

MASSACHUSETTS LAW REVIEW

Volume 91, No. 3

Published by the Massachusetts Bar Association

“True” Breaches of Contract:

Judicial Review and the Finality of Decisions of an Awarding Authority on Claims of a Contractor on Public Construction Projects in Massachusetts

by Richard T. Holland



Richard Holland is an attorney at Kopelman and Paige PC a municipal law firm in Boston.

It is well known that a breach of contract may be “material,” but less familiar, perhaps, is that a breach of contract may also be “true.” On a public construction project, not every alleged breach of contract by an awarding authority will be a true breach of contract. Whether a breach of contract is true can have important consequences for both the general contractor and awarding authority. The distinction between a breach of contract that is true and one that is not derives from the practice of including provisions in construction contracts that allow the contracting parties to assert and obtain relief for claims during the course of a construction project. Generally, such provisions, referred to as the contract claims procedure, allow the parties to request adjustments to the contractor’s compensation (the contract price) and the time within which the contractor must complete the work (the contract time).

1. The general conditions are, simply, terms of the construction contract. Although considered part of the contract, the general conditions are commonly contained in a document separate from the written agreement signed by the contractor and awarding authority. The general conditions, together with the signed agreement, drawings and specifications, and such other documents as the parties may agree upon, constitute the “contract documents,” to which the contractor is bound. The contract documents are usually identified in the written agreement or the general conditions.

2. References to the AIA General Conditions are to the 1997 edition of the *American Institute of Architects, AIA Document A201, General Conditions of the Contract for Construction*. Before publication of this article the American Institute of Architects issued its 2007 edition of the AIA General Conditions, which slightly modifies the claims procedure contained in the 1997 edition. References to the EJCDC General Conditions are to the 2002 edition of the *Engineers Joint Contract Documents Committee, EJCDC C-700 Standard General Conditions of the Construction Contract*. In Massachusetts, the AIA General Conditions are commonly used on public building projects, which are

This article addresses the consequences of a contractor’s failure to comply with the contract claims procedure. It also addresses the availability of judicial review of an awarding authority’s denial, through its architect or engineer, of a contractor’s claims, and reviews relevant legal decisions discussing that issue. As discussed below, a contractor who, in asserting a claim, fails to comply with the contract claims procedure will generally be precluded from recovering on that claim in subsequent litigation with the awarding authority.

I. The Contract Claims Procedure

The contract claims procedure is usually contained in the section of the construction contract known as the “general conditions.”¹ The most common forms of general conditions are those published by the American Institute of Architects (“AIA General Conditions”) and Engineers Joint Contract Documents Committee (“EJCDC General Conditions”).²

Under the AIA General Conditions, a claim must be initiated by written notice submitted to the project architect and awarding authority within 21 days of the event giving rise to the claim, or within 21 days after the claimant first recognizes the conditions giving rise to the claim.³ Claims are referred to the project architect for initial decision and, unless the architect fails to render a decision within 30 days from receipt of a claim, a decision by the architect is required before the parties may initiate mediation, arbitration or litigation.⁴ Once rendered, the architect’s decision is “final and binding on the parties but subject to mediation and arbitration.”⁵

Unlike the AIA General Conditions, the EJCDC General Conditions require two written notices to perfect a claim.⁶ The first written notice must describe the general nature of the claim and be

subject to MASS. GEN. LAWS ch. 149, § 44A (2006), whereas the EJCDC General Conditions are commonly used on public works (non-building) projects, which are subject to MASS. GEN. LAWS ch. 30, § 39M (2006).

3. AIA General Conditions, ¶¶ 4.3.1 and 4.3.2. The AIA General Conditions define a “claim” as a “demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term ‘Claim’ also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.” *Id.* ¶ 4.3.1.

4. *Id.* ¶ 4.4.1.

5. *Id.* ¶ 4.4.5.

6. EJCDC General Conditions, ¶ 1.01(A)(10). The EJCDC General Conditions define a “claim” as a “demand or assertion by owner or contractor seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.” *Id.*

delivered to the project engineer and awarding authority no later than thirty days after commencement of the event giving rise to the claim.⁷ The second written notice must substantiate the claim and be delivered to the engineer and awarding authority within 60 days after the commencement of that event.⁸ “No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this” procedure.⁹

Under the EJCDC General Conditions, the engineer’s decision on a claim is final and binding on both parties to the construction contract unless one of the parties requests mediation of the claim in writing within 30 days of the engineer’s decision.¹⁰ If the claim is not resolved within 60 days of a request for mediation, the engineer’s decision on the claim is final and binding, unless, within 30 days of the termination of mediation, either of the following occurs: (1) one of the parties invokes in writing any dispute resolution procedures that may have been included in any supplementary conditions;¹¹ (2) both parties agree to submit the claim to another dispute resolution process; or (3) one of the parties gives written notice of its intention to seek judicial relief.¹²

The purpose of a contract claims procedure is, simply, to manage risk by allocating that risk between the awarding authority and contractor.¹³ The claims procedure is intended primarily to make more certain the circumstances under which a contractor may obtain equitable adjustments to the contract price or contract time.¹⁴ This increased certainty, it is hoped, results in lower bid prices for the awarding authority. It is expected that allowing equitable adjustments for unforeseen conditions will discourage bidders from increasing their bid prices to insure against the cost of such conditions. As the Appeals Court stated in *Glynn v. City of Gloucester*¹⁵:

The adjustment remedies [i.e., the contract claims procedure] benefit both the contractor and the public agency. The agency customarily relies on the changed conditions and extra work clauses to remove unknown risks from competitive bidding and to obtain favorable bid prices stripped of such risk factors. Such a policy benefits the agency by keeping costs down and benefits

bidders by assuring them that they can be compensated by formulae for overcoming subsurface conditions and for extra work not anticipated in their bid estimates, or suggested by available data or by site inspection.¹⁶

In addition, since the contractor will (and should) be required, in accordance with the contract claims procedure, to notify the awarding authority of unforeseen conditions upon discovering and before unilaterally incurring expenses to address them, the awarding authority can exercise greater control over construction costs by addressing such conditions as they arise. Therefore, familiarity and compliance with the contract claims procedure is critical, and a contractor’s failure to follow that procedure has important consequences for both the awarding authority and contractor.

II. Contractors Must Comply with the Claims Procedure

“The law has long been settled in this Commonwealth . . . that a contractor cannot recover on the contract itself without showing complete and strict performance of all its terms. . . .”¹⁷ This requirement of complete and strict performance with the terms of the construction contract includes compliance with the contract claims procedure.¹⁸ A contractor’s failure to comply with the claims procedure may preclude it from recovering on its claims in subsequent litigation. The requirement of compliance with the contract claims procedure is well established by a long line of judicial opinions, some of which are discussed below.

In *Glynn*, the contractor, R&J Salvucci Corporation (“Salvucci”), alleged that it had sustained significant damages as a result of conduct of the awarding authority, the City of Gloucester.¹⁹ The master appointed to hear the evidence found that the city had breached its contract with Salvucci.²⁰ Although Salvucci had failed to comply with the contract claims procedure for requesting additional compensation—it argued that the city had waived that procedure²¹—the master found that the city had nonetheless been aware that Salvucci was incurring extra costs and intended to make a claim for payment of those costs.²² The superior court adopted the master’s findings and entered judgment in favor of Salvucci.²³

7. *Id.* ¶ 10.05B.

8. *Id.*

9. *Id.* ¶ 10.05F.

10. *Id.* ¶¶ 10.05E and 16.01A. “The mediation will be governed by the Construction Industry Mediation Rules of the American Arbitration Association. . . .” *Id.* ¶ 16.01A.

11. The parties may amend and supplement the standard forms of general conditions through “supplementary conditions.” See AIA General Conditions, ¶ 1.1.1; EJCDC General Conditions, ¶ 1.01A(47).

12. EJCDC General Conditions, ¶ 16.01C.

13. See *Glynn v. City of Gloucester*, 9 Mass. App. Ct. 454, 462 n.9 (1980).

14. Some provisions addressing equitable adjustments to the contract price and contract time are statutorily prescribed, such as the provisions contained in MASS. GEN. LAWS ch. 30, § 39N (2006), which sets forth the circumstances under which a contractor (or awarding authority) may be eligible for an equitable adjustment to the contract price if unforeseen subsurface or latent physical conditions are encountered, and MASS. GEN. LAWS ch. 30, § 39O (2006), which outlines the circumstances under which a contractor may be eligible for an equitable adjustment to the contract price where the awarding authority delays or suspends

the work. These provisions are incorporated into public construction contracts by operation of law. See *Sutton Corp. v. Metro. Dist. Comm’n*, 423 Mass. 200, 207 n.14 (1996); *Reynolds Bros. Inc. v. Commonwealth*, 412 Mass. 1, 5 (1992); *Mayor of Salem v. Warner Amex Cable Commc’ns, Inc.*, 392 Mass. 663, 666 (1984).

15. 9 Mass. App. Ct. 454 (1980).

16. *Id.* at 462 n.9.

17. *Andre v. Maguire*, 305 Mass. 515, 516 (1940); accord *Peabody N.E., Inc. v. Town of Marshfield*, 426 Mass. 436, 441 (1998); *Acme Plastering Co. v. Boston Hous. Auth.*, 21 Mass. App. Ct. 669, 675 (1986).

18. *E.g.*, *Glynn*, 9 Mass. App. Ct. at 454.

19. *Id.* at 455. Salvucci claimed, among other things, that the city had refused “to grant reasonable relief when the contractor encountered subsurface soil conditions in variance with those to be anticipated from the plans and test borings.” *Id.*

20. *Id.* The master found that the city had, among other things, misrepresented the subsurface soil conditions at the project site. *Id.*

21. *Id.* at 462.

22. *Id.* at 456.

23. *Id.* at 454-55.

The city appealed the denial of its motions challenging the sufficiency of the master's report.²⁴ The Appeals Court ruled that the report was insufficient and returned the case to the trial court for additional findings.²⁵ It also outlined the legal principles by which the trial court should be guided in determining whether Salvucci was eligible for additional compensation:

On a public construction project, if actions or requirements of the public agency necessitate changes in the work as it progresses, thereby causing the contractor to perform extra work or incur added expense, or if the contractor encounters materially different conditions from those predicted by the plans, specifications, preliminary borings and estimates, the contractor must follow the procedures spelled out in the contract . . . to adjust the price before unilaterally accruing expenses to be pursued later on breach of contract or quantum meruit theories.²⁶

Regarding Salvucci's argument that the city had waived compliance with the contract provisions, the Appeals Court noted the strict Massachusetts rule for proving waiver: "[I]f the contractor argues (as it does here) that the agency waived compliance with the contract's provisions, it is incumbent on it to show . . . that there was clear, decisive, and unequivocal conduct on the part of an authorized representative of the agency indicating that it would not insist on adherence to the agreement."²⁷ It also noted that the facts contained in the master's report, without more, would not support a finding of waiver by the city: "The present finding of the master that 'the defendant [awarding authority] was aware' that Salvucci was doing extra work and intended to bring a claim to recover for that work is inadequate without supporting subsidiary findings to warrant a conclusion of waiver by an authorized representative of the city."²⁸

Some six years later the Appeals Court issued its second decision in *Glynn v. City of Gloucester*.²⁹ It reiterated the principles articulated in its earlier decision, calling them "settled law," and concluded that Salvucci could not recover for its claims: "Salvucci's failure to follow the remedies established by the contract (and statutes governing public construction projects) compels the conclusion that the additional costs were incurred [by Salvucci] unilaterally at its own expense. Were it otherwise, the contractual and statutory framework for the resolution of disputed claims would be virtually meaningless."³⁰

Similarly, in *Skopek Brothers, Inc. v. Webster Housing Authority*,³¹ the contractor, Skopek Brothers, Inc. ("Skopek"), alleged that it had encountered subsurface rock not shown in the plans, specifications and test boring information included in the contract documents.³² Skopek alleged that it was, therefore, eligible for an equitable adjustment in the contract price under section 39N of chapter 30 of the General Laws,³³ which prescribes the circumstances under which a contractor (or awarding authority) will be eligible for such an adjustment when unforeseen subsurface or latent physical conditions are encountered.³⁴ On appeal by both parties from a judgment of the trial court, the Appeals Court ruled that Skopek was not eligible for an equitable adjustment because it had failed to give written notice of its claim to the awarding authority "as soon as possible" after the discovery of the subsurface rock, as required by section 39N.³⁵ It stated that the general conditions of the contract, of which section 39N was a part, were designed to provide for the resolution of the contractor's claim "by the architect . . . rather than by a court."³⁶

The same result was reached in *D. Federico Co., Inc. v. New Bedford Redevelopment Authority*.³⁷ In that case, the contractor, D. Federico Co., Inc. ("Federico"), encountered subsurface obstructions not shown on the contract drawings and requested additional compensation for the extra work it had performed as a result of those obstructions.³⁸ Yet, Federico failed to deliver written notice of its claim to the awarding

24. *Id.* at 454-56.

25. *Id.* at 457, 464.

26. *Id.* at 460.

27. *Id.* at 462. For legal decisions discussing waiver by an awarding authority in the construction context, see *Farina Bros. Co. v. Commonwealth*, 357 Mass. 131, 140 (1970) (notwithstanding clause in contract precluding award of damages for delay in progress of work, court awarded delay damages to contractor on the ground that commonwealth's engineer unreasonably failed to grant contractor's requests for extensions of the contract time), and *Kiewit-Atkinson-Kenny v. Massachusetts Water Res. Auth.*, No. 011920BLS, 2002 WL 31187691, at *22 (Mass. Super. Ct. Sept. 3, 2002) (genuine issue of material fact whether settlement agreement between contractor and public agency constituted waiver of written notice provisions of contract).

28. *Glynn*, 9 Mass.App.Ct. at 462 n.10; *accord Sutton Corp. v. Metro. Dist. Comm'n*, 38 Mass. App. Ct. 764, 768 (1995) ("Knowledge on the part of the public agency alone is not sufficient to support a finding that the agency waived strict compliance with the damage provisions of a public works contract or that compliance was excused."), *rev'd on other grounds*, 423 Mass. 200 (1996).

29. 21 Mass.App.Ct. 390 (1986).

30. *Id.* at 395, 398. The court held that the city's contemporaneous awareness that Salvucci was performing extra work did not support a finding that the city had waived the requirement of written notice contained in the contract. *Id.* at 395 n.8.

31. 11 Mass. App. Ct. 947 (1981).

32. *Id.* at 947.

33. MASS. GEN. LAWS ch. 30, § 39N (2006).

34. Section 39N states in relevant part as follows:

If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. MASS. GEN. LAWS ch. 30, § 39N (2006).

35. *Skopek Bros. Inc.*, 11 Mass. App. Ct. at 947.

36. *Id.*

37. 8 B.R. 888 (Bankr. D. Mass. 1981).

38. *Id.* at 892.

authority until *after* it had discovered the obstructions and completed the extra work, contrary to the written notice requirement in the construction contract.³⁹ Although the court found that Federico had verbally informed the project engineer of the extra work, and had been verbally instructed by the engineer to proceed with that work as quickly as possible, it ruled that those facts neither satisfied the written notice requirement in the contract nor constituted a waiver of that requirement by the awarding authority.⁴⁰

The cases discussed above raise an important question: If a contractor complies with the contract claims procedure and the architect arbitrarily denies the contractor's claim, will the contractor be eligible for a remedy greater than the relief provided for its claim in the construction contract? Stated differently, is the arbitrary denial of a properly made claim a "true" breach of contract? To answer this question, we must first define a true breach of contract.

III. A True Breach of Contract Defined

Perhaps the best way to define a true breach of contract is to state what it is not. Generally, if a contract provides relief for a particular claim, the awarding authority's good-faith rejection of that claim, even if that rejection is arbitrary, will not constitute a true breach of contract.⁴¹ This does not, however, leave the contractor without a remedy if its claim is arbitrarily denied. Rather, it limits the contractor to the relief expressly provided in the contract for the claim.⁴² In other words, the contractor will be limited to the relief that it had agreed was appropriate for the claim.

The decision in *Sutton Corporation v. Metropolitan District Commission*,⁴³ is a good illustration of the meaning of a true breach of contract. In that case, the contractor, Sutton Corporation ("Sutton"), was required to install sand drains in preparation for construction of a bridge for the Metropolitan District Commission ("MDC"), the awarding authority.⁴⁴ Soon after commencing its work, Sutton discovered unusual soil conditions, necessitating a change to a more costly installation method.⁴⁵ Sutton ceased the installation work, notified the MDC in writing that it had encountered a changed

condition under section 39N, and made a claim for the resulting increase in its cost to perform the work.⁴⁶ The MDC denied the claim on the grounds that Sutton had not encountered an unforeseen subsurface condition under section 39N and failed to comply with the procedure in its contract for making a claim for extra work.⁴⁷

The superior court ruled in favor of Sutton, and the MDC appealed.⁴⁸ The Appeals Court reversed on the ground that Sutton had failed to comply with the contract provisions for making a claim for extra work, which were more stringent than the notice requirement contained in section 39N.⁴⁹ The Supreme Judicial Court ("SJC") disagreed and held that Sutton's claim was not a claim for extra work because the installation of sand drains was required by the contract.⁵⁰ Rather, the claim was for an increase in the contract price under section 39N.⁵¹ Because Sutton had indeed encountered an unforeseen subsurface condition under section 39N and complied with the section 39N notice requirement, the SJC ruled that an equitable adjustment was mandatory, and that the MDC's denial of Sutton's claim was, therefore, an error of law.⁵²

Having established liability, the SJC next turned to the question of damages. Sutton argued that the MDC had committed a true breach of contract and, consequently, that it was entitled to damages greater than the relief provided in the contract for the claim.⁵³ The SJC disagreed: "A claim for an equitable adjustment under the changed conditions provision is a claim for relief under the contract, and is not a 'true' breach of contract claim."⁵⁴ It explained:

When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract. . . . Recovery for such claims is limited to the remedies provided in the contract. When a particular claim falls outside the contract, such that it is not redressable under specific contract adjustment provisions, it is a "true" breach of contract claim that may justify an award of damages.⁵⁵

39. *Id.*

40. *Id.* at 898-99. The court noted that there was no evidence that the project engineer had had the authority to waive contract provisions. *Id.* at 893, 898-99.

41. *E.g.*, *Sutton Corp. v. Metro. Dist. Comm'n*, 423 Mass. 200, 213 n.22 (1996). An exception to the definition of a true breach of contract provides that a bad faith rejection of a claim (for which the contract provides relief) may constitute a true breach of contract. *See Glynn v. City of Gloucester*, 21 Mass.App.Ct. at 397. Even under this exception, however, the contractor may be foreclosed from litigating its bad faith claim if it fails to comply with the contract claims procedure. *Id.* at 397-98 ("only after a claim has been validly processed through the stages established by the contract . . . could it be determined whether the city had acted in bad faith."); *see also* *JRJ Constr. Co. v. R.W. Granger & Sons, Inc.*, No. 97-2194, 1999 WL 706717, at *11 (Mass. Super. Ct. July 29, 1999) ("even in a claim for a true breach, the contractor is required to comply with the written notice and claim provisions of the contract"). *But see* *Petrucci v. Massachusetts Tpk. Auth.*, No. 9400690, 1998 WL 1181734, at *5 (Mass. Super. Ct. Sept. 21, 1998) (on summary judgment, one of contractor's four claims was sent to jury on question of bad faith even though contractor had failed to comply with contract claims procedure).

42. *Sutton Corp.*, 423 Mass. at 213.

43. 423 Mass. 200 (1996).

44. *Id.* at 202.

45. *Id.* at 203.

46. *Id.* at 205.

47. *Id.* at 204.

48. *Sutton Corp. v. Metro. Dist. Comm'n*, 38 Mass. App. Ct. 764, 765 (1995), *rev'd*, 423 Mass. 200 (1996).

49. *Id.* at 766.

50. *Sutton Corp.*, 423 Mass. at 207.

51. *Id.* at 206.

52. *Id.* at 206-08.

53. *Id.* at 212-13.

54. *Id.* at 213.

55. *Id.* at 213 n.22; *accord* *Thomas O'Connor & Co. v. City of Medford*, 16 Mass.App.Ct. 10, 13 (1983) (municipality liable for true breaches of contract even absent an appropriation); *Glynn v. City of Gloucester*, 9 Mass. App. Ct. 454, 460-61 (1980) (failure of contractor to invoke its remedies under agreement will preclude all relief unless claim falls "outside" the contract). For a discussion of the meaning and effect of a true breach of contract claim under federal construction contracts, *see* *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 402 (1966), *superseded by* Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat.283 (codified as amended at 41 U.S.C. §§ 601-13 (2000 & Supp. V), as amended by Pub. L. No. 109-435, 120 Stat. 3242 (2006)).

Since Sutton's claim was a claim for relief under the contract—section 39N was, by operation of law, deemed a part of the contract⁵⁶—it was not a true breach of contract claim. Therefore, Sutton's damages were "limited to those provided by the terms of the contract and the statutes governing public construction projects."⁵⁷

To understand the potential significance of limiting a contractor to the relief provided in the construction contract, consider the following example: A contractor prepares a bid for a "unit price" contract for the installation of a public sewer. The bid form requires bidders to insert a separate unit price for each of the various items of work listed on the form, including ledge excavation (per cubic yard), and it provides an estimated quantity for each item. The contract documents state that payment for all work performed will be measured by the contractor's unit prices, and that such prices will not be adjusted regardless of whether the quantity of work performed exceeds the estimated quantities on the bid form.⁵⁸

The awarding authority will determine the low bid, for the purpose of awarding the construction contract, by multiplying the estimated quantity of each work item by its corresponding unit price, and then adding together the resulting products for each item.⁵⁹ The contractor thus recognizes that its total bid price, rather than how that price is allocated among the separate work items on the bid form, will determine whether it will be the low bidder and awarded the contract. It therefore estimates a single bid price for all work to be performed, and then decides how best to allocate that price among the various work items.

The contractor anticipates that its actual cost to excavate a cubic yard of ledge will be \$50, but based on its review of the boring logs included in the bid documents, it concludes that the quantity of ledge estimated by the awarding authority is excessive. Therefore, the contractor assumes that it will be required to excavate less ledge. It recognizes, however, that if it bids \$50 and its assumption proves correct, it will not be paid for the entire estimated quantity of ledge

excavation contained on the bid form, since it will only be paid for work actually performed. To ensure that it will be paid its total bid price, and gambling that its assumption is indeed correct, the contractor bids "one penny" for ledge excavation and allocates its remaining bid price to the items of work it is certain to encounter, such as the installation of pipe.⁶⁰ The contractor submits its bid and is awarded the contract.

During construction and contrary to its assumption, the contractor excavates ledge in a greater quantity than estimated by the awarding authority. In an effort to make good the loss resulting from its penny bid, the contractor makes a claim to recover its actual costs for all ledge excavation. The awarding authority's project engineer denies the claim in good faith⁶¹ on the ground that the contractor did not comply with the contract claims procedure, and the contractor is paid nothing. The contractor sues the awarding authority and succeeds in proving that the engineer's decision regarding its compliance with the contract claims procedure was arbitrary. Even so, the contractor will be paid no more than one penny for each cubic yard of ledge excavation.⁶²

IV. Limits on De Novo Review of Claims Decisions

It is common practice to authorize the project architect or engineer⁶³ to make decisions on claims and other matters arising during construction, as has been recognized by the Appeals Court:

Construction contracts frequently contain provisions giving an architect the power to decide disputes which arise under a construction contract. Such is the number of details in construction drawings and specifications that inevitably there are disputes about methods, materials, and the extent of what a contractor is to do and for what the owner is to pay. It is important that someone more or less on the spot can resolve those disputes, and the architect, as we have seen, is commonly the designated referee.⁶⁴

56. *Sutton Corp.*, 423 Mass. at 207.

57. *Id.* at 213. Since there was no contractual or statutory method to determine Sutton's equitable adjustment under § 39N, the court stated that "it is reasonable to refer to the contractual damages formula concerning payment for extra work." *Id.* at 212. Limiting the contractor to the relief specified in its contract is consistent with the general rule of damages for breach of contract. "Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981). For legal decisions discussing this general rule of damages, see *Boylston Hous. Corp. v. O'Toole*, 321 Mass. 538, 562 (1947), and *Doering Equip. Co. v. John Deere Co.*, 61 Mass.App.Ct. 850, 856 (2004).

58. Under paragraph 12.01B of the EJCDC General Conditions, adjustments to the contract price must be determined by application of the contract unit prices, if any. Under paragraphs 7.2.2 and 7.3.3 of the AIA General Conditions, however, the contract unit prices may, but need not, be used to determine adjustments to the contract price. Unlike in the above hypothetical, the EJCDC General Conditions (§ 11.03D) and AIA General Conditions (§ 4.3.9) allow for an equitable adjustment to the contract price or applicable unit price, respectively, if the quantity of unit-price work stated in the contract is materially exceeded.

59. For example, assume the bid form contains two items of work: (1) installation of pipe (per linear foot), and (2) excavation of ledge (per cubic yard). The estimated quantities listed on the bid form are 10 cubic yards for ledge excavation and 10 linear feet for pipe installation. A bidder bids \$1.00 for ledge excavation and \$1.00 for pipe installation. The bid price is calculated as follows: $(\$1.00 \times 10) + (\$1.00 \times 10) = \$20.00$.

60. "Penny bids," as they are known, have been ruled legal under the public bid laws. See *Department of Labor and Indus. v. Boston Water and Sewer Comm'n*, 18 Mass.App.Ct. 621, 625-26 (1984) (stating that public bid laws do not forbid penny bidding and acknowledging that such bids may result from bidder's unique skills and advantages).

61. A bad faith denial of a claim may constitute a true breach of contract for which the contractor may be eligible to recover damages greater than the relief provided in the contract for its claim. See *Glynn v. City of Gloucester*, 21 Mass.App.Ct. 390, 397 (1986).

62. See *Sutton Corp.*, 423 Mass. at 207 (denial of contractor's § 39N claim was in error, but contractor was restricted to the relief provided in its contract for its claim).

63. For the remainder of this article references to "architect" will, unless otherwise indicated, mean architect or engineer.

64. *Fontaine Bros. Inc. v. City of Springfield*, 35 Mass. App. Ct. 155, 158 (1993).

In addition, “[i]t is well established that, where a building contract makes the architect an arbitrator between the parties to determine practical questions of construction that arise under the plans and specifications in the execution of the work, his decision upon these matters is binding.”⁶⁵ Moreover, so long as the architect acts fairly and in good faith, its decision may bind the parties even if the architect was mistaken in that decision. As stated in *Hurley v. City of Boston*,⁶⁶ which involved the question of whether the parties were bound by the architect’s decision fixing the *wrong* date of completion of the construction work⁶⁷:

The parties were bound by his [the architect’s] decision that the work was completed on August 8, if he honestly decided the matter, although as a matter of fact it was not completed until a later date, because they elected to take his judgment and be bound by his decision, for it was a part of their contract that the architect was to decide the question of the date of completion of the work. . . . The finding of the architect cannot be impeached merely because he was careless in his inspection, or mistaken in his conclusion. His judgment may have been wrong, and a more careful examination might have disclosed his error. As long as he acts fairly and in good faith, is not the victim of the fraud of others, and exercises his own honest judgment, the finding, or decision, is binding.⁶⁸

Therefore, de novo review of an architect’s good faith claims decision may not be available to a contractor.

This limitation of judicial review is the logical consequence of the parties’ agreement that the architect’s decisions will be final and binding.⁶⁹ In other words, the courts’ refusal to review such decisions de novo is nothing more than the enforcement of that agreement.⁷⁰

Such refusal is also consistent with the well established principle prohibiting parties from relitigating matters previously adjudicated.⁷¹ Simply put, courts will hold the parties to their agreement, contained in the construction contract, to be bound by the architect’s decisions.

In 1961, this limitation of judicial review was codified by the Massachusetts General Court for public construction projects. Section 39J of chapter 30 of the General Laws provides as follows:

Notwithstanding any contrary provision of any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public works by the commonwealth, or by any county, city, town, district, board, commission or other public body, when the amount of the contract is more than five thousand dollars in the case of the commonwealth and more than two thousand dollars in the case of any county, city, town, district, board, commission or other public body, a decision by the contracting body or by any administrative board, official or agency, or by any architect or engineer, on a dispute, whether of fact or of law, arising under said contract shall not be final or conclusive if such decision is made in bad faith, fraudulently, capriciously, or arbitrarily[,] is unsupported by substantial evidence, or is based on error of law.⁷²

As interpreted by the courts, section 39J, like the line of court decisions preceding it, limits judicial review of decisions rendered by an awarding authority (or its architect) on a public construction project.⁷³ If the project architect denies a contractor’s claim, that denial will not be subject to de novo review unless the contractor can show that it was “made in bad faith, fraudulently, capriciously, or arbitrarily[,] is unsupported by substantial evidence, or is based on error of law.”⁷⁴

65. *Handy v. Bliss*, 204 Mass. 513, 520 (1910).

66. 244 Mass. 466 (1923).

67. *Id.* at 470.

68. *Id.* (citations omitted). As will be discussed later in this article, the *Hurley* court ultimately ruled that the architect’s decision fixing the completion date was not final and binding because the architect had failed to perform an inspection of the construction work, as required by the terms of the construction contract, and, therefore, had not exercised “honest judgment.” *Id.* at 471-72.

69. As stated in *Marsch v. S. New England R. Corp.*, 230 Mass. 483 (1918):

This provision [making final and binding the engineer’s certification of payment] is not illegal as an attempt to oust the court of its jurisdiction respecting the subject-matter, because by the terms of the contract the contractor can have no right of action to which the jurisdiction of any court can attach. . . .

Id. at 493.

70. See *Hurley*, 244 Mass. at 470; *Marsch*, 230 Mass. at 493, 495.

71. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966), superseded by 41 U.S.C. §§ 601-13 (2006).

72. MASS. GEN. LAWS ch. 30, § 39J (2006) (emphasis added).

73. By the very language of § 39J, the limitation of judicial review applies to decisions by “the contracting body or by administrative board, official or agency.” *Id.* This language indicates that decisions by the awarding authority itself, as well as decisions by its architect-representative, will be final and binding.

74. MASS. GEN. LAWS ch. 30, § 39J (2006). The federal counterpart to § 39J is known as the Wunderlich Act, 41 U.S.C. § 321 (2000), which states:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Id. With a few exceptions, the Wunderlich Act was superseded by the Contract Disputes Act, also known as the “CDA,” 41 U.S.C. §§ 601-13 (2000 & Supp. V), as amended by Pub. L. No. 109-435, 120 Stat. 3232 (2006). See *Parker v. United States*, 77 Cl. Ct. 279, 287 (2007), *aff’d*, No. 2007-5163, 2008 WL 2329271 (Fed. Cir. June 4, 2008) (Wunderlich Act remains applicable “(1) when the contracting agency in question is not within the executive branch; or (2) when the contract at issue was entered into before the final effective date of the CDA”). Under the CDA, decisions of agency boards of contract appeals “on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.” 41 U.S.C. § 609(b) (2000 & Supp. V).

The following court decisions discuss the finality of a project architect's claims decisions.

A. The Architect's Decision Is Final Where the Architect Acts within the Scope of Its Authority

So long as the architect acts within the scope of its authority granted in the construction contract, its good faith decisions will be final and binding.⁷⁵ In *Fontaine Brothers, Inc. v. City of Springfield*,⁷⁶ the contractor sought additional compensation for extra work.⁷⁷ The dispute turned on an interpretation of the plans and specifications.⁷⁸ The architect interpreted the plans and specifications and decided that the contractor was not eligible for additional compensation.⁷⁹ The contractor sued the awarding authority, the City of Springfield, arguing that the architect had exceeded its authority, and won a jury verdict.⁸⁰

The city appealed the trial court's denial of its motion for a directed verdict.⁸¹ Although the Appeals Court agreed with the architect's interpretation of the plans and specifications,⁸² it nonetheless declared that its own opinion was irrelevant: "The question in the case . . . is not what we think the specifications mean. Rather, the question is: was the architect authorized to decide definitively what the specifications mean?"⁸³ The court found that the architect was so authorized.⁸⁴ The construction contract stated that the "work shall be done under the general direction of the Architect and his decision as to the . . . meaning of the drawing and specifications shall be final," and that the architect's decisions on disputed claims "shall be final and binding on the parties."⁸⁵ Since there was no evidence that the architect had acted fraudulently or arbitrarily, the Appeals Court ruled that the contractor was bound by the architect's decision.⁸⁶

B. The Architect's Decision Is Not Final if the Architect Acts beyond Its Scope of Authority

If the architect acts beyond the scope of its authority, its decisions will not be final and binding.⁸⁷ The case of *Henry B. Byers & Sons, Inc. v. Board of Water Commissioners*⁸⁸ involved the construction of a 73-unit housing facility by the Northborough Housing Authority.⁸⁹ The Northborough Board of Water Commissioners notified the plaintiff, a plumbing subcontractor, that it was required to pay a fee for each housing unit before it would be permitted to connect the facility to the municipal water source.⁹⁰ The architect decided that the subcontractor was indeed responsible for the fee.⁹¹ The subcontractor sued the general contractor, with whom it had a contract, the Housing Authority and the Board of Water Commissioners.⁹²

Reversing the trial court's judgment against the plaintiff subcontractor, the SJC explained that "[t]he issues over which the architect is given power of decision must . . . be determined by the reasonable interpretation of the contract provision creating such power. . . . The decision of the architect is not conclusive where he exceeds the authority conferred upon him. . . ."⁹³ Although the architect was broadly empowered to interpret the construction contract, that authority "did not give him the power to make a new contract for the parties. He could translate the contract and ascertain its meaning but he could not add to or detract from the text."⁹⁴ Since the construction contract did not expressly require the subcontractor to pay the fee, the court considered the architect's contrary decision a rewriting of the specifications, rather than an interpretation of the same, and ruled that such decision was, therefore, "a nullity."⁹⁵

75. *Gil-Bern Constr. Corp. v. City of Medford*, 357 Mass. 620, 624 (1970); *Farina Bros. Co. v. Commonwealth*, 357 Mass. 131, 143 (1970); *Benjamin Foster Co. v. Commonwealth*, 318 Mass. 190, 208 (1945); *Fontaine Bros., Inc. v. City of Springfield*, 35 Mass. App. Ct. 155, 160 (1993); *Acmat Corp. v. Daniel O'Connell's Sons, Inc.*, 17 Mass. App. Ct. 44, 45 (1983).

76. 35 Mass. App. Ct. 155 (1993).

77. *Id.* at 155.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 156.

82. *Id.* at 157.

83. *Id.* at 156-57.

84. *Id.* at 157-58.

85. *Id.*

86. *Id.* at 159-60. The court also addressed the plaintiff's argument that the architect "may not by his power of decision change the contract." *Id.* Although the court agreed that the architect may not change the terms of the parties' contract, it found that the architect had interpreted, not changed, the specifications: "Contract terms are not changed when the architect decides in the course of a job what a specification means or whether one specification trumps another." *Id.* But see *Henry B. Byers & Sons, Inc. v. Bd. of Water Comm'rs*, 358 Mass. 354, 364 (1970) (architect's interpretation constituted unauthorized rewriting of specifications).

87. *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 801 (1986); *Henry B. Byers & Sons, Inc.*, 358 Mass. 354, 364 (1970); *Morgan v. Burlington*, 316 Mass. 413, 420 (1944); *Morgan v. Murdough*, 216 Mass. 502, 504-05 (1914).

88. 358 Mass. 354 (1970).

89. *Id.* at 356.

90. *Id.*

91. *Id.* at 357.

92. *Id.*

93. *Id.* at 363-64 (citations omitted).

94. *Id.* at 364 (quoting *Morgan*, 316 Mass. at 420).

95. *Id.*

C. The Architect's Decision Is Not Final if Not Based on Required Inspections

If the architect is required by the construction contract to investigate a matter submitted to it for decision, the architect must do so, or its decision on such matter will not be final and binding.⁹⁶ In *Hurley v. City of Boston*,⁹⁷ a dispute arose about whether the plaintiff subcontractors had filed sworn statements of their payment-bond claims within sixty days of completion of the work, as required by statute.⁹⁸ Before that question could be answered, however, the court needed to determine when the work had been completed.⁹⁹

During the course of the project, the architect determined the date of completion of the work, as it was required to do by the construction contract.¹⁰⁰ Yet, in making that determination, the architect "failed to make any examination or inspection of the . . . work . . . although the inspection of this work was a part of his duty."¹⁰¹ Instead, the architect relied on an examination performed by inspectors hired by the awarding authority, the City of Boston.¹⁰²

The court ruled that, although the architect could have reasonably relied on an inspection of the work performed by its own assistants acting at its direction, it could not properly rely on an inspection performed by the city.¹⁰³ By failing to inspect the work to determine if it was complete, as required by the construction contract, the architect "did not exercise his honest judgment in passing upon the question and in deciding that the work was completed on a certain date."¹⁰⁴ Therefore, the architect's decision was not final and binding.¹⁰⁵

D. The Architect's Decision Is Not Final if the Owner Interferes with that Decision

If the awarding authority interferes with the architect's decision-making, the resulting decision may not be final and binding.¹⁰⁶ In *Marsch v. Southern New England R.R. Corp.*,¹⁰⁷ the defendants challenged the sufficiency of the plaintiff contractor's causes of action, which were founded upon the allegation that the contractor had not been paid for all of its work.¹⁰⁸ The construction contract appointed the engineer as "sole umpire" to decide questions arising under that contract, and it conditioned payment to the contractor

on the issuance of a certificate by the engineer certifying that the contractor had performed the work for which payment was sought.¹⁰⁹ The contract stated that the engineer's certificate "shall be final and conclusive between the parties . . . and actual fraud only shall disqualify him [the engineer] from acting as aforesaid."¹¹⁰

The engineer did not issue the requisite certificate for all of the work for which the contractor had requested payment.¹¹¹ Since the engineer's decision to issue or not issue a certificate was final and binding in the absence of fraud, in order to challenge the engineer's decision, it was not enough, the court stated, for the contractor to allege that it "has done and performed all acts and things which . . . he was required to do and perform."¹¹² Rather, to maintain its lawsuit, the contractor was required to allege "that the condition precedent [i.e., certification of the engineer] was performed or the want of that performance excused."¹¹³

The contractor alleged that the "engineer was prevented by the interference of the defendant [awarding authority] from giving a certificate."¹¹⁴ Although the engineer was under the owner's absolute control and direction, the court stated that such fact was not, by itself, a sufficient allegation "of bias, fraud or prejudice to show collusion and fraud and . . . not enough to require judicial inquiry."¹¹⁵ Nevertheless, the court held that the contractor's allegation of interference by the owner was sufficient to withstand the defendants' challenge.¹¹⁶ Such an allegation "imports not alone undue influence, but also that the engineer yielded to that influence. If such should be the case, such action would be a fraud and would leave the provision for obtaining the certificate of no effect."¹¹⁷

E. The Architect's Decision May Not Be Final if the Architect Fails to Object to the Contractor's Means and Methods of Performing the Work

Unless its contract states otherwise, the contractor chooses the means and methods by which it will accomplish its work. Typically, neither the awarding authority nor its architect will interfere with that choice—and for good reason, because doing so may result in claims by the contractor.¹¹⁸ There may be instances, however, where

96. *Hurley v. City of Boston*, 244 Mass. 466, 471 (1923).

97. 244 Mass. 466 (1923).

98. *Id.* at 468. A payment bond in the amount of no less than 50 percent of the total contract price is required for all Massachusetts public construction projects estimated to cost more than \$2,000 for municipalities and \$5,000 for the commonwealth. See MASS. GEN. LAWS ch. 149, § 29 (2006). This payment bond requirement is increased to 100 percent of the contract price for public building projects estimated to cost more than \$100,000. See MASS. GEN. LAWS ch. 149, §§ 44A and 44E (2006).

99. *Hurley*, 244 Mass. at 468.

100. *Id.*

101. *Id.* at 468, 471.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Marsch v. S. New England R.R.*, 230 Mass. 483, 494 (1918).

107. 230 Mass. 483 (1918).

108. *Id.* at 490-91.

109. *Id.* at 489-90.

110. *Id.* at 490.

111. *Id.* at 494.

112. *Id.* at 490.

113. *Id.*

114. *Id.* at 494.

115. *Id.*

116. *Id.*

117. *Id.*

118. For examples of contractual provisions addressing the issue of control over means and methods of construction, see AIA General Conditions, ¶¶ 3.3.1 and 4.2.2, and EJDC General Conditions, ¶¶ 6.01A and 9.09B.

the failure to object to a contractor's choice of means and methods will result in claims against the awarding authority.¹¹⁹

For example, in *J.A. Sullivan Corporation v. Commonwealth*,¹²⁰ the general contractor used the more expensive of two contractual methods of ledge excavation.¹²¹ The contract contained a separate unit price for each method of excavation, one more expensive than the other, but failed to indicate when and how the methods were to be used.¹²² During construction, the architect observed the ledge excavation but never objected to the contractor's use of the more expensive method.¹²³ Upon completion of the work, the contractor submitted to the architect a proposed change order based on the more expensive unit price.¹²⁴ The architect rejected the proposed change order and recommended to the awarding authority, the Massachusetts Bureau of Building Construction, that the contractor be paid some lesser amount for the work, and the awarding authority followed that recommendation.¹²⁵ Although the contractor accepted the lesser amount, it appealed the architect's rejection of the proposed change order to the Executive Office for Administration and Finance, which denied the appeal six days later.¹²⁶

At trial, the commonwealth argued that the architect's decision was final and binding and, therefore, not reviewable by the court.¹²⁷ The superior court disagreed, holding that the controlling provision of the construction contract did not expressly state that the architect's decisions would be final and binding.¹²⁸ That provision, Article V, stated:

The designer [architect] shall decide all questions which may arise as to the conduct, quantity, quality, equality, acceptability, fitness and rate of progress of the several kinds of work and materials to be performed and furnished under the contract and shall decide all questions which may arise as to the interpretation of the plans, and specifications and as to the fulfillment of this contract on the part of the contractor.¹²⁹

"The judge then interpreted the contract as authorizing the manner of ledge removal employed by the plaintiff."¹³⁰

The SJC affirmed the trial court's decision, but on different grounds, ruling that the architect had acted beyond the scope of its authority:

The architect's interpretation of the contract several months after the ledge was removed has no bearing whatsoever on whether the plaintiff is entitled to recover the cost of doing that work by the [more expensive] trench method, and this is so even if Article V contained specific "final and conclusive" language. *Article V does not address the resolution of disputes about contract interpretation arising for the first time after the relevant work has been completed, as here.*¹³¹

The SJC stated that Article V, which was included in a section of the contract entitled "Control of the Work," authorized the architect to control and direct the work as it progressed, *not* to resolve disputes about whether the contractor was eligible for payment for certain work *after* such work had been completed.¹³² The architect did not exercise its authority, however: "Here the architect gave the plaintiff no instructions concerning how the ledge should be removed. In fact, the architect's representative, by observing the ongoing ledge removal in silence, demonstrated acquiescence in the manner of ledge removal selected by the plaintiff."¹³³

The outcome may have been different, the court suggested, if the architect had instructed the contractor to use the less expensive method *before* the work was completed and the contractor defied that instruction. Under those circumstances, "the plaintiff would not have been entitled to be paid for removing the ledge by the more expensive trench method. The architect's decision, assuming it to be neither arbitrary nor in bad faith, . . . would have been final."¹³⁴

119. *J.A. Sullivan Corporation v. Commonwealth*, 397 Mass. 789, 800-01 (1986) (contractor eligible for additional compensation for use of more expensive method of excavation because architect had failed to object to use of that method); *Perini Corporation v. Massachusetts Port Authority*, 2 Mass.App.Ct. 34, 44-45 (1974) (contractor eligible for additional compensation for certain drilling work because engineer had failed to object to that work).

120. 397 Mass. 789 (1986).

121. *Id.* at 798.

122. *Id.*

123. *Id.*

124. A "change order" is, generally, a written amendment to the construction contract reflecting the parties' agreement regarding changes in the construction work and adjustments to the contract time or contract price. See AIA General Conditions, ¶ 7.2.1; EJCDC General Conditions, ¶ 1.01A(9).

125. *J.A. Sullivan Corp.*, 397 Mass. at 798-99.

126. *Id.* at 799.

127. *Id.*

128. *Id.* at 800. The commonwealth did not argue that the decisions of the Bureau of Building Construction and the Executive Office for Administration and Finance (concurring with the architect) were final and conclusive under "a provision in the contract that says '[t]he determination of the Bureau shall be final

upon all questions of the amount and value of changes or method of submission and approval thereof.'" *Id.* at 801-02. It raised that argument for the first time on appeal. Consequently, the SJC was "reluctant to conclude that the judge's conclusion was 'clearly erroneous' because of the judge's failure to take that provision into account." *Id.* at 802.

129. *Id.* at 799.

130. *Id.* at 800.

131. *Id.* (emphasis added).

132. *Id.*

133. *Id.* at 801.

134. *Id.* (citations omitted). In making this statement, the court appears to have rejected the trial court's holding, *id.* at 800, that the contract must expressly state that the architect's decision will be final and binding for the decision to have such effect. Otherwise, the court's statement appears contradictory, because if the contract must include such an express statement for the architect's decision to be final and binding, and the contract here contained no such statement, it is unclear how the timing of the architect's decision is relevant to the question of whether that decision is final and binding.

F. An Arbitrator May Be Bound by an Architect's Decisions

Where the contract requires the arbitration of disputes, the arbitrator, like a court, may have limited jurisdiction over the architect's decisions.¹³⁵ In *G.L. Rugo & Sons, Inc. v. Town of Lexington*,¹³⁶ the architect was responsible to do the following:

decide all questions which may arise as to the quality, quantity, acceptability, fitness and rate of progress of the several kinds of work . . . and . . . all questions which may arise as to the interpretation of the plans and specifications . . . and his determination and decisions shall be final and conclusive.¹³⁷

Pursuant to that authority, the architect decided that certain disputed work was required by the contract and, therefore, did not constitute extra work.¹³⁸

After having performed the work as directed by the architect, the general contractor submitted the same question that had been decided by the architect to a panel of arbitrators pursuant to article 40 of the general conditions, which stated: "If any controversy arises under the contract . . . it shall be determined by arbitration. . . . In the event of any discrepancy between this [provision] and other provisions of the general conditions, the provisions of this article 40 shall govern."¹³⁹ The panel of arbitrators ruled, however, that the architect's decision was final and binding, and that ruling was then filed with the superior court.¹⁴⁰ On motion of the awarding authority, the Town of Lexington, the superior court entered judgment on the arbitrators' ruling, and the contractor appealed.¹⁴¹

On appeal the general contractor argued that article 40 superseded the provision empowering the architect to make final and binding decisions.¹⁴² The SJC disagreed, stating:

We perceive no discrepancy between the express grant of final authority to the architect . . . and the powers of the arbitrators. . . . Nothing in article 40 empowers the arbitrators to override the decisions of the architect on questions within the ambit of his authority. Upon

submission only two issues were open to the arbitrators: (1) whether the architect acted within the scope of his powers, and (2) whether he was guilty of any fraud or bad faith in making his decisions.¹⁴³

Therefore, unless the provisions of the general conditions providing for arbitration expressly state otherwise, an arbitrator will likewise be bound by the limitation of judicial review codified in section 39J of chapter 30 of the General Laws.

G. The Architect's Decisions May Bind Subcontractors

Decisions by the architect may bind a subcontractor where the provisions of the construction contract, which authorize the architect to render final and binding decisions, are incorporated into the subcontract.¹⁴⁴ In *Ostrow Electrical Co. v. J.J. Marshall & Sons, Inc.*,¹⁴⁵ the plaintiff subcontractor disputed whether it, or another subcontractor, was responsible for certain electrical work.¹⁴⁶ The dispute was submitted to the architect, who, as "the interpreter of the requirements of the Contract Documents," was required to "render interpretations necessary for the proper execution or progress of the work. . . ."¹⁴⁷ To resolve the dispute, the architect interpreted conflicting language in the specifications, ultimately deciding that the plaintiff was responsible for the work.¹⁴⁸

The subcontractor sued the architect, general contractor and surety, arguing that the architect's decision was arbitrary and capricious.¹⁴⁹ The superior court granted the subcontractor's motion for summary judgment on its claims against the contractor and surety, and an appeal ensued.¹⁵⁰ The Appeals Court reversed, concluding that the architect's decision "was plausible and cannot be characterized as having no rational basis. The decision, therefore, was not arbitrary and capricious, and there was no error of law."¹⁵¹ Regarding the plaintiff's allegation that the architect had made "a new contract by interpreting ambiguities in the contract," the Appeals Court stated: "Contract terms are not changed when the architect decides in the course of a job what a specification means or whether one specification trumps another."¹⁵²

135. *G.L. Rugo & Sons, Inc. v. Town of Lexington*, 338 Mass. 746, 751 (1959).

136. 338 Mass. 746 (1959).

137. *Id.* at 749.

138. *Id.* at 747.

139. *Id.* at 748.

140. *Id.*

141. *Id.*

142. *Id.* at 751.

143. *Id.*

144. On public building projects estimated to cost more than \$100,000, certain subcontractors, known as "filed sub-bidders," are required to execute a form of subcontract prescribed by statute, which binds the subcontractors to the general contractor to the same extent that the general contractor is bound to the awarding authority. See MASS. GEN. LAWS ch. 149, § 44F (2006). For legal decisions involving subcontractor claims, see *Hampden Cornice Works, Inc. v. Leo Spear Constr. Co., Inc.*, 348 Mass. 798, 798-99 (1965) (architect decides certain work to be responsibility of subcontractor); *Salem Glass Co. v. Joseph Rugo, Inc.*, 343 Mass. 103, 104-05 (1961) (suggesting that decision of general contractor that subcontractor is responsible for certain work could be final and binding if subcontract gives general contractor authority to make such a decision and decision is reasonable); *Farm-Rite Implement Co. v. Fenestra Inc.*, 340 Mass. 276,

278-79 (1960) (subcontractor agreed in subcontract to be bound to provision in general contract empowering architect to render final decisions on interpretations of specifications); *Fred C. McClean Heating Supplies, Inc. v. Jefferson Constr. Co.*, 339 Mass. 356, 366-77 (1959) (decision of architect regarding scope of subcontractor's work not final because it was made long after commonwealth's acceptance of completed project); *Derby Desk Co. v. Conners Bros. Constr. Co.*, 204 Mass. 461, 467 (1910) ("[architect's] decision as to the interpretation of the contract, made nearly a year after the date of the writ, should not be a condition precedent to the right of the plaintiff to bring suit"); *Ostrow Elec. Co. v. J.J. Marshall & Sons, Inc.*, 59 Mass. App. Ct. 816, 819-22 (2003) (architect decides certain work to be responsibility of subcontractor); and, *J.J. Finn Elec. Serv., Inc. v. P & H Gen. Contractors, Inc.*, 13 Mass.App.Ct. 973, 973 (1982) (engineer decides that certain work is not responsibility of subcontractor).

145. 59 Mass. App. Ct. 816 (2003).

146. *Id.* at 817.

147. *Id.* at 819-20.

148. *Id.* at 817, 820-21.

149. *Id.*

150. *Id.*

151. *Id.* at 822.

152. *Id.* (quoting *Fontaine Bros., Inc. v. City of Springfield*, 35 Mass.App.Ct. 155, 159 (1993)).

Conclusion

The contract claims procedure is an important tool for allocating risk, managing construction costs, and resolving disputes arising out of a construction contract. Given the importance of the claims procedure, awarding authorities should draft that procedure carefully, using as a guide the legal principles discussed in this article, which can be summarized as follows:

(1) To avail itself of the remedies provided in the contract, a contractor must comply strictly with the terms of its contract, including the contract claims procedure;

(2) If the contractor fails to adhere to the requirements of the contract claims procedure, it will forfeit its claims, including any bad faith claim, unless it can prove that the awarding authority—through clear, decisive and unequivocal conduct—either (a) waived its right to reject the claim or (b) excused the contractor's noncompliance with the claims procedure;

(3) If the contractor complies with the contract claims procedure and the awarding authority arbitrarily rejects its claim, the contractor will not be eligible for damages greater than the relief provided in the contract for the claim, unless it can prove that the awarding authority acted in bad faith (i.e., a "true" breach of contract); and

(4) If the construction contract authorizes the project architect to make final and binding decisions on a contractor's claims, the architect's denial of a contractor's claim will be final and binding under section 39J of chapter 30 of the General Laws, and the contractor will be unable to obtain judicial review of that decision unless it can show that (a) it complied with the contract claims procedure and (b) the architect's decision was "made in bad faith, fraudulently, capriciously, or arbitrarily[,] is unsupported by substantial evidence, or is based on error of law."¹⁵³

153. MASS. GEN. LAWS ch. 30, § 39J (2006).