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***Spearin Doctrine* Is Alive and Well – Court Determines That It Does Apply To Construction Managers At Risk.**

In a much anticipated ruling, the Massachusetts Supreme Judicial Court clarified the application of the *Spearin Doctrine* to At Risk Construction Managers. On September 2, 2015 the highest Court in Massachusetts held that public owners impliedly warrant plans and specifications furnished in conjunction with a construction management at risk project. The Court also held that under the facts of the case, the parties did not disclaim this implied warranty and that the indemnification agreement in the parties' contract did not prevent the construction manager from bringing a third-party complaint against the public project owner seeking indemnity for damages alleged by a subcontractor claiming additional costs arising out of alleged design defects.

Background

Gilbane Building Co. ("Gilbane") contracted with the Massachusetts Division of Capital Asset Management and Maintenance ("DCAMM") for preconstruction and construction management services for a psychiatric facility to be built for the Massachusetts Department of Mental Health. Gilbane's contract with DCAMM was a construction management at-risk ("CMAR") contract. DCAMM contracted separately with an architect 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 subsequently contracted with Coghlin Electrical Contractors, Inc. ("Coghlin") for the electrical construction work on the project (in accordance with the drawings and specifications prepared by the Designer). During the course of construction, Coghlin submitted design related change order requests to Gilbane who submitted them to DCAMM. When the parties were unable resolve the claims, Coghlin sued Gilbane for breach of contract to recover costs for the design related change order requests. As the construction manager, Gilbane brought a third-party complaint against DCAMM seeking indemnity for Coghlin's claims. Gilbane alleged that if Coghlin recovered against Gilbane for damages resulting from problems with the design, then DCAMM was responsible for those problems and must reimburse Gilbane for any damages paid to the subcontractor. Gilbane relied on the long-established Owner's implied warranty of the plans and specifications and referred to as the *Spearin Doctrine*.

The *Spearin Doctrine* takes its name from the seminal 1918 United States Supreme Court case of *United States v. Spearin* where it was held that if a contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. In other words, the owner impliedly warrants the information, plans and specifications which it provides to a general contractor. The contractor will not be liable to the owner for loss or damage which results solely from insufficiencies or defects in such information, plans and specifications. This doctrine has had

wide spread acceptance throughout the country for almost 100 years, and in particular applies to lump sum, competitively bid contracts where the contractor is bound to build according to the plans and specifications, typically in a design-bid-build scenario where the plans are completed before the project is ever advertised for bid.

DCAMM moved to dismiss Gilbane's third-party complaint against it, and the trial court granted the motion concluding that the owner's implied warranty of the design only applied to traditional design-bid-build construction projects. The trial court held that the same implied warranty did not apply when the CMAR delivery method is employed because the "roles and responsibilities" of the parties were substantially different from the design-bid-build method. 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 determined that the indemnity obligation in the contract between Gilbane and DCAMM required Gilbane to indemnify DCAMM for any damages Gilbane might be awarded from DCAMM, thereby creating "an impermissible circuitry of obligation."

The trial court's decision was contrary to the general understanding of the implied warranty of plans and specifications and decades of case law, and Gilbane appealed to the Massachusetts Supreme Judicial Court. Several construction industry groups also filed briefs in the appeal as amicus curiae or "friend of the court" in support of the Gilbane position.

The Decision

The Supreme Judicial Court held that although the roles of the parties in the CMAR method do differ from those in the design-bid-build method, the differences are not so great that the owner's implied warranty of the design should not apply altogether. The Court found that with the CMAR method, the owner still retained control of the design process through the contract terms and the use of a separate designer and, therefore, should retain responsibility for any defects.

More specifically, the Court held:

“(1) under our common law, a public owner of a construction management at risk project gives an implied warranty regarding the designer's plans and specifications, but the scope of liability arising from that implied warranty is more limited than in a design-bid-build project; (2) the construction management at risk contract in this case did not disclaim the implied warranty; and (3) the indemnification provision in the contract did not prohibit the CMAR from filing a third-party complaint against the owner that sought reimbursement under the implied warranty for damages claimed by the subcontractor arising from the insufficiency of or defects in the design.”

The Court reached its decision in part based on the fact that “[t]he possibility that the CMAR may consult regarding the building design does not suggest that the CMAR should be the guarantor against all design defects, even those that a reasonable CMAR would not have been able to detect.” The Court found that the scope of the implied warranty will depend upon whether the CMAR “acted in good faith reliance on the design and acted reasonably in light of the CMAR's own design responsibilities.” In making such determinations, courts will need to consider the “CMAR's level

of participation in the design phase of the project and the extent to which the contract delegates design responsibility to the CMAR.”

While this confirms the application of the *Spearin Doctrine* to CMAR contracts, the Court also held that because the construction manager at-risk’s role was different from the design-bid-build method, the scope of the implied warranty would be determined by the extent of the construction manager’s design responsibility:

“The greater the [construction manager’s] design responsibilities in the contract, the greater the construction manager’s burden will be to show, when it seeks to establish the owner’s liability under the implied warranty, that its reliance on the defective design was both reasonable and in good faith. ... Therefore, the [construction manager] may recover damages caused by the breach of the implied warranty, but only if it satisfies its burden of proving that its reliance on the defective plans and specifications was reasonable and in good faith.”

The Court went on to state that the amount that Gilbane will be able to recover from DCAMM for alleged design defects will be limited to "that which is caused by [Gilbane’s] reasonable and good faith reliance on design defects that constitute a breach of the implied warranty."

The Court also held that the broad indemnity provision in the contract between Gilbane and DCAMM did not require Gilbane to indemnify DCAMM for DCAMM’s liability to Gilbane under the third-party complaint for design errors. The Court acknowledged that although the indemnity provision was "broad in scope, [it] does not cover claims, damages, losses, and expenses arising out of the Designer’s work, as opposed to Gilbane’s design-related duties." Damages resulting from the designer’s errors, as opposed to Gilbane’s failure to meet its contractual design-related obligations such as performance review, do not trigger an indemnity obligation.

The Implications

This decision correctly retains the concept of the implied warranty of the plans and specifications although it does water it down on a case by case analysis when construction management at risk contracts are involved. The broad implication for construction managers at risk (at least in Massachusetts) is to carefully negotiate the scope of contractual responsibilities pertaining to the project design, including indemnity provisions. The construction manager’s scope of work related to design should be narrowly written so that control of the design remains firmly with the owner and it is clear that the construction manager is not serving as designer and assumes no liability for the design. With such language in place, the construction manager will have a better chance of demonstrating that it reasonably relied on the design and, therefore, has a claim for design defects under the implied warranty.

While this decision is fact specific as to Massachusetts public projects, it is likely applicable in the private setting. It is also instructive for the application of the *Spearin Doctrine* in other states that permit and utilize the CMAR project delivery method. Construction managers must carefully determine their scope of services when it comes to accepting legal responsibility for design work performed by a third party designer.

The citation to this case is Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co., et al., ___ Mass. ___, 2105 WL 5123135 (Sept. 2, 2015). Click [here](#) to read the decision.