

CLIENT ALERT

CONSTRUCTION



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Construction Manager at Risk Held to Assume the Risk of Design Changes on Massachusetts Public Construction Project

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The Massachusetts Superior Court (County of Worcester) held in *Coghlin Electrical Contractors, Inc. v. Gilbane Building Co. and Travelers & Surety Company of America* decided on June 24, 2014 that a Construction Manager at Risk (CMR) assumed

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responsibility for design changes (1) based on the Construction Manager's duty under the contract to review design documents during the preconstruction phase of the Project and (2) based on the broad indemnification provision in the contract. The case is now on direct appeal to the Massachusetts Supreme Judicial Court, Docket No. SJC-11778. Oral argument was held on March 2, 2015.

The case has far-reaching implications because if the decision is upheld, a Construction Manager at Risk in Massachusetts will assume much if not all of the liability for the design of the project, even though the design is furnished by a third party Designer under contract with the Owner. The upshot of this is that either there will be fewer bidders on construction management at risk contracts, or bidders will include a substantial premium in their bids to account for the additional risks.

"Construction management at risk" or "Construction management at risk services" or "Construction management at risk delivery method," a construction method wherein a construction management at risk firm provides a range of preconstruction services and construction management services which may include cost estimation and consultation regarding the design of the building project, the preparation and coordination of bid packages, scheduling, cost control, and value engineering, acting as the general contractor during the construction, detailing the trade contractor scope of work, holding the trade contracts and other subcontracts, prequalifying and evaluating trade contractors and subcontractors, and providing management and construction services, all at a guaranteed maximum price, which shall represent the maximum amount to be paid by the public agency for the building project, including the cost of the work, the general conditions and the fee payable to the construction management at risk firm.

Gilbane contracted with the Massachusetts Division of Capital Asset Management and Maintenance (DCAMM) for the construction (and for preconstruction services) for a psychiatric facility to be built for the Massachusetts Department of Mental Health. DCAMM contracted separately with Ellenzweig Associates, Inc. as the "Designer" of the project. Gilbane's involvement in the design of the project was limited to review of design documents prepared by the Designer. The contract specifically stated that in reviewing the design, Gilbane did not assume the Designer's responsibility for design.

Gilbane, in turn, subcontracted with Coghlin Electrical Contractors, Inc. for the electrical construction work on the project (in accordance with the drawings and specifications prepared by Ellenzweig). Coghlin submitted design related change order requests to Gilbane who submitted them to DCAMM (and who apparently passed them along to Ellenzweig). When the parties (Coghlin, Gilbane, DCAMM and Ellenzweig) were unable

resolve the claims in mediation, Coghlin sued Gilbane, who asserted a “third party” complaint against DCAMM, seeking recovery for the change order claims based on the long-established Owner’s implied warranty of plans and specifications (*Alpert v. Commonwealth*, 357 Mass. 306 (1970)).

DCAMM moved to dismiss the third party complaint and made two basic arguments: (1) that as a CMR, Gilbane assumed liability for the design of the project, and (2) that given the broad indemnification clause of the contract with DCAMM, Gilbane was obligated to defend and indemnify DCAMM (even though the indemnification clause excluded claims arising out of the Designer’s design of the project).

The trial court concluded that:

- Construction Management at Risk (CMR) is an “alternative delivery method” under M.G.L. c. 149A distinct from traditional “design-bid-build.”
- Gilbane as CMR took on “additional duties and responsibilities for the project, including . . . an ongoing duty to ‘review the design documents for clarity, consistency, constructability, maintainability/ operability and coordination among the trades, coordination between drawings and specifications. . . .’ ”
- “With these added duties and responsibilities comes additional financial exposure for the Construction Manager in the event that something goes wrong, including. . . a broad obligation to indemnify and defend the Owner from and against ‘all claims, damages, losses and expenses, including but not limited to court costs and attorneys’ fees arising out of or resulting from the performance of the Work,’ regardless of whether ‘such claims, damages, losses, or expenses are caused in whole or in part by the actions or inactions of a party indemnified hereunder.’ ”

The trial court went so far as to conclude that a change in the design of the walls and ceilings could not be a change in scope because the scope of the project as initially planned included wall and ceilings, thereby rendering those items within the original “scope” of the project.

The trial court also concluded that the public Owner’s implied warranty of plans and specifications does not apply in the CMR context. Specifically, the court held that “given the material changes in the roles and responsibilities undertaken in a modern CMR contract, the protections that the Massachusetts courts historically have extended to construction contractors in the traditional design-bid-build context as espoused in *Alpert* . . . and the other cases cited above, simply are inapplicable to such contracts.”

Finally, while acknowledging that the indemnity clause in CM Agreement does not extend to the liability of the Designer arising out of preparation of plans and specifications, that exclusion does not, the court held, limit Gilbane's obligation to indemnify DCAMM. The court DISMISSED Gilbane's third party complaint.

Gilbane filed its notice of direct appeal to the Supreme Judicial Court on August 12, 2014. Briefs were filed by Gilbane and DCAMM, with amicus briefs filed by Associated General Contractors of America, AIA and American Council of Engineering, among others.

The complete docket and copies of the briefs of the parties and amicus briefs are available at <http://www.mass.gov/courts/court-info/sjc/sjc-case-information>, search on Docket No. SJC-11778.

We will continue to follow further developments and will publish an update when the Supreme Judicial Court decides the case.

To view other cases of interest, visit <http://www.constructlaw.com>.

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