-provided drawings were inaccurate and not coordinated with one another. Regarding the issues pertaining to the drawings, the court focused on part of the contract.

The Disclaimer

The court's decision first cited this wording from part of the ship conversion contract: *"The Government does not guarantee the correctness of the dimensions, sizes, and shapes given in any sketches, drawings, plans or specifications prepared or furnished by the Government. The Contractor shall be responsible for the correctness of the shapes, sizes and dimensions of the parts to be furnished hereunder, other than those furnished by the Government."*



But the Court Says the Government IS Responsible for Adequate Drawings and Specifications

The court then stated: *"The Court finds that this provision does not affect the disposition of the case because it is a general disclaimer and does not relieve the Government of its obligation to provide adequate drawings and specifications."*

This is not a new interpretation by the Court; it is a reminder of a well-established principle. Simply stated, when a designer (on behalf of the owner) puts into writing (or electronic files) information that will be used by shipyards for bidding purposes, all of that information has to be consistent with all other contract requirements. The correctness and reliability of that information cannot be disavowed by a broadly-worded disclaimer. ▲



A newsletter
for the Maritime
Industries from:



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The Flow of Contract Information

Content, Form, and Timing

Many aspects of contracted worksopes for shipyard projects involve the flow of information between the parties, with the information being as diverse as drawings, engineering calculations, noise measurements, test results, steel-and-air temperatures, megger readings, classification comments on drawings, and many others. These requirements are presented in the project's specifications. In general, the flow of information requires a mutual understanding of the content, form and timing of the conveyance of the information, and sometimes the medium by which it is conveyed.

Specification writers often assume that the shipyard will understand why the owner's staff needs the information required by some of the specification items. Implicit in that assumption is the premise that the shipyard will provide the correct information in a form that is useful to the owner and, moreover, will provide it on a timely basis. However, while the shipyard anticipates expending the fewest possible resources on the development and communication of that information, the owner anticipates something else. Often the differences between the shipyard's plan of action and the owner's expectations for such communications become apparent in form and timing, as well as sometimes in content. When such misunderstandings arise, they are usually the responsibility of the specification writers' implicit assumptions, rather than explicit requirements for the information.

Avoidance of a misinterpretation, omission or delay in the flow of the information arising from a specification item often is essential, if not critical to the project. Because of differing perspectives between owner and shipyard as to the resources needed to address information flow, a specification should separately address the content, form and timing of the requisite information to ensure that the owner's needs for that item are fully and clearly communicated in the specifications.

Content: While technical content of information is typically well defined, most persons in the

industry can cite examples where insufficient definition of the content of the information has been the basis of disputes, large and small. For example, when a large change order during ship repair would impact vessel redelivery date, the parties agreed that the extent of the contract extension was "to be determined," with no further description given. Later, in arbitration over that issue, the owner said a pre-completion formal schedule impact analysis was expected; while the shipyard said the extension was to be determined by the sequence of actual completion events, however it turned out. This is but one example of the necessity of defining the content of information that is to be communicated at some later time.

Form: Once the content of a given specification item has been nailed down, the next point to consider is that of form. Especially since the advent of computers and related technologies this point has become increasingly more important—and complicated. Paper or electronic? Merely using "electronic" may result in a non-searchable 'pdf' file. Instead, identify the application and the version of it by which the information can be effectively used. Example: As-fitted drawings were to be provided in both printed and "electronic form." When the owner received the drawings as a 'pdf' file, the owner's unhappy response was initially directed toward the contractor, but later toward his own specification writers. (The shipyard had asked for an additional fee to provide them in a more useable electronic format.)

Timing: When is the most appropriate time for the owner to receive the information? An example of that question not being explicitly answered in the specifications involved the conversion of a ro-ro to a training ship, requiring much more accommodation space. All design engineering was provided by the owner except that the shipyard was to accomplish the HVAC engineering and design. The contract did not require that the HVAC engineering be done before assembly of the new accommodation structure. So after the structure was mostly fabricated (to

accelerate cash flow), the shipyard performed the engineering, only to learn that the HVAC distribution system would not fit. This led to the necessity of an extensive alteration in the configuration of the already fabricated deckhouse. If the engineering had been required to be accomplished pre-fabrication, a much less costly 'fix' could have been arranged. Lesson learned: get the engineering done before the construction begins. This is an example of why the flow of information (HVAC engineering) should include the timing of when it is to be accomplished (before fabrication of the deckhouse).

Regarding the medium for the transmission of information, Fisher Maritime's recent review of a proposed ship construction specification noted that it required that a certain dynamic test result be 'tape recorded.' At a number of other places it specified that data be stored on 'magnetic media.' With the appreciation that the owner did not want to receive these documents on an outdated floppy disc or magnetic tape, it was recommended that these specifications be updated to identify a more modern (i.e., optical) means of data storage. This illustrates why the medium by which information will be conveyed sometimes needs to be defined, as well.

There are numerous opportunities for inconsistencies and incompleteness in specifications for shipyard projects. Often they may be largely avoided by having persons other than the specification writer independently reviewing the specifications. Fisher Maritime routinely provides specification quality assurance services, ensuring uniformity throughout the specifications. To assist owner's during the contract development and execution processes, Fisher Maritime also has a number of other resources available including training programs and publications. Additional information pertaining to resources available from Fisher Maritime may be found by visiting our website at www.fisher-maritime.com. ▲

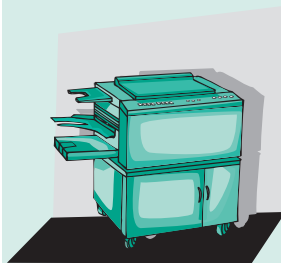
Color Coded Features *The Vanishing Information*

During the conversion of a vessel, a shipyard installed incorrect fire-rated bulkheads in several of the vessel's spaces, delaying the issuance of the flag-state Certificate of Inspection, as well as being costly to both parties. Fisher Maritime's analysis of the underlying facts revealed that the cause of the error was found to be vanishing information.

It was learned that the fire boundary plans supplied to the shipyard by the owner utilized different colors to delineate the different fire ratings required in several locations. The shipyard's project management office had photocopied the drawings in black-and-white, sending those copies to the purchasing and production departments. With all the fire boundaries now appearing as the same gray, the shipyard's subsequent use of these black-and-white reproductions resulted in a single (lower) fire-rating of bulkheads being installed throughout. This confusion in fire ratings was not discovered until well after the bulkheads and other outfitting had been installed, leading to extra costs and delays to effect a correction.

The Original Color Documents Indicate Important Differential Information

There is a lesson to be learned from this experience. With the availability of low-cost color printers, and the ease of using different colors in drawings, charts and tables, the use of color-coded information appears to be a means of emphasizing the needed differentiations. But this is appropriate only when viewing the originals of those drawings, charts and tables. As soon as black-and-white copies are made, that differentiating information vanishes.



Accordingly, when color-coded information is presented, consider sending it back to its authors and asking for revisions to incorporate a differentiation of features that will survive black-and-white copying. This might mean using different forms of lines, gradients, fill patterns, or more extensive word-labeling. For those cases where certain constraints limit the application of these suggestions, it may be appropriate to include a highly visible notation stating that the document must be reproduced in color to ensure clarity. ▲

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Shipyard Safety Concerns

Put it in Writing

As ship owners' representatives walk through the ships during on-going work at shipyards, they may observe conditions or situations that are not consistent with the contractually-required means of assuring safety to both personnel and the vessel. A few words to the production supervisor often is sufficient to achieve a correction to that deficiency, at least temporarily. But more likely than not, a temporary correction is not sufficient; it has to endure for as long as the shipyard's work continues, although that implementation has a cost impact on the shipyard. The challenge is for an owner's representative to effectively convince the shipyard to implement for the duration of the contract all the safety features that it contractually promised.

Recently Fisher Maritime's expertise was called upon to help resolve a dispute centering on a vessel which experienced a significant fire stemming from hot work during the repair process for which there was inadequate fire watch and fire protection. During the ensuing litigation over responsibility for the cost and schedule impact of the fire and subsequent repairs, an owner's representative alleged that he had passed through the space before the fire occurred, asking for improvement in the fire watch situation and the greater use of appropriate fire blankets. The shipyard denied that they had been advised of those alleged deficiencies.

Written Communication to Management Documents Owner's Concern About Safety Issues

Orally calling safety issues to the attention of the shipyard is often believed sufficient. However, these conversations are often subject to differing recollections, especially as time passes, memories fade and unfortunate events occur. In order to ensure that the communicated concern is properly preserved, a safety issue which has been verbally communicated to the shipyard probably should be

followed up immediately in writing to shipyard project management.

This process achieves four objectives. First, it ensures that the shipyard management, beyond the production staff, is notified immediately upon detection of perceived safety hazards. Second, there is no misunderstanding regarding the particulars of a given issue. Third, the issue has been preserved in the event of future disputes. Fourth and perhaps most importantly, knowledge of the existence of this contemporaneously-developed document puts pressure on shipyard management to implement for the duration of the contract all the safety features that it contractually promised.

An owner's representative may even find it useful to create a form in advance in order to easily record such important parameters as the nature of the issue, reference to particular contractual and statutory requirements, and identification of the location, date, time, person notified, and corrective actions to be taken, among other possible factors.

Dovetailing into this issue is the confusion regarding the intent of occupational safety and health regulations pertaining to ship repair, conversion, construction, and breaking. Those regulations have been promulgated to ensure the safety and protection of shipyard employees from unsafe working conditions. That is, those regulations exist to protect the shipyard employees, not the vessel, from unsafe working conditions. With this in mind, the owner may find that those regulations fall short of adequately protecting the vessel from unsafe conditions. Accordingly, many owners find it important to contractually define supplemental requirements that focus on the safety of the vessel above those regulations that focus on safety for shipyard employees. ▲



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When do you need us?

When you need help with...

Contracts

Fisher Maritime writes **contracts, specifications, and complete bid packages** for new construction, conversion, overhaul or repair. We also review and revise draft contracts and specs.

Recent contract work included new construction on:

- Ice breaking research vessel
- Off-shore construction and pipe-laying vessel
- Self-unloading bulk carrier ITB

Project Management

Fisher Maritime consultants are grounded in commercial fleet construction and repair, as well as naval repair and overhaul. **Fisher Maritime provides on-deck project management** services for shipyard construction and conversion projects.

Recent project: Multiple disputes between owner and shipyard about costs and schedule for conversion and re-flagging of a research vessel led to a breakdown in the project work. Fisher Maritime was installed by owner between its project staff and the shipyard to get the project moving ahead and completed, all within a renegotiated budget.

Dispute Resolution

It takes many forms, from project-phase analysis through litigation. **In every situation, we provide accurate assessments and incontrovertible analyses.**

Recent case: A platform support vessel lost all power while transferring drilling fluid to a moored drilling rig, causing multi-million dollar damage and downtime for repairs. Fisher Maritime analyzed the cause of loss of power to be the absence of certain design features on the PSV, resulting in a settlement in favor of our client.

Litigation Support

We support our clients with **construction and repair disputes in state, federal, civil and criminal courts**, in every stage of litigation. We can also help you avoid litigation.

Recent case: The alleged improper use of intellectual property rights by a vessel owner was challenged by a shipyard that had engaged in discussions with the owner, but was not awarded the contract. Fisher Maritime analyzed multiple design features to 'test' whether the constructed vessel had used the intellectual property of the first shipyard.

For 31 years, Fisher Maritime Consulting Group has been resolving technical, cost, and schedule issues in shipbuilding and repair contract disputes. Our clients come from every sector of the industry: shipyards, shipowners, third-party vendors, government agencies and private concerns. Because we're experienced naval architects, marine engi-

neers and project managers, we bring strength and clarity of insight to our clients. **Our overriding goal? A well-developed suite of contract documents, structured management controls for complex projects, rapid resolution of developing conflicts and disputes, and projects completed with minimal growth.**



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2008 Training Programs

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programs can be viewed on our website www.fishermaritime.com or you may call to request a detailed brochure via fax or mail.

Each of the programs can be presented on-site at your organization's facility for seven or more persons at less cost than sending your staff to an open-registration presentation. Over 98 organizations in fourteen countries have had these programs presented on an in-house basis over the past 19 years. To receive details for arranging an on-site presentation of any of the programs listed below, contact us: **tel. 800-732-3476 or 973-660-1116, fax 973-660-1144, email: email@fishermaritime.com.**

C&CM: Contract and Change Management for Ship Construction, Repair and Design. This 3-day course is designed for all members of the contract management team for ship owners, shipyards, design firms, vendors, subcontractors, regulatory agencies, whether commercial or government. Senior and middle management of all those types of organizations benefit from the "lessons learned" approach to managing all contractual commitments.

2008		
San Francisco, CA	Mon.-Wed.	Mar. 3-5
London, U.K.	Wed. - Fri.	Apr. 9-11
Mobile, AL	Mon.-Wed.	June 9-11
Annapolis, MD	Mon.-Wed.	Sept. 22-24
London, U.K.	Wed. - Fri.	Oct. 29-31

TPEC: The Port Engineer's and Owner's Representative's Course. This 3-day course is designed for shipowner's personnel who prepare specifications, who accompany the ship to the shipyard, and who arrange for new/growth/change work during contract performance. This course helps assure getting maximum value for money spent.

2008		
Seattle, WA	Mon.-Wed.	May 12-14
Pensacola, FL	Mon.-Wed.	Nov. 10-12

SMCC: Shipyard Management of the Customer and Contract. This 2-day course for project managers, production supervisors, estimators and planners is the only training program specifically developed for mid-level managers of shipyards and subcontractors. Presented in-house only. Contact Fisher Maritime for details.

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