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Saul Ewing LLP

# Construction Law Advisory

The Newsletter of the Construction Practice

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## Saul Ewing LLP is sponsoring AGC Build New England Awards Gala

Saul Ewing LLP is a proud sponsor and corporate partner of the 2015 Build New England Awards Gala on October 8, 2015 in Boston, Massachusetts. Firm attorneys who support the construction industry will join with members of the Associated General Contractors of Massachusetts and other professionals in the industry to celebrate teamwork in building.

Winning teams are recognized for their collaborative approach to planning, designing and building facilities that meet the vision and goals of owners and enhance the community where projects are built.

The gala is from 6:00 p.m. to 9:30 p.m. at the Intercontinental Hotel, located at 510 Atlantic Avenue. Please visit http://tinyurl.com/ACG-NEA for more information.

## Attorney General Crackdown on DBE/MBE Representations in Subcontracts

By Doreen M. Zankowski and Gregory M. Boucher

The Massachusetts Attorney General is taking action to ensure that general contractors working on public construction are complying with state requirements to use DBE/MBE subcontractors.

In August 2015, the Attorney General filed suit against multiple contractors for allegedly violating the Massachusetts False Claims Act by making misrepresentations over their compliance with requirements for working with Minority Business Enterprises ("MBE"), Women Business Enterprises ("WBE") and/or Disadvantaged Business Enterprises ("DBE"). The defendant contractors immediately settled for a combined $1.4 million. *See Comm of MA v. CTA Construction Co., Inc. et al.*, Suffolk Superior Court Civ. Action No. 2015-02491.

Proposals and contracts with public entities typically require participation goals for a certain percentage of construction work to be completed by MBE, WBE or DBE contractors. General contractors often have difficulty meeting this requirement, and at times have resorted to using shell companies that are MBE, WBE, or

DBE-owned, but which do not actually perform the contracted work. A key issue often is whether the MBE/WBE/DBE performed a "commercially useful function" or merely was a pass-through.

Here, the Massachusetts Attorney General alleged that a general contracting company hired an alleged MBE contractor to perform certain work, but in fact the MBE had no personnel or equipment to perform work. The MBE merely was a "front" that did not supervise or perform any work. The Attorney General sued the general contractor, alleged MBE contractor, and the performing subcontractor for allegedly knowingly violating the Massachusetts False Claims Act by participating in a scheme to mislead and misreport the performance of MBE work. The alleged false claims involved bidders certificates, letters of intent, schedules of participation, and certificates of compliance.

This case is a reminder to all general contractors that MBE, WBE, and DBE requirements and goals must be strictly and honestly followed. The hiring of a hollow MBE, WBE, or DBE business that simply is a front and pass-through for others to do work can be a violation of state and/or federal laws. A general contractor must take active steps to ensure to that their MBE, WBE, and DBE contractors meet the up-front entry requirements and that the contractors continue to meet the requirements throughout a construction project.

# Pennsylvania Court Refuses to Enforce "No Damages for Delay" Clause

By Gregory J. Wartman

A Pennsylvania appellate court recently refused to enforce a "no damages for delay" clause and upheld an award of delay damages against a school district where the district actively interfered with a general contractor's work.

In *John Spearly Construction, Inc. v. Penns Valley School District*, a school district ("District") entered into a contract with an architect and various contractors for the design and construction of a biomass boiler system. John Spearly Construction was responsible for constructing a building to house the boiler plant. Another contractor, Allied Mechanical & Electrical, was responsible for supplying the boiler itself.

Spearly filed a lawsuit after delays caused the substantial completion to be nearly a year late. Despite a "no damages for delay" clause in the contract, the trial court ruled for Spearly, and held that the "no damages for delay" clause was unenforceable because the District actively interfered with Spearly's work and caused the delay. The Pennsylvania Commonwealth Court recently affirmed the judgment.

Although Pennsylvania courts have ruled that "no damages for delay" clauses may be enforceable, such clauses may not be asserted as a defense "when a public entity commits active interference." A public entity, such as the District, is deemed to actively interfere with a contractor's work when it engages in "positive action not reasonably anticipated under the contract, or failed to act as needed for a project to progress."

The court found that the District interfered with Spearly's work by failing to address Allied's failure to adhere to the schedule. The court also held the District responsible for the failure of the District's architect to coordinate the schedule of all prime contractors, provide adequate oversight of the contractors' progress, and make timely decisions on design issues.

*Spearly* demonstrates that even where a contract includes a favorable "no damages for delay" provision, an owner can be held responsible for delay damages if it – or contractors for which it is responsible – actively interferes with another contractor's work. Following *Spearly*, owners should: (1) be proactive to ensure coordination of all contractors' work and avoid delays; and (2) negotiate contract language that would expressly hold contractors responsible for delays they may cause to other contractors' work.

# Public Owners Held to Warrant Accuracy of Plans to Construction Managers

By Scott McQuilkin

A recent Massachusetts Supreme Judicial Court decision clarified that public owners on construction management projects impliedly warrant the accuracy of plans and specifications to construction managers. The case, *Coghlin Electrical Contractors, Inc. v. Gilbane Building Co., et al*, greatly benefits construction managers on Massachusetts public projects.

It has been well established for years that, on traditional design-bid-build projects, a party furnishing plans and specifications warrants the sufficiency of the plans and specifications to a contractor who relies on them in good faith. Unlike design-bid-build projects, construction management projects often involve the construction manager, at least to some extent, in the design phase of the project. The construction manager may consult on and influence the project's final plans and specifications.

*Coghlin* addressed whether, given the construction manager's involvement in design, the implied warranty extends to construction management projects.

The court acknowledged the design role of a construction manager in its September 2, 2015 decision, but determined that "the owner, through the designer, ultimately controls the design and is the final arbiter of it." While the construction manager provides consultation and advice on the project design, the owner is under no obligation to accept that advice. Simply put, the fact that a construction manager may advise on a project design is not enough to pass the risk of defective design onto the construction manager.

The increased design role does, however, subject a construction manager to a higher standard in asserting a claim under the implied warranty. While a contractor on a design-bid-build project need only show good faith reliance on the plans and specifications, a construction manager must demonstrate that its reliance on the plans and specifications was both in good faith and reasonable. Even with the slightly higher standard, *Coghlin* is a clear "win" for construction managers of public projects.

# Negligent Misrepresentation Standard Shifts in Contractor's Favor with Pennsylvania Appellate Ruling

By Nicholas V. Fox

Contractors and subcontractors who are aggrieved by erroneous information on construction documents may have an easier time proving an architect or other design professional made a negligent misrepresentation that harmed them financially under a recent decision from the Pennsylvania Superior Court.

In *Gongloff Contracting, LLC v. L. Robert Kimball & Associates,* the appellate court ruled that plaintiffs no longer need to expressly identify in their pleadings the design professional's specific representations they allege to be erroneous.

*Gongloff* involved a construction project at a public university. Because of concerns over the design of the roof structure, a subcontractor engaged an independent structural engineer who concluded that the roof design was "grossly inadequate." Although the architect, Kimball, then modified the roof design, the structural steel subcontractor, Gongloff, sued the architect

to recoup costs it allegedly incurred installing the roof structure pursuant to the architect's modified design – which did not facilitate the use of standard construction means and methods.

The architect argued that under *Bilt-Rite Contractors, Inc. v. The Architectural Studio* – a Pennsylvania Supreme Court case recognizing negligent misrepresentation claims against designers – Gongloff was required to identify some particular communication or document provided by the architect that was false. The Superior Court, however, rejected this conclusion, stating that pleading an "express representation" is not an element of a negligent misrepresentation claim under *Bilt-Rite* or its progeny. Under *Gongloff,* a plaintiff need not isolate a specific document or other source of information related to the project design that contained erroneous evidence. While this likely lessens the pleading burden on plaintiffs, the *Gongloff* court noted that plaintiffs still need to plead with specificity sufficient facts surrounding the alleged erroneously supplied information.

The long-term effects of *Gongloff* are yet to be seen. At a minimum, however, claims litigated under Pennsylvania law against architects and other construction industry design professionals are now more likely to survive past the pleadings stage, and designers must be aware of their heightened risk of liability.

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