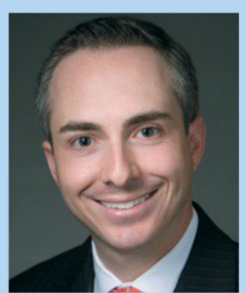
Feature

Alternative Project Delivery, Alternative Risks

Are construction managers more at risk?



BY MICHAEL C. ZISA AND WARREN E. FRIEDMAN

IN THE DAYS of design-bid-build project delivery, architects and engineers were responsible for design, and contractors were responsible for construction. These days, however, the bright lines of responsibility have been blurred by alternative project delivery methods such as “design-build” and “construction manager at-risk.” As project delivery methods change, so do risks for contractors who assume these alternate and expanded roles. A Massachusetts Superior Court decision highlights the potential risks for a construction manager at-risk (CM@R). In what it determined was a matter of first impression, that Massachusetts trial court ruled that, based on its scope of work under the

contract and the contract's broad indemnification provision, a CM@R could not sue an owner for design deficiencies even though the owner provided the plans and specifications for the project. This is 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. and Travelers & Surety Co. of America*, 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 and its surety for the 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 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 . . . .

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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 in the CM@R delivery method, the CM takes on additional duties and responsibilities for the project along with 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 that 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. Following the ruling, an appeal was filed by the CM in the Appeals Court of Massachusetts (Case No. 2014-P-1431), and in light of the significance of the decision on the construction industry, amicus curiae briefs were filed by American Council of Engineering Companies of Massachusetts and Massachusetts Chapter of the American Institute of Architects, Construction Industries of Massachusetts, Columbia Construction Company, and Associated General Contractors of Massachusetts, Inc., each of which expressed a different industry view of the issues. Interestingly, in its briefing and during oral argument, the Owner conceded that, if a design flaw arises out of the designer's work, the Owner would owe the CM for costs arising from such error or omission.

This decision, as it currently stands, 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 that 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 modifying that language or including carefully

crafted language in clarifications to limit their exposure from the risks stemming from such a provision. Another method for addressing or mitigating the risk associated with potential design liability for a CM is to purchase a professional liability policy prior to commencement of a project. These policies are intended to provide coverage to contractors for such liability, including, but not limited to, design errors or omissions or negligence of the contractor in rendering its construction and related services to a project. In fact, some owners are even requiring by contract that contractors (especially in a CM@R setting) procure these professional liability policies.

This decision also raises issues for sureties providing payment and performance bonds for CM@Rs. Specifically, sureties may lose rights to pursue a principal's claims for defective plans and specifications and may be confronted with performance bond claims arising out of a principal's failure to fulfill its design-related or attendant indemnification obligations under the CM agreement.

If the appeals court affirms the trial court's ruling, the decision will likely have far-reaching consequences and change the way CM@R agreements are understood and operate because, traditionally, CM@R agreements do not assume responsibility for design. Furthermore, such a decision would potentially erode the *Spearin Doctrine* in any construction contract where a contractor participates in or assumes some contractual responsibility for even a portion of the design process. The appeal has already been pending for nine months and the appellate court recently entered an order waiving a procedural rule setting a maximum time frame for a decision, so only time will tell. ●

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