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Construction

September 2015

Construction Manager Found Not Responsible for Design

In 2004, Massachusetts departed from exclusive use of the traditional “design-bid-build” project delivery method for public projects and permitted public agencies to employ the "design-build" and "construction manager-at-risk" (CMAR) delivery methods on certain public projects. This change, along with an increasing trend in the use of nontraditional project delivery methods, raises a number of questions regarding the allocation of liability over the adequacy of a project’s design.

On a traditional design-bid-build project, the owner holds two separate contracts, one with the design entity and another with the contractor. The contractor does not commence construction until the design is 100 percent complete. Because the contractor is not responsible for the design, the U. S. Supreme Court defined what has become known as the Spearin doctrine, which holds that the owner impliedly warrants that the plans and specifications are suitable for construction. Massachusetts adopted the *Spearin* doctrine into its common law in a 1970 decision, *Alpert v. Commonwealth*, 357 Mass. 306, 320 (1970), when public agencies generally employed only the design-bid-build method.

Unlike a design-bid-build project, under the CMAR project delivery method, the owner retains a construction manager, who, in addition to acting as the general contractor during construction, may consult on the design prior to the start of construction, possibly affecting the plans and specifications. Given this expanded role of a construction manager, it became unclear whether the *Spearin* doctrine would apply to CMAR projects.

The Massachusetts Supreme Court recently resolved this issue and held that the *Spearin* doctrine does apply to a CMAR who performs preconstruction services and some design review, provided the CMAR relied upon the design both reasonably and in good faith. In *Coghlin Electrical Contractors, Inc. v. Gilbane Building Company*, the Massachusetts Division of Capital Asset Management and Maintenance (DCAMM), as the owner, and Gilbane Construction Company, as the CMAR, entered into an agreement for a public project involving the construction of a psychiatric facility at Worcester State Hospital. Following the completion of the project, Gilbane’s electrical subcontractor Coghlin Electrical Contractors, Inc., filed suit against Gilbane to recover additional costs allegedly incurred as a result of certain design errors and omissions. Gilbane subsequently filed a third-party complaint against DCAMM alleging that “in the event that Coghlin proves its claim against Gilbane” DCAMM is liable for the additional costs resulting

from the design errors and omissions.

DCAMM sought to dismiss Gilbane's claim, arguing in part that because the CMAR consulted on the design and offered preconstruction services it should not be afforded the same protection under the *Spearin* doctrine as a general contractor on a traditional design-bid-build project. The trial court agreed and dismissed the CMAR's complaint. Gilbane appealed. The Supreme Court reversed the lower court's decision and held that a CMAR on a public project is entitled to the protections set forth in the *Spearin* doctrine. The Court concluded that, despite the differences between a traditional design-bid-build project and a CMAR project, it "was not persuaded that the relationships are so different that no implied warranty of the designer's plans and specifications should apply in construction management at risk contracts…and that the CMAR should bear all of the additional costs caused by design defects" on public projects. The Court, however, also recognized that a CMAR does have more influence and access to the design than a general contractor in a traditional design-bid-build project; therefore, the Court limited the protection of the warranty by concluding that to establish the owner's liability under the implied warranty, under a CMAR delivery method, the CMAR bears the burden of proving that its reliance on the defective design was both reasonable and in good faith.

The *Coghlin* decision also reaffirmed Massachusetts' recognition and favorable treatment of subcontractor "pass-through claims." In a pass-through claim a contractor asserts a subcontractor's claim against the owner because a subcontractor, who does not have a contract with the owner, cannot assert its own claim. Instead of one lawsuit between a subcontractor and contractor and another between the contractor and the owner, pass-through claims allow the contractor to pursue its subcontractors' claims directly against the owner. As set forth in the Texas Supreme Court decision *Interstate Contracting Corporation v. City of Dallas*, 135 S.W.3d 605, 610-614 (Tx. 2004), most jurisdictions that have examined the enforceability of pass-through claims have held that such claims are permitted, provided the contractor remains liable to the subcontractor, but only to the extent the contractor receives payment from the owner. Notwithstanding this widely accepted view, Connecticut remains part of a very small minority that has adopted a contrary rule. Unlike the majority of jurisdictions that require only conditional liability, Connecticut requires that a contractor either admit unconditional liability to the subcontractor or pay the subcontractor prior to asserting the claim against the owner. As noted in *Coghlin*, Massachusetts follows the majority view that conditional liability to the subcontractor is sufficient to assert a pass-through claim against an owner.

The *Coghlin* decision provides guidance to both construction managers and owners employing the construction manager-at-risk delivery method regarding who bears the responsibility for the design. Based on this decision, owners must be aware that, despite a construction manager's collaboration in the design, the ultimate responsibility for the accuracy and sufficiency of the design continues to rest with the owner and architect.

If you have any questions or would like to discuss this update further, please contact one of the following lawyers or any other lawyers in Robinson+Cole's Construction Group:

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