Legal Perspective

Implied Warranties as to the Plans and Specs on a CM at-Risk Project

By Scott D. Cessar, Esq.

In a traditional design/bid/build project, the owner retains the architect/ engineer to design the project and, once the design is complete, puts it out to bid. As such, the owner, pursuant to the Spearin Doctrine, impliedly warrants the constructability of the plans and specifications. If the contractor relies, in good faith, on the plans and specs, the contractor will be entitled to recover additional costs arising from design defects.

In a CM at-Risk project, the owner engages professionals to design the project and, in addition, hires a CM (contract management) firm to provide a range of preconstruction services. These preconstruction services may include cost estimation, design review, value engineering and preparation and coordination of the bid packages. The CM firm then serves as the general contractor holding the subcontracts, directing the work of the trade contractors, and providing management and construction services.

This distinction in project delivery systems raises an interesting question: Does the extensive preconstruction involvement by the CM at-Risk in the design of the project eliminate the implied warranty of the plans and specs by the owner under Spearin?

The question was considered in a recent case from the Supreme Judicial Court of Massachusetts in Coughlin Electrical Contractors v. Gilbane Building Company v. Division of Capital Management and Maintenance (DCAM).

Coughlin arose from a CM at-Risk project administered by a Massachusetts state agency, DCAM, for the construction of a hospital. DCAM hired a designer to design the hospital. Gilbane served as the CM at-Risk for DCAM. Coughlin was the electrical subcontractor to Gilbane.

Coughlin filed suit against Gilbane alleging a 49 percent labor hour overrun based on Gilbane's alleged failure to schedule and coordinate the project and based on alleged design defects, including a discrepancy as to the amount of space in the ceiling to place the electrical work and a claim that design changes prohibited the work from being done in a logical order.

Thereafter, Gilbane joined DCAM to the case alleging that, if there were design defects, then DCAM was responsible based on the implied warranty of constructability of the plans and specs.

The trial court dismissed Gilbane's joinder of DCAM because the CM at-Risk method results in "material changes in the roles and responsibilities voluntarily undertaken by the parties," which extinguishes the owner's implied warranty of the plans and specs. Stated another way, the trial court concluded that Gilbane's consultation and involvement with the design as part of its preconstruction services immunized DCAM from liability for subsequently discovered design defects.

On appeal, the highest court of Massachusetts reversed the lower court and held that the owner in a CM at-Risk project may have liability for design defects based on a breach of the implied warranty of constructability of the plans and specs.

The court held that, although the relationship of the CM at-Risk and a general contractor in a design/bid/ build project is substantially different, this, in and of itself, does not constitute grounds such that the CM at-Risk bears all responsibility for design defects and the owner none. The owner may or may not have accepted the CM at-Risk's design suggestions as to the plans and specs. The owner also engaged a designer to prepare the design and may be able to transfer liability to the designer. Further, and importantly to the court, the contract between Gilbane and DCAM did not contain any express waiver of the implied warranty.

Based on these considerations, the Massachusetts high court reversed the trial court and sent the case back to the trial court. At trial, Gilbane will be permitted to attempt to prove a breach of the implied warranty by DCAM. The greater Gilbane's design responsibilities and involvement during preconstruction, however, the greater Gilbane's burden will be to show that it reasonably and in good faith relied on DCAM's design.

For Gilbane to recover against DCAM on Coughlin's claims, Gilbane will, therefore, likely need to show that the design issues raised by Coughlin were not something that Gilbane, in good faith and in the reasonable exercise of its preconstruction services duties, would or should have discovered.

Coughlin, thus, teaches that determining liability for design issues, in most situations, will not turn on labels like "CM at-Risk." Instead, the determination will turn on a careful review of the contract clauses at issue and the facts as they relate to the particular design defects that serve as the basis of the claims.

Further, Coughlin suggests that owners in a CM at-Risk project would be wise to contractually disclaim the implied warranty of constructability of the plans and specs with a carefully worded clause in which the CM at-Risk acknowledges that, based on its extensive preconstruction services, the CM at-Risk has satisfied itself that the design is sound and is buildable in all respects.

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