Unless you're deep into the theory of contractor defenses, you probably don't know about the *S pearin*
doctrine. The first thing we need to do is talk about it.

The *Spearin* doctrine is a legal theory established by the U.S. Supreme Court in 1918. It holds that the owner (or customer) impliedly warrants the information, plans and specifications which an owner provides to a general contractor. The contractor will not be liable to the owner for loss or damage which results solely from insufficiencies or defects in such information, plans and specifications. As Wikipedia quotes from the original SCOTUS decision—

Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work ... the contractor should be relieved, if he was misled by erroneous statements in the specifications.

Thus, the government is responsible to provide accurate plans and specifications to its contractors, and will be found liable if any defect in those plans and specifications leads to additional costs being incurred.

In what Senior Judge Lettow, of the Court of Federal Claims called "a very unusual potential application of the *Spearin* doctrine," the government was found liable for the allowable portion of a contractor's costs incurred to defend itself from a False Claims Act
qui tam
suit, when the government's inaction led to the conditions that the
qui tam
relater asserted was a false claim.

The case involves several issues that should be of interest to us. It involves allegations of violations of the False Claims Act. It involves legal expenses and application of the cost

principle at 31.205-47 to determine cost allowability. It touches cost allocability and the beneficial or causal relationship between legal costs and final cost objectives. Finally, it involves a contractor attempting to recover additional costs on a firm, fixed-price contract. *So let's discuss it!*

For reference, see *Tolliver Group v. US*, **17-1763C** , decided January 22, 2020.

In 2011, the Army awarded to DRS Technical Services a $1.41 million fixed-price, level-of-effort (FPLOE) contract to develop and deliver technical manuals for an Army mine clearing vehicle. "… to aid the contractor in developing the manuals without having to engage in extensive reverse engineering, the contract's PWS [Performance Work Statement] required the Army to provide certain government-furnished information to the contractor, including a technical data package with engineering drawings from the manufacturer … and commercial off-the-shelf manuals."

Unfortunately, the Army never obtained and/or provided the required technical data package. "Fully aware that the technical data package had not been, and could not be, provided to the contractor as Task Order 10 required, the Army nonetheless directed the work to proceed." Can you smell an expensive Request for Equitable Adjustment in the Army's near future? We can.

Tolliver assumed the Task Order 10 contract from DRS through novation in September, 2012. It "endeavored to perform without the technical data package." In April, 2013, after Tolliver had worked on the contract for approximately seven months, "the Army issued Modification 8, … that changed the terms of performance by removing the government's obligation to provide the technical data package [and] converted Task Order 10 from a firm-fixed-price, level-of-effort contract to a firm-fixed-price contract at an increased cost of approximately $6.45 million." (Yep, that was an expensive oversight on the Army's part.)

But the fact remained that Tolliver had been submitting invoices to the Army, invoices that a *qui tam*
relator alleged to be false claims. The relator "asserted that Tolliver violated the False Claims Act while performing Task Order 10 during the period before [issuance of] Modification 8 … by certifying compliance with the technical data package despite having never received that package." Ultimately the suit was dismissed because "[the Army] intended to provide [Tolliver] with [the technical data package] for use in developing the manuals, it did not do so, it knew that it did not do so, and still instructed [Tolliver] to proceed with performance." The dismissal was

appealed to the Fourth Circuit, which affirmed the lower court's decision.

Throughout the course of litigation, Tolliver incurred nearly $250,000 in attorney's fees. Pursuant to 31.205-47(e), since the disposition of the litigation was dismissal, Tolliver was entitled to claim 80% of its legal expenses as allowable costs. (The remaining 20% were, by rule, unallowable—apparently as a penalty for getting dragged into court.) Thus, Tolliver submitted a claim to the contracting officer, seeking reimbursement under Task Order 10 for $195,890 in allowable legal fees it had incurred in defending itself against the suit. The contracting officer rejected the claim, stating the contract was "a firm fixed price order which contains no provision for [the government to assume the risk of legal costs]." In addition, the Contracting Officer's Final Decision (COFD) stated that the legal costs—

… were not allowable under the cost principles of FAR Subpart 31.2 because they were neither allocable nor allowable within the terms of the contract. The [COFD] found that the costs were not allocable because they were not incurred specifically for the contract and did not provide the government with a benefit. Likewise, it found that they were proscribed by the fixed-price nature of the contract in the absence of a contract clause providing otherwise.

(Citations omitted.)

Citing to the *Spearin* doctrine, Judge Lettow found that the Army's failure to provide the promised technical data package was the proximate cause for Tolliver having to defend itself against the False Claim Act suit. The government argument that the fixed-price nature of the contract prevented an equitable adjustment of this type was rejected, because the original *Spearin*
contract was also fixed-price, and "the Supreme Court allowed an equitable adjustment precisely because of the implied warranty that if the contractual specifications were complied with, performance would have been satisfactory."

While Tolliver was the victor of the entitlement argument, the Judge declined to decide quantum. He wrote "In their motions for summary judgment, however, the parties spilt little ink addressing the reasonableness of the attorneys' fees at issue. Although the contracting officer appears not to have disputed the amount of defense costs Tolliver claimed, this court must review the contracting officer's final decision *de novo* …Therefore, this court cannot enter judgment based solely on the contracting officer's acceptance, or decision not to address, the reasonableness of Tolliver's legal fees." Further, the court did not address the other contracting

officer contentions regarding cost allocability.

All in all, an interesting case.