P&A PETRINI & ASSOCIATES, P.C.
Counselors at Public Law

372 Union Avenue | Framingham, MA 01702
(Tel) 508-665-4310 | (Fax) 508-665-4313
www.petrinilaw.com

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

From: Christopher J. Petrini C.J.P.

Date: September 15, 2015

RE: Supreme Judicial Court Decision on Risk Allocation under G.L. c. 149A, §§ 1-13 Coghlin Electrical Contractors, Inc. v. Gilbane Building Company, et al., SJC - 11778 (September 2, 2015)

Petrini & Associates Client Advisory No. 2015:06

One of the innovations of the Construction Reform Act of 2004 was to introduce Construction Management at Risk ("CM at Risk") as an allowed alternative delivery method for certain Massachusetts public construction building projects. See G.L. c. 149A, §§ 1-13. Ten years later, the Supreme Judicial Court took on an appeal that presented an important question about whether the CM at Risk model allocates risk for design defects differently than the traditional design-bid-build model. The SJC decided that appeal earlier this month, in the much awaited decision of Coghlin Electrical Contractors, Inc. v. Gilbane Building Company, et al., SJC -11778 (September 2, 2015), finding that public owners assume a continued but narrowed risk for design defects in CM at Risk projects. The Court's decision also provides guidance how a public owner may eliminate this risk entirely.

In Gilbane, project subcontractor Coghlin Electrical Contractors, Inc. sued Construction Manager At Risk ("CMAR") Gilbane Building Company alleging that it was forced to incur additional costs as a result of design errors. In turn, Gilbane sued project owner Division of Capital Asset Management and Maintenance (DCAM), alleging that DCAM is responsible for design errors pursuant to the common law doctrine under which project owners are construed to impliedly warrant that the project design plans and specifications are sufficient for their intended purpose (i.e., free from defects). This common law principle is often referred to as the Spearin doctrine because the U.S. Supreme Court affirmed it in U.S. v. Spearin, 248 U.S. 132 (1918).

The Superior Court (Davis, J.) allowed DCAM's motion to dismiss Gilbane's third-party complaint, on the grounds that the owner's traditional implied warranty was inapplicable in the CM at Risk context because, unlike in a traditional design-bid-build project, the CMAR participates in the design process. The Superior Court also relied on the strong indemnity language in the DCAM contract with Gilbane requiring "Gilbane to indemnify, defend, and hold harmless DCAM from all claims, damages, losses, and expenses 'arising out of or resulting from the performance of the Work.'"

In reversing the Superior Court, the SJC rejected the wholesale exclusion of the implied warranty in CM at Risk projects. However, the SJC limited the implied warranty in the CM at Risk context, finding that the construction manager "may benefit from the [Spearin Doctrine] implied warranty only where it has acted in good faith reliance on the design and acted reasonably in light of the CMAR's own design responsibility." The SJC further clarified that "[t]he greater the CMAR's design responsibilities in the contract, the greater the CMAR's burden will be to show, when it seeks to establish the owner's liability under the implied warranty, that its reliance on the defective design was both reasonable and in good faith." Thus, to recover for damages resulting from defective design specifications, the CMAR must show that (a) it relied in good faith on the plans and specifications (including proactively identifying and attempting to resolve specification inconsistencies wherever possible) and that it (b) acted reasonably in relying on the extent of the construction manager's assumption of its own design responsibilities under the CMAR contract.

While Gilbane at first glance may be viewed as a victory for contractors, the decision also includes at least two practice pointers that may be extremely helpful to counsel for public owners. First, the SJC held that the owner's implied warranty of plans and specifications is more limited in the construction manager at risk context than in the design-bid-build context. Second, the SJC was careful to note that public owners can avoid application of the Spearin doctrine by including express language in the contract documents (which the public owner provides) expressly disclaiming any express or implied warranties regarding the sufficiency of the plans and specifications. In addition to including such disclaimer language in the CMAR contract and bidding documents, the public owner should include companion language in its contract with the designer stating that the designer is obligated to defend, indemnify and hold the public owner harmless from any claim by the CMAR alleging defective plans or specifications. By implementing these dual drafting precautions, counsel for the public owner can avoid the unintended application of implied warranties to the unexpected financial harm of public owners.

Please contact me or any of the other attorneys at P&A should you have any questions regarding the Gilbane decision or construction issues generally. Happy Fall!