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CONSTRUCTION MANAGER AT-RISK CONTRACTS IMPLICATIONS OF COUGHLIN ELECTRICAL CONTRACTORS, INC. V. GILBANE BUILDING COMPANY

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The Supreme Judicial Court ("SJC") recently decided the case of Coughlin Electrical Contractors, Inc. v. Gilbane Building Company, 472 Mass. 549 (2015), addressing the scope of a construction manager's ("CM") liability for design defects under a construction manager at-risk ("CMR") contract. This case has important implications for municipalities with respect to future building projects.

As you may recall, the 2004 Construction Reform Law made significant revisions to the laws governing public construction projects, including adoption of G.L. c.149A, §§1-13, which authorizes municipalities to use the CMR method of project delivery as an alternative to the traditional "design-bid-build" process. Under a CMR contract, the CM is retained during the initial stages of a project to provide input in project planning and design review. The CM's services are provided at a "guaranteed maximum price," which is intended to represent the maximum that the owner will pay for the CM's work. Because the CM is involved in the early stages of project planning and design review, it is reasonable to expect that the CM has priced some of the risk associated with additional costs that may be incurred during the construction process within the "guaranteed maximum" price.

The Coughlin case overruled a favorable Superior Court decision and vacated the judgment against the CM, holding that public owners may still be required to indemnify CMs for cost overruns on a project. The SJC was not convinced that the General Court, when adopting G.L. c.149A, intended to abolish the common law rule that a project owner impliedly warrants that the plans and specifications are sufficient for their intended purpose which applies in the "design-bid-build" context. The SJC reasoned that the possibility that a CM may consult with the owner and project architect regarding building design, with no obligation on the part of the designer or owner to accept the CM's changes, did not "suggest that the [CM] should be the guarantor against all design defects, even those that a reasonable [CM] would not have been able to detect." Id. at 559.

However, the SJC further concluded that the scope of the owner's implied warranty in a CMR contract is narrower than under a design-bid-build contract. Under a design-bid-build contract, a contractor may recover for additional costs resulting from a design defect if the contractor relied on the plans and specifications in good faith. For CMR projects, "the [CM] may benefit from the implied warranty only where it has acted in good faith reliance on the design and acted reasonably in light of the [CM's] own design responsibilities." Id. at 560. Therefore, the greater the CM's design responsibilities under the CMR contract, the greater the CM's burden will be to show that its reliance on a defective design was reasonable and in good faith.

As a result of this decision, cities and towns contemplating use of CMR contracts for public building projects will want to carefully consider the role that the CM will have in the design process. If a municipality intends for the CM to bear more responsibility for design defects, the CMR contract will need to properly reflect this intent by: (1) specifically identifying the CM's responsibilities in the scope of services; and (2) limiting the ability of the designer and municipality to reject design changes requested by the CM. Municipalities may also consider including contract language expressly disclaiming the standard common law implied warranty that the design will be free from defects.

Should you have any questions concerning construction manager at-risk contracts or other public construction issues, please contact Attorney Thomas W. McEnaney by e-mail at tmcenaney@k-plaw.com or at (617)556-0007.