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Construction Manager *More* at Risk?

The Massachusetts Superior Court issued an opinion this summer which expands the risk of doing business as a Construction Manager At-Risk ("CM@R"). That Massachusetts trial court ruled, in what it determined was a matter of first impression, that a CM@R could not sue an owner for design deficiencies even though the owner provided the plans and specifications for the project, a decision that, if affirmed on appeal or adopted by other courts, will likely have a major impact on the business of general contractors performing CM@R work.

In *Coghlin Electrical Contractors, Inc. v. Gilbane Building Co., et al*, No. 2013-1300-D (Mass. Sup. Ct., June 24, 2014) (Davis, J.), the Massachusetts Division of Capital Asset Management on behalf of the Massachusetts Department of Mental Health ("Owner") contracted with Gilbane Building Company ("CM") to manage the construction for a psychiatric facility pursuant to a CM@R agreement. CM subcontracted the electrical scope of work to Coghlin Electrical Contractors, Inc. ("Subcontractor"). During construction, Subcontractor encountered issues resulting in additional costs as a result of CM's purported mismanagement of the project, stemming from design changes impacting Subcontractor's work. Subcontractor sued CM for its resulting damages and CM subsequently sued Owner by way of a third party complaint, asserting that Owner was responsible for any damages caused by the design-related changes and design errors. Owner moved to dismiss CM's claims, arguing that the CM@R agreement obligated the CM to "indemnify, defend and hold harmless" Owner from and against "all claims, damages, losses, and expenses . . . arising out of or resulting from the performance of the Work."

Examining the CM@R agreement, the court found that the provisions imposed upon the CM extensive design responsibilities:

> The CM shall review, on a continuous basis, development drawings, specifications and other design documents. The design reviews shall be performed with a group of architects and engineers, who are either employees or independent consultants under contract with the CM. . . . The CM shall review the design documents for clarity, consistency, constructability, maintainability/operability and coordination among the trades . . .

Ultimately ruling for the Owner, the court explained that this was not a typical design-bid-build project, but was rather an "alternative delivery method," authorized by Massachusetts law, where under the CM@R project delivery system, the purpose is to engage the CM during the design phase of the project so that the public entity can benefit early on from the CM's expertise. The court further explained that

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in the CM@R delivery method, the CM takes on additional duties and responsibilities for the project along with the added risk, but, according to the court, this additional exposure should be compensated through the CM's guaranteed maximum price, absent change orders. Despite arguments by the CM that the Owner modified the scope of the CM@R agreement, the court found no contractual support for this argument.

Additionally, the Court held that the contractual indemnification language running in favor of the Owner "trump[ed] the long-standing Massachusetts common law principles to the effect that 'where one party furnishes plans and specifications for a contractor to follow in a construction job . . . the party furnishing such plans impliedly warrants their sufficiency for the purpose intended.'" In fact, the court determined that the doctrine which requires the owner to ensure constructability of the plans and specifications (recognized across the country as the *Spearin Doctrine*) does not apply in the CM@R context where the CM takes on added roles and responsibilities, including design related roles and responsibilities. While the CM argued to the court that the indemnity obligation excluded claims involving design changes and design errors and omissions, the court disagreed because no claims had been filed against the designer.

As a result, based upon this rationale, the court ignored all of the CM's arguments and dismissed the CM's claims against the Owner in their entirety and with prejudice. This decision poses a significant risk to CMs. This potential risk should be accounted for in the guaranteed maximum price, and CM@R agreements should be reviewed carefully to avoid a similar result. In fact, many CM@R agreements, while including similar design related responsibilities, also contain language which memorializes that the CM is not the designer and will not be responsible for design errors and omissions. Likewise, where a CM@R agreement contains a broad indemnity provision, CMs should consider including carefully crafted language in clarifications to limit their exposure from the risks stemming from such a provision.

An appeal was recently filed in the Appeals Court of Massachusetts (Case No. 2014-P-1431), so we will continue to monitor this case and future decisions.