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To: Petrini & Associates, P.C. Clients & Friends

From: Christopher J. Petrini
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Date: April 23, 2019

RE: Important Recent Developments in Construction Law
Petrini & Associates Client Advisory No. 2019:02

As the calendar turns to spring, we celebrate warmer weather, the return of baseball and our beloved (although struggling at the moment) Red Sox, and in many of our communities, the encroaching signs of the summer construction season with road work signs and detours. In another spring tradition, P&A will be presenting our 9th Annual Public Construction Update conference for the Massachusetts Municipal Lawyers Association on Wednesday, May 15, 2019 from 3pm to 6pm at the Publick House in Sturbridge. This year's conference will look at several issues that often arise on construction projects and strategies for responding to them, such as payment disputes, injuries to workers during the construction project and responding to lawsuits from the same, contractor defaults and negotiating with performance bond sureties, and assessing design and construction defects. Like the programs in past years, this should be a very informative program and you are welcome to attend. Attached to the email is a program agenda for the conference. Please contact the firm if you are interested in attending.

As a complement to our upcoming conference program, we are writing you with this advisory regarding some recent important developments in construction law, including a recent statutory change and several decisions at the appellate and trial levels of the Massachusetts courts that potentially impact construction issues.

1. Changes to Design Procurement Thresholds

Chapter 113 of the Acts of 2018, effective June 15, 2018, changes the dollar thresholds in the designer selection statute, G.L. c. 7C, §§ 44-58, under which qualifications-based selection processes are required to procure design services for public building projects. Formerly, the estimated design fee had to be $10,000 or more and the estimated construction cost of the project had to be $100,000 or more. These thresholds have both tripled. They are now $30,000 or more for the estimated design fee and $300,000 for the estimated construction cost. As a reminder, the

qualifications-based selection process under G.L. c. 7C, §§ 44-58 should be set forth in designer selection procedures that municipalities adopt at the local level. A community's procedures may define a different procurement process below the thresholds in the designer selection statute, but the Inspector General's Office continues to recommend soliciting qualifications and prices from at least three designers even if the project design fee or the estimated cost do not meet the thresholds in the statute.

2. Bidder Responsibility Determinations - Revoli Construction Co., Inc. v. Wayland, Middlesex Superior Court Civil Action No. 1881CV01970.

Although not an appellate decision or major change to the legal landscape, this Superior Court litigation, a drama in two acts, provides a good example of the legal standards applicable to bidder responsibility determinations for awarding authorities for public construction projects. Revoli Construction ("Revoli") was the low bidder on a public works contract for the Town of Wayland and challenged the Town's bypass on the grounds that it was not a responsible bidder, Wayland and its project engineer conducted independent investigations of Revoli's responsibility by contacting references that Revoli had not provided. The independent investigations revealed issues with two projects in Tyngsborough and another project in Framingham.

Revoli filed an action in Superior Court seeking a preliminary injunction to enjoin Wayland from awarding the contract to any entity other than Revoli. In allowing Revoli's motion for preliminary injunction, the Court found that Wayland should have given Revoli an opportunity to respond to the negative information obtained from the independent investigations prior to the Town's decision to bypass them. In its analysis, the Superior Court relied on the SJC seminal bidder responsibility decision of Barr v. Holliston, 462 Mass. 112, 118 (2012), where the SJC held that when an awarding authority denies a bidder the opportunity to respond to the results of an independent investigation, the decision should be "justifiable on the record." Here, the Superior Court determined that there was no justification for Wayland's failure to provide Revoli with an opportunity to respond to the results of the independent investigations. The Court noted that one of the Tyngsborough projects about which negative information had been provided occurred 18 years prior and therefore its significance to Revoli's more recent work was "minimal at best." In considering this old project, the Court found that Wayland "should have provided Wayland with an opportunity to explain how its practices have changed since then." For the other two projects, which were the subject of litigation, the Court found that Revoli should have had an opportunity to explain its own position on the issues involved.

After the Court's entry of the preliminary injunction on August 2, 2018, Wayland gave Revoli a chance to respond to the negative information. After considering Revoli's response, Wayland still found Revoli not responsible. Wayland was subsequently able to obtain an order dissolving the injunction on September 14, 2018. In the decision dissolving the injunction, the Court noted that the submission of excessive change orders on prior projects is a legitimate consideration for an awarding authority. The Court also found that it was reasonable for Wayland to rely more heavily on the experience of its own employees with Revoli's prior work to find that Revoli was not responsible. Lastly, the Court noted that it was Wayland's

prerogative to consider the positive and negative references it received regarding Revoli's past work and to determine which references on which to place more weight. Because Revoli failed to show a likelihood of success on the merits of its claims against Wayland, the Court allowed Wayland's motion to dissolve the injunction.

The key takeaway from Wayland's experience here is that awarding authorities who rely upon independent investigations to reject a bidder as not responsible should give the bidder an opportunity to respond to the information obtained in the independent investigation before a final determination regarding bidder responsibility is made. That being said, so long as the opportunity is provided, awarding authorities continue to enjoy broad discretion in determining bidder responsibility and should not be deterred in rejecting a bidder that the authority believes is not responsible and such a belief is justified on the record.

3. Statute of Repose Applications – Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349 (2018) and Stearns v. Metro Life Ins. Co., 481 Mass. 529 (2019)

The past year has seen two important decisions interpreting the statute of repose, G.L. c. 260, §2B. The statute of repose generally provides that tort claims arising from improvements to real property cannot be commenced "more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." While tort claims generally have a three-year statute of limitations, meaning they must be commenced within three years of when the cause of action accrues, the statute of repose prevents a cause of action from accruing after the six-year period runs. The repose statute "was enacted in response to case law abolishing the rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, there was no liability as a matter of law." Klein v. Catalano, 386 Mass. 701, 708 (1982). The abolition of that rule exposed "those involved in construction … to possible liability throughout their professional lives and into retirement." Id. at 708-09 The Legislature therefore "placed an absolute outer limit on the duration of this liability," id. at 709, and the statute thus protects contractors from claims arising long after the completion of their work.

In Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349 (2018), the Supreme Judicial Court considered the application of the statute of repose to statutory consumer protection claims. A homeowner sued a contractor in 2016 under the state Consumer Protection Statute, G.L. c. 93A, for unfair and deceptive practices after a fire damaged their home in 2012. The work at issue which the homeowner argued was the cause of the fire had been completed over 15 years earlier, in January 2001. Chapter 93A claims have a four-year statute of limitations under G.L. c. 260, §5A, but notably Section 5A does not contain a statute of repose. The suit was brought within four years of the fire which damaged the home. The contractor argued that the statute of response in G.L. c. 260, §2B barred the homeowner's Chapter 93A claim. Where claims do not obviously sound in tort, courts look at the underlying action to determine whether the statute of repose applies. See Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs, Inc., 396 Mass. 818, 823 (1986). Citing a long line of Appeals Courts cases holding that "tort-like" G.L. c. 93A

claims are subject to the statute of repose in G.L. c. 260, §2B, the SJC concluded that the homeowner's claim was barred by the statute. The homeowner's claim was essentially that the defendants failed to perform the work at issue in compliance with certain statutory standards set forth in G.L. c. 142A, §17 and was "indistinguishable from a claim of negligence."

In Stearns v. Metropolitan Life Ins. Co., 481 Mass. 529 (2019), the SJC held that the statute of repose operates to bar tort claims arising from diseases with extended latency periods, such as those associated with asbestos exposure, where the defendants had knowing control of the injurious instrumentality at the time of exposure. The plaintiff in the underlying case had died of mesothelioma in 2016 after exposure to asbestos during the construction of two nuclear power plants in the 1970s. The plaintiff disputed the application of Section 2B because it would otherwise have the effect of extinguishing meritorious claims before they even come into existence. Most asbestos-related diseases do not develop until many years after the exposure. Although the trial court judge in the federal district court denied the defendant's motion for summary judgment, she certified a question to the SJC regarding the applicability of the statute of repose to these types of claims. Noting the recent Bridgwood decision discussed above that the statute of repose "forbids us from considering the fact that a plaintiff did not discover and reasonably could not have discovered the harm before the six-year period of the statue of repose expired," the SJC determined that the statute of repose did apply to asbestos-related claims arising from improvements to real property. The Court also considered another statute related to asbestos, G.L. c. 260, §2D, which established special time periods for the Commonwealth and its subdivisions to seek damages to recover the costs of asbestos removal from public buildings, as evidence that if the Legislature had meant to exempt asbestos-related tort claims from the statute of repose set forth in Section 2B, it knew how to do so.

The SJC's decision essentially leaves this issue for the Legislature to resolve. A few other state legislatures have exempted asbestos-related illnesses from their respective statute of reposes related to improvements to real property. The SJC in a footnote at the conclusion of the decision encouraged the Legislature to consider doing the same.

4. Strict Performance Requirement for Recovery in Contract – G4S Technology LLC v. Mass. Technology Park Corp., 479 Mass. 721 (2018)

In this case, the SJC concluded that ordinary contract principles, including the materiality rule, rather than the former "complete and strict performance" requirement, applies to breaches of contract provisions other than the design and construction themselves on a public building project. Before this decision, the general rule was that "in relation to building contracts, … a contractor cannot recover on the contract itself without showing complete and strict performance of all its terms." Andre v. Maguire, 305 Mass. 515, 516 (1940). As explained below, the Court also enunciated a new standard for evaluating quantum meruit claims.

The project at issue involved the installation of a 1,200-mile fiber optic network connecting 123 communities in western and north central Massachusetts to high-speed internet service. Because the project was funded in part by federal funding under the American Recovery

and Reinvestment Act of 2009, there were significant time constraints on the construction of the project. The contract accordingly provided for various levels of liquidated damages for failure to timely achieve substantial and final completion of the project. Ultimately the design-build contractor, G4S Technology, LLC, did not achieve substantial completion until more than seven months past the contractually-required date. G4S sought extensions of time and additional compensation which the project owner denied, asserting that G4S was the reason for the project delays. G4S filed suit, alleging breach of contract, breach of warranty and quantum meruit claims against the owner, alleging damages of approximately $14 million. The owner in turn asserted counterclaims against G4S for fraud and violations of G.L. c. 93A. Discovery revealed the G4S had submitted inaccurate progress payment releases claiming that its subcontractors had been paid on time when they had not. In sum, G4S had received $38.6 million in progress payments through sixty false certifications. Although the work had been performed, the subcontractors involved had not been paid prior to the certifications. Based on G4S' conduct, the trial court granted a motion for summary judgment concluding that G4S had intentionally breached the contract and that, without complete and strict performance of all the contract terms, could not recover on the contract. The judge also concluded that G4S could not recover in quantum meruit because an intentional violation of a contract provision was inconsistent with a finding of good faith and barred all so recovery unless the violation was de minimis. The judge found that G4S' payment delays and false certifications were inconsistent with the good faith requirement to recover in quantum meruit.

The SJC clarified that the "complete and strict performance" requirement from prior case law applies only to the actual design and construction of a project, noting that the cases "have emphasized the importance and need for strict compliance with construction law contracts to ensure that the construction itself is done safely and correctly according to design specifications." G4S Technology, LLC, 479 Mass. at 731. The Court noted however, that there are all types of different provisions in construction contracts, some that are subsidiary to or supportive of the design and construction but that do not directly involve the design and construction itself. For such provisions, the SJC held that they should be analyzed "pursuant to ordinary contract principles, including the materiality standard applied under Massachusetts contract law." Id. at 732. The Court found that the provisions regarding the timing of payment to subcontractors did not concern the actual design and construction of the project and thus should be analyzed under the materiality standard, not the complete and strict performance standard. The Court found that the failure to timely pay subcontractors was a breach of "an essential and inducing feature" of the contract and thus a material breach. Because of G4S' material breach, it was therefore precluded from recovering breach of contract damages from the owner. The intentional misrepresentations in the falsified certifications also were deemed material breaches that precluded G4S from recovering.

On the quantum meruit claim, the Court overruled prior longstanding precedent and concluded that "intentional breaches [of contract] alone are not dispute of the right to equitable relief, at least when such breaches do not relate to the construction work itself." Id. at 736. The Court further noted that "in evaluating the contractor's good faith and right to recover under quantum meruit, we must consider the contract performance as a whole, taking into account both

parties' actions, the different contractual breaches and the damages they caused, and most importantly the value of the project provided as compared to the amount paid for that work." Id. at 737. The Court remanded the quantum meruit claim for further consideration by the trial court as it found that there were disputes of material fact that precluded summary judgment.

Taken all together, this decision is not a good development for public owners, as it increases the ability of contractors to recover on both breach of contract and quantum meruit claims even if the contractor has also breached the contract. Diligent and effective project management after this decision is even more important of a factor in mitigating potential liability for public owners.

5. Insurance Coverage Issues ("Your Work" Exclusion) – All American Ins. Co. v. Lampasona Concrete Corp., 95 Mass. App. Ct. 79 (2019)

The last case in our advisory concerns the tangential world of insurance coverage disputes around the issues that arise on construction projects. In this Appeals Court case, All American Ins. Co. v. Lampasona Concrete Corp., 95 Mass. App. Ct. 79 (2019), Lampasona was one of several subcontractors that constructed a flooring system at Beverly Hospital. During Lampasona's installation of the concrete slab portion of the system, it made multiple errors, including puncturing the vapor barrier, which allowed moisture to pass through into the concrete slab, and improperly mixing fiber reinforcement into the concrete, which contributed to moisture wicking to the surface. The resulting moisture problems caused damage to the tiles and carpet, such as causing the tiles to buckle. The owner sued the general contractor, who in turn asserted third-party claims against its subcontractor, Lampasona. Coverage under Lampasona's insurance policy was denied based on a the Section j(6) exclusion in its policy, which states that the insurance does not apply to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The exclusion did not apply, however, to damage "occurring away from premises you own or rent and arising out of … 'your work'" if the work has been completed or abandoned. As is typical in coverage denial situations, Lampasona's insurer, All America filed a separate complaint for declaratory judgment against Lampasona asserting it had no duty to defend or indemnify Lampasona against the claims. Ordinarily, a commercial general liability policy does not provide coverage for faulty workmanship that damages only the resulting work product. Rather, such policy coverage only provides coverage if the faulty workmanship causes property damage to something other than the insured's work product. This language in the All America policy at issue is thus fairly typical.

After All America moved for summary judgment on its declaratory judgment claim, the lower court ruled in All America's favor, finding that Lampasona's work played an "integral and inseparable part … in the installation of a flooring system that was comprised of multiple layers, but constituted one completed product: interior flooring for the first floor of [the hospital]." The judge also stated that while installing the concrete slab, "Lampasona's work was incorrectly, even if inadvertently, performed on the vapor barrier." The judge concluded that § j(6) of the policy excluded coverage for any damage that resulted from the pierced vapor barrier. The Appeals Court reversed the judgment, finding based on the summary judgment record that it was

undisputed that Lampasona did not install the vapor barrier on which the concrete slab sits, or the floor tiles or carpeting installed on top of the concrete slab. The Appeals Court therefore concluded that the alleged damage that Lampasona caused to those parts of the hospital property (e.g., the piercing of the vapor barrier and the buckling of the floor tiles) did not fall within the § j(6) exclusion.

In this case, the hospital would still be able to recover from the general contractor even if the Appeals Court had not reversed the decision, since Lampasona was a subcontractor, but this case illustrates the complexities that insurance exclusions can introduce when things go wrong on a construction project.

We look forward to hopefully seeing many familiar faces of our clients at the Public Construction Update conference on May 15th. Please contact Petrini & Associates should you have any questions or concerns regarding the conference or regarding any of the statutes or decisions discussed in this advisory and how to respond to these various developments in your jurisdiction. Thank you.