BURNS & LEVINSON LLP

DESIGN & CONSTRUCTION PRACTICE

2012 YEAR IN REVIEW

ANATOLY M. DAROV

Chairman of the Firm's Design & Construction Group

TIMOTHY J. FAMULARE

Associate in the Firm's Design & Construction Group

It was another memorable year for the construction industry in Massachusetts. As the economic recovery continued to take hold, commercial construction market activity continued to stabilize and public projects remained a source of stability for designers and builders. Burns & Levinson also had a busy year with our construction industry lawyers working on many exciting projects for our clients. This Year in Review provides a summary of notable cases, statutory and regulatory changes, and other noteworthy events impacting the construction industry in Massachusetts over the past twelve months.

Determination of Bidder Responsibility (Barr v. Town of Holliston)

In May 2012, the Commonwealth's highest court looked at the practices of one Massachusetts town in evaluating whether the low bidder on a new police station project satisfied the "responsibility" requirement of the Massachusetts bidding law, Chapter 149, § 44A-J. In *Barr v. Town of Holliston*, a town administrator directed the chief of police to conduct an investigation of Barr, Inc., the apparent low bidder on the project. After contacting a number of other municipalities that had previously worked with Barr, the town received several negative references and concluded that Barr was not a responsible bidder and therefore ineligible to be awarded the contract.

Barr filed suit asserting that the town's independent investigation, which looked beyond the information contained in the DCAM certification files was unlawful. Under Chapter 149, a bidder is considered responsible when it demonstrates that it possesses "the skill, ability and integrity necessary to faithfully perform the work called for by the particular contract, based upon a determination of competent workmanship and financial soundness…" The Supreme Judicial Court recognized that, although DCAM serves as a clearinghouse of information between various public awarding authorities relative to contractors' certification and performance on public projects, it is the individual awarding authorities—in this case the town of Holliston—that are required to determine the contractor's responsibility, or lack thereof.

Although Chapter 149 requires an awarding authority to review the bidder's DCAM update statement and certification file, the court held that an awarding authority need not limit its investigation to the four corners of the DCAM file and could conduct an additional investigation of the bidder's past performance. The Court rejected Barr's arguments that allowing such open-ended investigations by public awarding authorities would result in preferential treatment of certain contractors. The Court reasoned that such risks are mitigated by a disappointed contractor's right to protest the awarding authority's decision or bring a challenge to Superior Court. However, such redress, while certainly available to a contractor, is costly, time consuming, and unlikely to lead to either a meaningful financial recovery or an injunction halting the award of a contract to the next lowest bidder.

The decision in Barr confirms that awarding authorities are vested with substantial authority to conduct investigations and review information beyond the DCAM certification file. Public officials must remember to properly document such investigations and be mindful that decisions stemming from such investigations—particularly findings that a contractor is not responsible—must be supported by the record.

Design Professionals' Liability for Economic Losses (Meridian at Windchime v. Earth Tech)

2012 saw another reported decision interpreting the economic loss doctrine in Massachusetts. In *Meridian at Windchime v. Earth Tech*, a municipality retained Earth Tech to perform a peer review of engineering plans prepared by DiPrete Engineering Associates for a residential subdivision project, as well as perform certain inspection services during construction. The town's contract with Earth Tech made clear that Earth Tech was not responsible for the means

• continued

and methods of construction and, at the outset of the project, Earth Tech issued a memorandum to the developer setting forth Earth Tech's role on the project.

Earth Tech completed its peer review of the engineering plans and conducted numerous on-site inspections during the course of construction that were documented in reports to its client. As it turned out, the developer's construction contractor improperly installed various waterlines, hydrants, curbing, manholes, and other elements of the work that had to be repaired at great expense to the developer. Meridian sued asserting that Earth Tech, an engineering firm with whom it did not have a contract, failed to identify the deficiencies in the contractor's work. Meridian argued that, had Earth Tech timely done so, Meridian would have been able to cure the defects for significantly less cost.

Courts across the country wrestle with the degree to which design professionals should be liable to third parties for purely economic losses arising from their negligence. While numerous states take the view that such economic losses are barred, most states allow exceptions of various degrees that permit plaintiffs to recover against negligent design professionals. In Massachusetts, courts will find design professionals liable to a third party plaintiff if: (1) the consequences of their negligence are foreseeable when measured by an objective standard; (2) the injured party's reliance on the defective services was reasonable; and (3) the design professional had actual knowledge of such reliance.

In this case, Earth Tech had informed the developer at the outset of the work that any deviations from the approved subdivision plans required Earth Tech's prior approval. Further, the developer had retained its own engineering consultant to whom Meridian should have looked for adequate inspection of the contractor's work during construction. In the end, the court concluded that Earth Tech owed no duty of care to the developer or its contractor with whom it had no contractual relationship because the developer did not act reasonably when it expected to rely on Earth Tech's inspection services performed for the municipality. Given the terms of its contract and information it provided to the developer at the outset of the project, Earth Tech demonstrated it had no knowledge of Meridian's reliance on its professional services.

Waiver of Payment Bond Claims Held Illegal (Costa v. Brait Builders)

This case arose from a public construction contract held by Brait Builders. Costa & Son Construction was awarded a site work subcontract on the project, which content was terminated as a result of Costa's alleged poor performance. Unhappy with the termination of its subcontract, Costa sued Brait Builders for breach of contract, violation of chapter 93A, and quantum meruit. Costa's complaint also sought recovery under Brait's statutory payment bond. At trial, Costa prevailed against Brait Builders on the majority of its claims, but the court denied Costa's payment bond claim against the surety on the basis of subcontract language that purported to waive Costa's right to assert a bond claim.

The relevant subcontract language stated that if Costa was unable to provide payment and performance bonds in the full value of its subcontract, its right to assert a bond claim would be deemed waived. On appeal, Costa argued that such provisions were void and unenforceable as a matter of public policy, and the SJC agreed holding that the statute's strong public policy purpose renders waivers of payment bond claims unenforceable in Massachusetts.

In reaching its decision, the Court recognized the dual purpose of the payment bond statute, namely to give security to those furnishing labor and materials on public projects that are not subject to mechanics liens and to promote the timely and orderly completion of work on public projects. Accordingly, contract provisions, like the one in this case, purporting to strip contractors of their right of security under a payment bond would significantly disrupt public construction, and, therefore, it is in the public interest that contractual waivers of bond claim rights be void.

AIA Issues Sustainable Project Contract Documents

In May 2012, the American Institute of Architects issued a new series of documents for use on sustainable projects. The five new documents—bearing the "SP" designation—are based on the 2007 conventional versions of the A101 Owner-Contractor Agreement, A201 General Conditions for the Contract for Construction, A401 Subcontractor Agreement, B101 Owner-Architect Agreement, and C401 Architect-Consultant Agreement. The new sustainable project documents offer a contractual framework to assist owners, contractors, and design professionals to establish a project's sustainability goals and effectively allocate roles, responsibilities, and risk that could arise from those elements of a project.

The AIA Sustainable Project documents are not limited to any single green-standard, code, or certification and are equally applicable to projects that do not intend to seek certification. Sustainable projects may seek to achieve increased building performance through decreased energy or water use, decreased operating costs, and use of sustainable materials. The concepts incorporated into the AIA Sustainable Project documents include special definitions, allocations of risks and responsibilities, new scope of service items, and integration with other documents in the sustainable project document family. Pursuant to the new documents, a sustainability plan is required to be prepared by the architect. The sustainability plan is intended to become a contract document and describes the sustainable objectives and measures that will be used by the project participants as well as each party's roles and responsibilities.

Sustainable projects raise a number of legal issues. Design professionals, for example, typically require the owner to agree that they do not guarantee or warrant that the

• continued

project will meet any specific sustainability objective or certification. Professional liability insurance coverage, like on conventional projects, will be tied to the professional standard of care. However, establishing the standard of care for sustainable projects, which often employ new and innovative (and continuously evolving) equipment, technologies, and designs, presents a moving target for the industry. Further, the sustainable project documents expand the conventional mutual consequential damages waiver to include damages that the owner may incur as a result of the project's failure to achieve the intended sustainability objectives that may result in unachieved utility cost savings, operating expenses, and lost financial incentives. Similarly, owners typically craft contracts for sustainable projects to insure they are not left with a project that fails to meet the required certification level or building performance goals, leaving the owner with an asset that does not meet sustainability requirements of the owner's lease or the applicable local and state building codes or environmental permits.

As with most AIA documents, the standard agreements present a starting point for owners, contractors, and design professionals on which contracts responsive to the particular needs of the parties, the project, and the geography may be crafted. The AIA Sustainable Project documents provide an excellent starting point for creating effective legal documents for sustainable projects that are quickly becoming the industry standard.

Bid Protests Involving Electronic Bidding

In 2012, two bid protest decisions by the Massachusetts Attorney General's Bid Unit addressed issues regarding the use of electronic bidding software. Quinn Brothers of Essex, Inc. challenged the validity of the Wakefield Municipal Gas and Light Department's use of BidDocs Online, Inc. ("BidDocs") as its electronic bidding agent for a headquarters renovation project. Quinn maintained that it had submitted the lowest Miscellaneous Metals sub-bid, which the Department argued that BidDocs did not receive. Based on BidDocs' computer log and the fact that Quinn did not receive an email confirming a successful submission, Quinn could not prove that it had submitted the bid electronically. However, Quinn argued that electronic bidding does not conform to statutory requirements that bids be "publicly opened" and read "by the awarding authority." The Attorney General determined that nothing in G.L. c. 149 prohibits a public entity from delegating to a vendor the authority to open bids. It further determined that BidDocs' process satisfies the purpose of a "public opening" because the bids are kept secret until they are made viewable to the public online immediately after the close of bidding.

In a second protest involving electronic bidding, the town of Granby used Projectdog, Inc. as its agent for electronic distribution of bid documents for the town's new library project. BidDocs protested the procurement because Projectdog denied access to the website containing the project plans and specifications by employees of BidDocs and certain other competitors of Projectdog. The Attorney General held that the procurement violated the requirement in G.L. c. 149, §44B(1) that complete plans and specifications be made available to "each person requesting the same." In a public bidding context, Projectdog was not allowed to determine which persons requesting copies of the bidding documents were eligible to receive them.

Bid Protest Involving "Bundling" of Services

This year, the Bid Protest Unit addressed another protest in a line of recent "bundling" protests arising from pavement management services in the town of Kingston. Pavement Maintenance Systems, Inc. ("PMS") challenged Kinston's latest procurement for roadway surface restoration services. In 2002, the town solicited bids for surface restoration seeking one contractor to perform three services: (1) infrared patching of utility and large pavement cuts, (2) small crack filling, and (3) "restorative sealing" of entire roadways. Subcontracting was not permitted, and the contractor had to have five years experience with all three services. Felix Marino Co., Inc. was the only contractor that could meet the experience requirements and provide all three services, and, in fact, had developed the "restorative sealing" process. PMS challenged the award to Felix Marino in 2002, arguing that the three services are unrelated and should not have been bundled. The Massachusetts Appeals Court rejected this argument in a 2004 decision. For the town's 2006 and 2010 procurement of these same bundled services, Felix Marino remained the only bidder that could perform the three services and met the experience requirement, and was awarded those contracts.

In its 2012 protest, PMS presented unrebutted evidence that the town has never used the restorative sealing process and has used the crack-filling process only twice; that Felix Marino charges the town twice as much for the infrared patching services as it does in towns where there is competition; and that these three processes would never actually be provided at the same time. The town also failed to demonstrate that working with one contractor has actually saved it any administrative costs. Given that the town has paid Felix Marino twice as much for infrared patching as it would if it were competitively bid, and has not or has rarely used the other two services, the Attorney General determined that "administrative ease" is not a rational basis to bundle the services. Further, because only one bidder could meet the experience requirement for all three services, that requirement was overly restrictive and violated G.L. c. 30, §39M(b). The Attorney General ordered the Town to bid the third year of Felix Marino's contract with specifications that unbundle the services.

MBTA Deploys CM/GC Procurement

In June 2012, the Legislature authorized the use of the construction manager/general contractor project delivery method (CM/GC) on the Green Line Extension (GLX) project. CM/GC combines several beneficial aspects of traditional design-bid-build procurement and construction management

• continued

at risk, which has been widely used for vertical construction since its authorization in Massachusetts in 2004. Because CM/GC allows the MBTA to retain the construction contractor earlier in the procurement process, specifically during the design phase of the project, the MBTA anticipates that the new procurement method will provide for better coordination between the MBTA, its design team, and the construction contractor, shorten the overall delivery schedule of the project, improve the quality of design and construction, reduce errors, omissions, and conflicts, and improve accountability of all parties.

The contracting procedures and associated legal issues of the new CM/GC procurement method represent a significant departure from the familiar design-bid-build approach. The MBTA has issued a procurement manual for the GLX project that outlines the procedures it intends to govern the CM/GC process. The MBTA has indicated that it plans to execute a construction contract with the successful CM/GC firm that will contain a negotiated guaranteed maximum price (GMP) for all required construction services. The GMP will consist of various cost elements including lump sum items, allowance items, and unit price items. Allowance items will be priced on a time and materials basis and all components of the GMP will be subject to audit by the MBTA and the Inspector General. The MBTA procurement manual indicates that the GMP (as well as any interim GMPs) may be priced based on documents that are 90 percent complete, which implies that the CM/GC firm will be expected to assume some risk of the incomplete design.

The MBTA's CM/GC selection process will include "best-value" evaluation criteria that will allow it to consider qualifications of CM/GC firms, rather than low price alone. Because the design will not be complete at the time the CM/GC is selected, bidding on construction cost is not part of the price evaluation. The price component of the evaluation will consist of an overhead and profit multiplier that will subsequently be applied to all project costs. The price component of each CM/GC firm will be opened during the evaluation and scored across all proposers. By statute, the MBTA's technical evaluation criteria must include minimum levels of experience, financial capability, bonding capacity, demonstrated commitment to obtaining meaningful disadvantaged business enterprise participation, and workforce diversity. The CM/GC procurement method also requires that the CM/GC firm self-perform at least 50 percent of the work with its own employees.

The use of CM/GC procurement on the GLX project is an important milestone in Massachusetts public construction that could change the way other large and complex public infrastructure projects are delivered in the future by the MBTA, MassDOT, and other public entities. Its ability to accommodate early collaboration and exchange of information among all parties involved in the project while retaining some beneficial aspects of traditional design-bid-build procurement make it an attractive option as projects become more complex. However, CM/GC is new, and the method of its implementation will be critical to its success.

Our Industry Leadership

Burns & Levinson's Design & Construction attorneys are active leaders of local and national trade and industry associations, and participate in numerous industry committees to advance the design and construction industry. Our involvement in these organizations makes us knowledgeable about current and emerging industry trends and allows us to provide business advice, as well as legal counsel to our clients. Some of the organizations in which our Design & Construction industry lawyers are active include: ACEC Legal Counsel Forum, Construction Industries of Massachusetts, ASCE, BSCES, BSA, MMA, NAIOP, REBA, AGC, ABC, ABA Forum on the Construction Industry, and Boston Bar Association – Construction Law Committee.

For questions regarding this Design & Construction Update, please contact:

Anatoly M. Darov, P.E.
Direct: 617.345.3820
Email: adarov@burnslev.com
www.linkedin.com/in/anatolydarov
@anatolydarov

Timothy J. Famulare
Direct: 617.345.3338
Email: tfamulare@burnslev.com
www.linkedin.com/in/timothyfamulare

Note: This update is intended to call your attention to important changes in the law, but it does not attempt to summarize all relevant provisions or nuances affecting application of the law to specific situations.