Case No. A25-0754
STATE OF MINNESOTA
IN SUPREME COURT

Ames Construction Inc.,

Appellant,

vs.

City of Moorhead,

Respondent.

BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF MINNESOTA, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Associated General Contractors of America ("AGC"), Associated General Contractors of Minnesota ("AGCMN"), and American Road & Transportation Builders Association ("ARTBA" and collectively, "Amici") respectfully file this amicus brief in support of Petitioner.

Amici's interests in this matter are public. They are all non-profit trade associations comprised of general contractors, subcontractors, owners-developers, and other businesses that perform, supply, or have interests in highway, road, heavy-civil, industrial, and commercial construction in Minnesota and around the United States. Both AGC and ARTBA are national organizations concerned about maintaining the national understanding and recognition of the *Spearin* Doctrine. Their members are and will be directly impacted by the Court of Appeals' decision as well as any subsequent decision made by this Court. Amici represent the interests of their members on industry-related issues at all levels of government and work to promote thoughtful and durable policies and practices that benefit all stakeholders in the construction industry.

[1] Pursuant to Minn. R. Civ. App. P. 129.03, Amici and their undersigned counsel are solely responsible for the content of this brief. No counsel for any other party to this matter authored the brief in whole or in part, and no person or entity made a monetary contribution to the preparation or submission of this brief other than Amici.

INTRODUCTION

The *Spearin* Doctrine stands for the proposition that when an owner furnishes project information to a contractor, which may include specific construction materials or methods, then an implied warranty is created that the information and/or materials will achieve the desired result. *United States v. Spearin*, 248 U.S. 132, 136–38 (1918). This warranty overrides broad, general disclaimers, and, when reasonable, the contractor may rely on the owner-furnished information. *Compare Robert E. Lee & Co. v. Commission of Public Works of City of Greenville*, 149 S.E.2d 55, 58–59 (S.C. 1966) (holding that a contractor's reasonable reliance on owner provided boring test results was not overcome by general disclaimers), *and White v. Edsall Const. Co.*, 296 F.3d 1081, 1085 (Fed. Cir. 2002) (holding that general disclaimers are ineffective to overcome the doctrine's implied warranty), *with J.A. Thompson & Son, Inc. v. State*, 465 P.2d 148, 154 (Haw. 1970) (finding reliance not reasonable considering contractor's knowledge of regional subsurface conditions and visible indicators of site conditions).

This implied warranty is now universally recognized in the United States as the "*Spearin* Doctrine," including by Minnesota. *See, e.g.*, *Stanton v. Morris Const. Co.*, 199 N.W. 104, 106 (Minn. 1924) (adopting the *Spearin* Doctrine in Minnesota); *McCree & Co. v. State*, 91 N.W.2d 713, 722 (Minn. 1958) (same).

If this Court affirms the Court of Appeal's decision, holding that the owner's requirement to furnish accurate information does not include information that is not expressly part of the contract—a holding directly contrary to this Court's holding in *Stanton*—then owners will be able to easily circumvent the *Spearin* Doctrine and improperly shift risks to contractors and other parties that are required to rely on owner- or developer-furnished information. If affirmed, the Court of Appeal's decision will largely gut the *Spearin* Doctrine in Minnesota. The result will be increased costs, in this case for Ames but moving forward ***for all municipalities and project owners.*** If contractors cannot rely on owner-provided geotechnical information provided during the bid phase, they will have to either (1) include a risk premium in all of their bids—increasing the costs for all projects as opposed to just the ones where the information is inaccurate or (2) bid on fewer and smaller projects thereby handicapping municipalities and project owners from the benefits of lowering costs through competitive bidding.

Thus, affirming the Court of Appeal's decision is bad for everyone (including all taxpayers). The Court should reverse.

ARGUMENT

I. THE *SPEARIN* DOCTRINE HAS A LONG HISTORY OF ACCEPTANCE NATIONWIDE

The implied warranty of the adequacy of owner-supplied information articulated in *Spearin* has become a bedrock of construction law. As leading construction-law commentators have explained, *Spearin* is "considered by many to be the most significant construction law case," and the doctrine became "one of the pillars of U.S. construction law." Buckner Hinkle, Jr., Robert J. MacPherson & James F. Nagle, *Still Spearin After All These Years?*, 12 No. 1 J. Am. Coll. Constr. Laws. 1, 1 (2018). Every state has adopted what has now been termed the *Spearin* Doctrine. *See* 3 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 9.94 (West 2026). As Ames details in its brief, *Spearin* has a long history of acceptance in Minnesota. But it also has a long history of acceptance in federal common law, from which it stems.

Several federal cases support the position that when an owner provides information pre-contract or pre-construction, a contractor can (and often must!) rely on that information. For example, in *Foster Construction C.A. & Williams Bros. Co. v. U.S.*, the owner provided information in the form of drill hole logs and design details for the construction of piers. 435 F.2d 873, 876-77 (Ct. Cl. 1970). The information indicated that the subsurface below the piers would be "firm and stable." *Id.* at 877. But the plaintiff encountered "loose and permeable materials [that] gave no firm hold" for the piers. *Id.* This led to increased costs and difficulty in construction. *Id.* The court held that the contractor is unable to rely on owner-provided indications of the subsurface "only where relatively simple inquiries might have revealed contrary conditions." *Id.* at 888. The court further held that "unmistakable contract language in which the Government seeks to disclaim responsibility [for the information] does not lessen the right of reliance" because such disclaimers "conflict with the changed conditions clause." *Id.* Ultimately, the court held that "the plaintiff and the other bidders had the right to rely on indications of the subsurface in logs put in the contract for their use and reliance." *Id.* That was so even in that case, where the project designer, which was separate from the geotechnical engineer, relied on the geotechnical information to create the final design. *Id.* So too here. It's not as if the City of Moorhead provided the geotechnical information at the center of this case gratuitously. It ***required*** that the information be used for the bidding and construction of the Project.

Similarly, in *Robert E. McKee Inc. v. City of Atlanta*, the city provided subsurface information to the contractor prior to the bidding stage. 414 F.Supp. 957, 958 (N.D. Ga. 1976). When the contractor started excavating the site, he discovered "the level of rock was substantially higher than had been represented by the borings," which led to increased costs. *Id.* The court recognized that the Supreme Court "held long ago . . . that the government is liable to the contractor when it makes positive statements of material facts concerning the nature of the work in question, when those facts are false." *Id.* at 959. And that "general exculpatory clauses which disclaim any responsibility for the accuracy of that data have been held to be of no effect when the positive specifications made by the government were obviously intended to be used by the bidding contractors in formulating their bids." *Id.* The court ultimately did not grant relief at the summary judgment stage due to factual issues. But the legal principles recognized by the court are the same as those the Amici ask this Court to recognize. Here, because the City of Moorhead made positive statements to Ames via geotechnical information provided during the bidding stage that was "obviously intended to be used," Ames should be entitled to rely on that information.

II. THERE ARE STRONG PUBLIC POLICY REASONS FOR THIS COURT TO REINFORCE THAT THE IMPLIED WARRANTY GROUNDED IN *SPEARIN* REACHES INFORMATION PROVIDED BY THE OWNER THAT IS NOT EXPRESSLY PART OF THE CONTRACT

A. The *Spearin* Doctrine Promotes Efficiency and Lowers Costs

1. The *Spearin* Doctrine Promotes Efficiency and Lowers Costs for Municipalities, Including for the City of Moorhead

Owners—including municipalities—should support the reaffirmation of the *Spearin* Doctrine by this Court. If *Spearin* is fundamentally altered to allow owners to disavow data provided to contractors for bidding and project design purposes, as the Court of Appeal's opinion does here, then contractors cannot safely rely on any owner-furnished data or information. As a result, contractors will have no choice but to incorporate the risks of relying on inaccurate owner-furnished information into their bid prices. *See Sherman R. Smoot Co. v. Ohio Dept. of Adm. Serv.*, 736 N.E.2d 69, 77 (Ohio Ct. App. 2000) ("The basis for the *Spearin* doctrine is the belief that it is unreasonable to expect every bidder on a government contract to perform expensive job site investigations . . . To hold otherwise would reduce the number of bidders on government contracts and increase the price of the few bids received.") (citations omitted). This risk premium will cause the price of many public projects to increase, instead of the far more cost-effective alternative of owners only paying to correct informational errors when they actually occur. This efficient allocation of risk is at the heart of the *Spearin* Doctrine, and its benefits accrue to the general public through more cost-effective use of taxpayer dollars, potentially enabling the funding of additional projects as well.

In sum, although it may be in the City of Moorhead's short-term interest to succeed in its defense to Ames' claims here, ultimately all municipalities and the general public will be harmed if the Court does not reverse. It is not in anyone's long-term interest to uphold the Court of Appeals' decision.

2. The *Spearin* Doctrine Promotes Efficiency and Lowers Costs for Contractors

Construction is an inherently risky undertaking. *See Blake Construction Co. v. C.J. Coakley Co., Inc.*, 431 A.2d 569, 575 (D.C. App. 1981) ("[E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project . . . ."). The most efficient, cost-effective way to allocate construction risks is to have the party that is best able to control the risk bear it. *See* 2 BRUNER &

O'CONNOR ON CONSTRUCTION LAW § 7.7 (West 2024) (citing Abrahamson, *Risk Management*, 2 INT'L CONSTR. L. REV. 241 (1984)).

In a typical public construction project, the owner selects the site and conducts the site investigation. The owner decides how much time and effort to invest in the site investigation, depending on the character of the site and the nature of the project. The owner then shares the information gathered from its site investigation as part of a bid packet that is provided to all bidding contractors. Because the owners/developers control the project site, the pre-construction design phase, and any pre-construction site investigation, and choose how much time and effort to devote to these activities, it is logical that they bear design- and site-related risks.

In contrast, contractors typically have a limited amount of time to prepare their bids (often thirty days or less); limited opportunity to inspect the site and ask clarifying questions; and little to no time to retest site conditions.[2] Contractors use the information provided by the owner in the bid packet to prepare their bids—allowing the owner to make an apples-to-apples bid comparison based on each contractor bidding on the same owner-provided information. It would be both impractical and inefficient to expect each bidding contractor to conduct its own detailed site investigation—work typically performed by a geotechnical design professional at considerable expense. Tight bidding timelines would often make such efforts impossible. *See Foster*, 435 F.2d at 888-89 ("The duty of bidders to investigate the site did not require them to conduct geological or other technical investigations, costly and perhaps

[2] The City of Moorhead's position cannot possibly be that Ames should have retested the site before beginning construction. That would have taken months.

impossible in the 20 days available[.]"). Moreover, having bidders rely on *different* site investigations would make accurate bid comparisons by owners more difficult, if not impossible, and it's unlikely any owner would allow the degree of site disruption required for multiple contractors to have separate geotechnical analyses performed.

Overturning the *Spearin* Doctrine (by permitting an owner to furnish and then later disclaim reliance upon design information) would upend the current bidding process for government contracts. It would require each bidder either to conduct independent site investigations (e.g. multiple tests of the same soil) and perform significant, pre-contract-award design work—investments that would effectively preclude small and emerging contractors—or to add risk premiums to account for the possibility that the owner will later disavow the design information it provided. The results will be: (1) increased costs and risks in the bidding process for all contractors; (2) delays and inefficiencies resulting from repetitive site investigations; and/or (3) an inability of owners to accurately compare bids that rely on differing pre-bid investigative information. Under this alternate reality, the costs and risks of public bidding will necessarily increase, with the additional costs ultimately borne by the general public and the harms resulting from the increased risks disproportionally impacting small and emerging contractors.

This case exemplifies the problem. Here, the City of Moorhead would have needed to: (1) provide extended access to the jobsite to allow prospective bidders to perform independent soil tests, which almost certainly would have required multiple road or lane closures; (2) extend the bidding timeline to allow for additional soil studies to be performed ; and then (3) devise a way to accurately compare bids based upon the differing soil investigative work. All of this would have added both time and expense. But the City permitted none of it, forcing contractors to rely on the information that the City provided.

The more efficient alternative—and the norm for Minnesota public construction projects—was the process the City chose in this case. The City performed one comprehensive geotechnical investigation and then shared the resulting report with all bidding contractors in the bid packet. The bidding contractors had no choice but to rely upon this information in preparing their bids, thus creating an enforceable implied warranty of adequacy that is the essence of the *Spearin* Doctrine.

The Court of Appeals erred when it allowed the City to disclaim responsibility for the adequacy of the information it provided.

B. The *Spearin* Doctrine Promotes Fairness

Owners and developers have superior (often sole) knowledge about the site and design of a construction project because they can take as much time and spend as much money as they want to investigate the site and develop the project parameters. It therefore would be inequitable to allow owners armed with this superior knowledge, access, and power to nevertheless impose upon bidding contractors the risks associated with wrong information that owners provide.

Further, it is unlikely that a contractor could bargain to shift these risks back to the owner where they belong. Bidders that try to bargain most likely would be deemed non-responsive and their bids would be rejected.[3] The *Spearin* Doctrine promotes both efficient

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[3] Melinda Sarjapur, *Bargaining in the Dark: Why the California Legislature Should Render "No Damage for Delay" Clauses Void as Against Public Policy in All Construction Contracts*, 42 GOLDEN GATE U. L. REV. 283, 290 (2012) (explaining the impact of contractors' relative lack of bargaining

and equitable risk allocation in the face of the owner's superior knowledge and bargaining power.

C. Affirming the Court of Appeals' Decision Would Shrink the Diversity of Bidders

If Minnesota law does not reaffirm the *Spearin* Doctrine in this case, small and emerging contractors will pay the heftiest price. Smaller contractors already struggle to adequately manage cash flow. *See* Warren Miller, *Construction Companies Can Seize the Day With Savvy Financing & Cash Flow Solutions*, Construction Financial Management Association, https://cfma.org/articles/construction-companies-can-seize-the-day-with-savvy-financing-and-cash-flow-solutions (noting that 61% of small companies struggle with managing cash flow) (citing QuickBooks study). Some will be unable to afford the cost of independent testing, especially for larger projects; others may be unwilling to gamble on paying for a costly geotechnical study given the relatively small chance to win the work in a competitive marketplace.

Small businesses therefore will have to decide to rely on potentially inaccurate owner-provided information, putting their business at risk, or abstain from the bidding process entirely, effectively squeezing these contractors out of the market. *See* Jameson K. George, Comment, *Ohio Construction Delay Claims: Blaming the Contractor for Plan Errors?* 38 OHIO N.U.L. REV. 333, 356 (2011); *see also Robert E McKee*, 414 F.Supp. at 959 ("If every bidder were required to perform all the investigations, even though the chance of receiving the bid was

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power in the public contract bidding process and owners' ability to easily "select a more compliant contractor from the range of available competitors").

remote, the number of bids would decrease and the dollar amount of the bids would increase."). Either outcome disproportionately impacts small and emerging contractors.

Larger contractors also may elect not to bid on projects because most contractors who bid will not recoup bid costs.[4] The premise of significant additional costs without a certain return on investment is especially worrisome in an industry with tight margins. And fewer bidders ultimately leads to less competition and higher costs for public construction projects.

D. Prohibiting Contractors from Relying on Geotechnical Information Would Increase Bid Timelines

Adopting the Court of Appeals' reasoning will also negatively impact bidding timelines. Contractors will need additional time to conduct independent investigations, and owners will need more time to reconcile inconsistencies among various bids that are based on different information. *See, e.g.*, *Alpert v. Commonwealth*, 258 N.E.2d 755, 764 (Mass. 1970) ("Golden did, in fact attempt to make an independent investigation of the site, but because of the lack of time between the notice to bidders and the date bids had to be submitted, it was impossible for Golden to take adequate borings."). The majority of public construction projects accept bids for only four weeks. Hexu Liu, et. al., *Competitive Bidding in Construction Contracting*, Western Michigan University, 11 (2022), https://rosap.ntl.bts.gov/view/dot/66075. The time it takes to prepare a geotechnical report varies by project, but—by way of example—at least some

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[4] *See Condon-Cunningham, Inc. v. Day*, 258 N.E.2d 264, 274–75 (Ct. Common Pleas Ohio 1969) ("What were the bidders to do? Was each bidder to run these tremendously expensive core boring tests not knowing whether or not he would get the contract? Under defendant's contention there would be practically no bidders. A bidder would be faced with this dilemma. Shall I bid on what is presented to be and run the risk of loss if the information is not correct or shall I run core boring tests at great expense, amounting to thousands of dollars, which expense I must bear on my own if I do not secure the contract?").

states recommend governments begin geotechnical surveys ten months before releasing the final designs for large roadway projects. *See* Kentucky Transportation Center at the University of Kentucky, *Geotechnical Investigation – Where to Begin and How to Proceed* (July 10, 2025), https://kp.uky.edu/knowledge-portal/articles/initiating-and-understanding-geotechnical-investigations/. The geotechnical vendor in this case testified that it would take at least eight weeks, making it impossible for bidders to conduct the study before the bid period expired. It is worth noting too that the geotechnical investigation at issue in this case took much longer (years) to complete.

Moreover, site conditions in winter may be completely different than after the spring thaw, and useful site investigations may be impossible to perform from November through mid- to late-Spring in many parts of Minnesota. And geotechnical site investigations are just one component of the extensive bid packets contractors receive and use to create their bid. The Court of Appeal's holding implicates all information provided by the City of Moorhead that is not expressly included in the contract. This will require contractors to potentially reperform or check other work performed by the owner pre-bid as well.

Further complicating matters is the fact that there are maybe a handful of companies that perform the type of geotechnical analysis performed in this case (Braun Intertec, American Engineering Testing, and Terracon come to mind). It is unlikely, if not impossible, that those three companies would perform an analysis for multiple contractors (and/or the owner) for a single project. Suggesting that the bidders here should have, or could have, commissioned such a study anyway is incredible.

Consequently, under the Court of Appeals' holding, the bid timeline would have to increase dramatically to allow for contractor-led pre-bid investigations.

E. A Sensible, Clear Restatement of the *Spearin* Doctrine Promotes Common Sense

Finally, the *Spearin* Doctrine appeals to common sense. *See Sanders Co. Plumbing & Heating, Inc. v. City of Independence, Missouri*, 694 S.W.2d 841, 848 (Mo. Ct. App. 1985) (explaining that "common sense" dictates that a contractor should not be "penalized" for following owner-provided information). It is logical that a contractor can rely on plans, specifications, and reports provided by the owner at the bidding stage. As explained in *Condon-Cunningham, Inc. v. Day*, "it [would be] a strange procedure to furnish the contractors with such information [including boring reports] . . . and then to say because of some of our disclaimers you may not use any of this elaborate information that obviously was obtained by us at much expense and, if you do rely on it, you are doing so at your peril." 258 N.E.2d 264, 268 (Ohio Com. Pl. 1969). The owner is not providing this information as light reading. The owner knows, given industry norms and bidding timeline constraints, that contractors will use and rely on the veracity of this information, where reasonable, to create their bids. The owners ***expect*** it.

The positive effects of the *Spearin* Doctrine on the construction industry, helping both owners and contractors, is exemplified by its resounding and longstanding history. Providing a modern, clear statement of the doctrine in this case will benefit Minnesota law and help avoid future misinterpretations.

III. THE COURT SHOULD REVERSE THE COURT OF APPEALS' DECISION AND ADOPT A CLEAR, SIMPLE RESTATEMENT OF THE *SPEARIN* DOCTRINE

The core issue in this case is the lack of a clear restatement of the *Spearin* Doctrine for district courts to easily find and follow. The doctrine stands for the following proposition:

> An owner that furnishes information to a contractor or specifies construction materials creates an implied warranty that the information and/or materials will achieve the desired result. Bidders have the right to rely upon positive representations made by owners respecting materials, design, and jobsite conditions, unless a mere inspection would reveal inaccuracies. This warranty cannot be disclaimed with broad, general disclaimers and the contractor may reasonably rely on the owner-furnished information.

When confronted with a case in which an owner provides information or specifications upon which a contractor relies, district courts should not enforce contractual disclaimers as a matter of law but instead must evaluate whether it was reasonable for the contractor to rely on the information or specification provided, without regard to the disclaimers. When the reliance was reasonable, the disclaimer cannot be enforced, and the adequacy of the owner-supplied information should be deemed to have been warranted by the owner.

CONCLUSION

The law allowing contractors to rely on information provided by an owner pre-contract has been set in stone since the early 1900s. The Court of Appeals' decision upends that settled law. Amici urge the Court to reverse.

Dated: July 24, 2026

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Certificate of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 3,892 words. This brief was prepared using Word for Microsoft 365.

Dated: July 24, 2026

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