Scribbles Squibs #23 (January 31, 2014):*
A MASSACHUSETTS SUPERIOR COURT ALLOWS THE USE OF THE 'TOTAL COST' METHOD TO DETERMINE DELAY DAMAGES

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1. A VERY RECENT MASSACHUSETTS SUPERIOR COURT DECISION HELD THAT SUBCONTRACTORS ON PUBLIC BUILDING JOB CLAIMS CAN RECOVER FOR DELAY CLAIMS FIGURED UNDER THE 'TOTAL COST' METHOD OF DAMAGES AND ON CLAIMS FOR REDUCED PRODUCTIVITY WHERE THERE IS GENERAL CONTRACTOR FAULT, INCLUDING IN DETERMINING THAT FAULT, AT LEAST PARTIALLY, DESIGN PROFESSIONAL ERRORS.

A Massachusetts superior court in a twenty-eight page decision has come out with an absolute bombshell of a decision on December 19, 2013 in the case of Central Ceilings, Inc. v. Suffolk Construction Company, Inc., Fidelity & Deposit Company of Maryland, Safeco Insurance Company of America and XL Specialty Insurance. This case arises out of the Suffolk Superior Court. *If anyone reading this would like to see the entire decision, send us an email requesting this and we'll send it to you by email without charge.*

The plaintiff worked for the defendant general contractor performing ceiling and drywall work in the construction of several dormitory halls for the owner, Massachusetts State College Building Authority, at Westfield State College, a public project. The plaintiff subcontractor alleged a variety of errors in Suffolk's administration of the project. Plaintiff subcontractor sought $82,538 for 154 pending change orders and damages for lost productivity due to poor administration and design deficiencies in the amount of approximately $321,315. There was a contractual pay-when-paid clause applicable to the subcontract along with a no damage for delay clause. The subcontractor had requested time extensions and according to the decision, no time extensions were given by Suffolk. To complete, the plaintiff subcontractor had to accelerate its performance. The Court awarded the subcontractor damages for Suffolk's 'hindrances and interferences' with the subcontractor's work. It also allowed the subcontractor to be awarded delay-type damages under the 'total cost' method. And, since one of the factors underlying the Court's decision, referenced several times, was design defects from the project's designer, the decision appears to essentially extend general contractor liability to subcontractors to include the results of those design defects (along with a number of other supporting factors). The Court did not award to the subcontractor the value of the pending change orders due to the fact that Suffolk did not get paid for them, thus barring a payment obligation due to the pay-when-paid clause in the subcontract. Judgment *did* enter against Suffolk for the damages determined by the total cost method due to the delay (or hindrance). The decision is unclear as to what exactly the sureties' liability was in this matter: certain of the subcontractor's claims against the sureties were dismissed.

This writer is unaware of any Massachusetts court's ever allowing the 'total cost' method as a possible means of computing construction delay damages by a subcontractor against a general contractor and its payment bond surety on a public project prior to this decision. There is an earlier case from the Bristol Superior Court, a 2012 decision discussing 'total cost' delay damages principles relative to a private project not involving a payment bond, being the case of

Certified Power Systems, Inc. v. Dominion Energy Brayton Point, LLC *et al*, 2012 WL 384600 (Mass.Super.), which case is believed to be the first Massachusetts case discussing 'total cost' principles in establishing a value for delay claims. The *Central Ceilings* case has a more lengthy discussion on a variety of 'total cost' elements than does the decision in *Certified Power Systems,* including a comparison of the 'total cost' method with a 'total cost' alternative, being the 'measured mile'.

The 'total cost' method, as with many construction concepts, was developed through a number of federal board of contract appeal decisions and is not a concept often favored in such cases for a number of reasons discussed below.

There are basically **three** important holdings with this case, which appear to be either brand new law or significant extensions of existing law.

The **first** holding is that where a subcontractor is delayed by a general contractor on a public building project, under certain circumstances, that subcontractor's delay damages can be determined under the 'Total Cost' method, defined below. This is a change from or at least an extension of other court cases discussing evidence requirements which would generally require a much higher level of proof than would be required under the 'Total Cost' method. Under that method, a subcontractor's total costs for a delayed item minus its estimated costs for this item result in what the actual delay damages are. Under such a formula, there is not necessarily a reduction in the subcontractor's awarded damages due to its own participation in the delay. That fault might be in failing to mitigate its damages when it could have, which obligation is generally required under the law of damages for any damaged party. In handling construction cases for several decades, none readily comes to mind where the subcontractor's actions and inactions didn't contribute in at least some measure to the delay. So, under this decision, it appears the subcontractor gets a 'free pass' as to that contribution, which would not seem to be fair to the party being required to pay such damages. Also, this damage method is predicated upon an assumption that the subcontractor's estimate for the item delayed was completely accurate. Whose estimate is ever completely accurate? In the case under discussion, while the Court acknowledged that a plaintiff subcontractor had to be able to prove that its estimate was realistic, this seemed to have been a fairly light burden in this case with the majority of that evidence, as reported by the Court, coming from the plaintiff subcontractor's expert witness.

Secondly, the Court has awarded damages for reduced productivity due to claimed general contractor fault in the way it ran the job even in the face of a no damage for delay clause. Certainly, no general contractor is perfect. Suffolk Construction is one of Massachusetts' largest general contractors and they didn't get that way by not properly performing, in the main, their jobs. In this case, the Court lists an extensive litany of 'sins', many of which can be found on a great many construction projects to one extent or another. Therefore, to the extent that the trial judge appeared to feel that those errors were truly unique in this factual situation, I would contend that this premise is at least partially mistaken. There are no perfect general contractors or subcontractors. On a plans and specifications job, I am unaware of even one troubled job I have been associated with over several decades where there weren't some actual or claimed architectural insufficiencies. How could those possibly be the general contractor's fault? Yet, this decision makes the general contractor at least partially liable for some of them.

The type of complaints this subcontractor had would appear to be run of the mill, particularly for a troubled job. Elements of such claims - certainly, not all of them - can appear in even well-run jobs. Coordination of the work of the general contractor and of dozens of materials suppliers and subcontractors, the vast majority of which are the low bidders, figuring into the equation New England weather and the logic (or illogic) of a CPM-type schedule is a daunting task. There are frequently claims as to the alleged insufficiencies of the design documents, whether such defects are real or imagined or both. 'Both' is common, in this writer's experience.

Suffolk's claimed failures include: its failure to provide sufficient weather protection; Suffolk's failure to properly supervise and coordinate the job; its failure to properly lay the job out; Suffolk's claimed poor supervision and coordination of various subcontractors; various omissions in the contract documents which caused the plaintiff subcontractor to have to submit about 200 RFI's; slowness on the part of the architect in responding to subcontractor concerns.

Therefore, the **third** bombshell aspect of this decision - perhaps its most startling holding- is in its apparently extending liability to the general contractor for delay claims for aspects of what the architect did or didn't do. Essentially, this extends liability for design professional errors. This would seem to be grossly unfair with no prior support in the law known to this writer. If challenged on this ground, I think it is likely that the Appeals Court will negative that reason for general contractor liability. To make the general contractor potentially liable for *any* design professional error would not/should not find any support in the law. It is completely lacking in fairness to the general contractor which, itself, is usually battling the architect for any number of claimed design insufficiencies, both for the general contractor and for various subcontractors. Before this decision was announced, it would be impossible to imagine that any general bidder included in its bid price some factor for its potential vicarious liability for the architect's errors as, heretofore, I am unaware of any Massachusetts case that has ever held such.

The Court seemed to take pains in distinguishing 'delays' from 'hindrances' and 'delays' from 'acceleration'. Acceleration, though, is what is almost always required when there has been a delay in order to *get the job done* on time or as close to as on time as is humanly possible. Acceleration is not generally required on a project unless there is some aspect of delay which has triggered it.

Now, a discussion of some elements of the law necessary to better understand this decision and its approval of a 'total cost' computation of delay damages, as discussed more fully in Section VI of this article below. We will review various legal and contractual aspects of delay claims in Massachusetts: the different kinds that there are; when they are awardable; when they are not; and, what happens when the contractual remedy for delay is limited to a time extension and this isn't given? In the case being reviewed, the fact that the subcontractor for this project was possibly a filed subbidder (not clear from the decision) probably contributed somewhat to the result achieved in this case. Also, where this decision was given in a case by a subcontractor against the general contractor and the general contractor's payment bond surety under MGL C. 149, s. 29, a very liberally interpreted statute, probably contributed somewhat to this case being decided in this manner. The fact that the seminal Massachusetts court case

allowing for recovery of "Eichleay" delay damages - something not greatly favored by the federal procurement law out of which they were developed - was a case by a subcontractor against a general contractor and its payment bond surety under MGL C. 149, s. 29 may have also played a role in extending the law as to the total cost aspect of delay damages.

And, although this decision is against a general contractor arising out of a public building project, the legal principle should work equally well in favor of general contractors on public project and with regard to private jobs, as well. (As to private projects, claimants are assisted by the case of Certified Power Systems, Inc. v. Dominion Energy Brayton Point, LLC *et al*, 2012 WL 384600 (Mass.Super.), required reading for those considering making such 'total cost' claims.)

2. SPECIFIC PROTECTIONS OF FILED SUBBIDDERS IN THE MASSACHUSETTS PUBLIC BUILDING CONSTRUCTION PROCESS UNDER MGL. C. 149, S. 44A-H.

Several things have to be understood to fully appreciate this case. For the construction of 'public buildings', there are two key procurement methods. One is the time-honored system of soliciting bids from general contractors with an award to the lowest responsive, responsible and eligible general bidder. This is the system described in MGL C. 149, s. 44A-H. Under this system, the general contractor bids itself for all of the work of the contract except for the work of filed subbidders. These are eighteen trades of work for which subcontractors bid directly to the owner, not to the general contractor, such bids being submitted before the general bidders themselves bid the job. Indeed, in such cases, the filed subbidder's bid includes a bid bond that runs exclusively to the benefit of the owner, not to the benefit of the general contractor. These specific procedures are described in, *inter alia,* MGL C. 149, s. 44F.

Central's trade - drywall - is sometimes bid as one of these eighteen trades – within the lathing and plastering section of the law. Central may have been a filed subbidder for the job at issue: the decision isn't clear, one way or another. The legislative purpose behind having filed subbidders is to afford these specific trades certain additional protections not otherwise available to subcontractors on public work. For example, in an ordinary general contractor-subcontractor involvement, on or before bid day, the subcontractor will give the general contractor its price for doing the work. The general contractor can - usually, does - include the lowest price for each trade in its bid. *However,* once the general is determined to be the lowest bidder, he will then usually contact the subcontractor and ask for and negotiate the *buy price,* which will normally be lower than the price originally submitted to the general bidder before it submitted its bid. In effect, the subcontractor has to negotiate its bid price *twice.* In essence, the system almost of necessity requires the subcontractor to bid against itself because that is the nature of the process.

Because filed subbidders have certain additional legal protections than do non-filed subbidders, whatever the filed subbidders' initial price is as submitted to the public owner, this is the price between the subcontractor and the general contractor for this project and the general cannot ask for anything lower than the price bid to the owner. Since the public bid laws largely reflect 'public policy' - a higher level of statutory purpose and protection than more run of the mill legislation - for the general contractor to ask for a lower price from a filed subbidder could very well be not only a statutory violation but an unfair and deceptive trade practice, as well.

In addition, filed subbidders have further protections under the law. One example is that if the general contractor wants the filed subbidder (now filed subbid *subcontractor*) to supply payment and performance bonds, the general contractor has to pay the premiums for such bonds. (Trade contractors take note: for the contractor-at-risk program, *you* have to pay for your own bond premiums, the premiums for which must be figured into your bid price.)

Another protection is that among all subcontractors on public buildings projects, filed subcontractors are the only subcontractors who have an absolute unfettered and inherent right to file a demand for direct payment from the owner.

So, a filed subbidder subcontractor has some very specific additional benefits in litigation against the general contractor than has other subcontractors bidding on other trades.

3. MASSACHUSETTS 'LITTLE MILLER ACT' CLAIMS AGAINST GENERAL CONTRACTOR BONDS ON PUBLIC WORK ARE VERY LIBERALLY INTERPRETED, MORE SO THAN THE ACTUAL MILLER ACT IT PURPORTS TO EMULATE.

There are no attorneys' fees for successful subcontractor plaintiffs under the Miller Act, the general contractor payment bond statute applicable to most federal work. Only claims through second tier subcontractors (sub-subcontractors having a contract with a subcontractor) can be made under the Miller Act.

Massachusetts, on the other hand, specifically provides for attorneys' fees in its 'little Miller Act' statute. (A seminal case on this issue is Manganaro Drywall v. White Construction, a Supreme Judicial Court case from 1977, a case which I worked on assisting Attorney Sally Corwin at the appellate level.) Also, by a specific Massachusetts case, Massachusetts recognizes claims from an unlimited number of tiers of subcontractors – i.e. below the second tier - provided that all other requirements of the applicable statute are followed. Typically, this includes the requirement for second tier subcontractors to give the general contractor actual notice of their claim (or potential claim) within sixty-five days after the second tier subcontractor last works. This is somewhat unusual because the Massachusetts statute itself as to this type of claim only specifically provides for claims down through the second tier subcontractor. The Court refers to the fact that this statute is liberally-construed in favor of claimants and there are a boatload (a nautical legal term!) of court cases so holding.

4. WHAT IS A DELAY CLAIM?

There is no one-size fits all definition. From my perspective, there are at least **two** different kinds of delay claims, the second appearing in at least two different forms.

The **first** kind of delay claim is the actual, historically recognized 'General And Administrative Expense' (Home office overhead, sometimes referred to as 'G&A'), which came, as much of our procurement law came from, a decision by a federal board of contract appeals titled In Re: Eichleay. The easiest way to understand this is that this type of claim is not for

job-costable items, such as labor, materials and equipment. In essence, greatly simplified, this formula is to compensate a contractor for the actual period of delay that contractor incurs on a particular project as to its home office overhead. One determines what the overall G&A expense is for the period of the delay and develops a daily rate for its G&A. Then one multiplies this figure by the number of days of delay this project incurred, then multiplying *that* figure times the percentage that this job bears in comparison with all of your work during this delay period.

Massachusetts has an appellate case which held that the C. 149, s. 29 payment bond actually covers this type of claim in a public payment bond claim. I have always thought that this decision is surprising. Theories of liability for payment bonds are roughly equivalent to theories of liability for mechanics' liens, both usually requiring that the claim represents some actual improvement to the real estate, which a delay claim does not provide.

At the same time, Massachusetts courts traditionally are very tough on sureties with regard to bonds and on insurance companies with regard to insurance policies. (A surety bond is *not* an insurance policy.) I think the fact that some of the defendants in this case are sureties may have figured in the decision, possibly greatly.

The **second** form of 'delay claim' - at least from a contractor's perspective - is to compensate the contractor for job-costable items incurred for a period of delay, such as a portion of the PM's salary, the super's salary, trailer, utilities, etc. There are at least two variants of this.

The first variant is when such claims are governed by contractual provisions. The greatest difficulties with this type of claim are: (a) provisions that there are no damages for delay because a time extension is the only available remedy; (b) a no damage for delay clause. One general contractor I represented against a state agency contended that such a claim for job costs isn't really a delay claim at all. The state bought that argument in the face of a fairly comprehensive no damage for delay clause in the contract documents. There was a six figure settlement of that claim. In fact, subsequent to that settlement, the state agency actually gave this general an award for its work on this project! I had another six figure settlement in favor of a general contractor against a different state agency with similar facts and contract provisions.

The second variant is a statutory basis for such claims, contained in MGL C. 30, s. 39O, which is only applicable to public jobs. The key thing for such a claim is that the public owner has to suspend work on the job for at least fifteen days and this has to be evidenced by a writing from the public owner. Case law is very clear that unless the owner issues a writing to this effect, there can be no viable claims under this statute.

So, for job-costable delays, such can be *either* contractual or statutory or, in some cases, possibly *both*. Put another way, the fact that there may be no allowable delay damages *as a matter of contract* doesn't mean that you may not be able to recover delay damages as a matter of statutory law. One shouldn't get overly-excited about this, however. Since public owners with decent legal advice are aware of the necessity for an owner writing to have a colorable (possible) delay claim, my experience has been that public owners take pains to avoid writing such letters. Based on the wording of this statute, there can be no 'constructive' delays, being

those delays that are inferred only from the circumstances. There has to be a writing. *If you would like to read this statute to see what rights you might have under it, drop me an email and I'll send it to you by email without charge.*

5. UNDER THE "FARINA CASE", A FAILURE TO GRANT RIGHTFUL TIME EXTENSIONS CAN RESULT IN DELAY-LIKE DAMAGES EVEN IN THE FACE OF A NO DAMAGE FOR DELAY CLAUSE.

The Judges dance in that decision by saying that damages that might be possible if they were not blocked by an active no damage for delay might still be awardable if the contracting party fails to give a legitimate time extension, the only contractual compensation in a period of delay.

A legitimate question suggests itself: what is the *difference* between damages for delay as compared with damages for failure to receive a legitimate time extension? While I try to minimize quoting case language in these *Squibs*, no one can improve upon this (sort of) perfection:

> "In sum, we hold that the Commonwealth cannot hide behind the specifications of its contract dealing with delay and, in the circumstances of this case, deny recovery to a contractor who has been put upon to the extent here shown. We have dealt not with the question of damages caused by delay itself which was the main subject of the Wes-Julian case. We have dealt rather with damages caused the contractor by failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling work. It remains only to say that the Commonwealth cannot expect unfailing and honest performance by contractors when it administers its contracts as this one appears to have been administered."

If you read this and can't tell the difference between these two kinds of 'damage', I mean, how much clearer *could it be?* Small confession. I don't understand the difference, either. I think that from a practical standpoint, this seems to be a distinction largely without a difference. To the best of my knowledge, no other appellate court has further defined what such damages might be. The rationale for the award of damages in this matter appears to be, well, rather *lame.* The fact that the use of such a description might cause a court to wince doesn't make that description any less true. A rose is a rose is a rose irrespective of what name one gives it.

6. THE 'TOTAL COST' METHOD OF DETERMINING DELAY DAMAGES.

Initially, we need to be clear on a major point of law. There are two aspects of determining breach of contract damages. The first is that there must be a determination that the defendant is liable for those damages. And, the second is what is the amount of those damages, sometimes referred to in the law as the '*quantum'*. In terms of judicial award, to recover damages, one needs to prove *both* liability *and* damage, as they are two different and separate things and ideas. And, the 'total cost' method has nothing at all to do with the determination of

whether or not the defendant is liable. This method simply applies to a determination of the amount of the damages, once liability has been established.

Another thing to be kept in mind is from the law of damages is what is the level of proof one must have to *prove* damages. Here are what some of the cases previous to this decision have held. In the case of business torts (a tort is a civil wrong, being something other than a contract claim), an element of uncertainty in the assessment of damages is not a bar to recovery. Mere uncertainty in assessing the amount of damages should not jeopardize an injured party's right to recover as long as those damages are the certain result of the wrongdoing. While damages may not be determined by speculation or guess, an approximate result is permissible if the evidence shows the extent of damages to be a matter of just and reasonable inference. Although an award of damages cannot be based on speculation, proof of damages does not require mathematical precision.

These can be summarized as saying that while the amount of damages cannot be a guess or speculation, there can be some element of uncertainty in their computation and still have them be awardable, there being no requirement of mathematical precision. The key words being, then: 'not a guess or speculation'; 'they can have an element of uncertainty'; 'there is no requirement for mathematical precision in their determination'.

So, what is the 'total cost' method of computing delay damages? For this method of computation, the claimant doesn't even have to try to prove what the delay actually cost. One simply takes the estimated value for the performance of an item of work (e.g. labor, materials, equipment) and subtracts this amount from the ultimate actual value of what that item cost. The claimant gets the difference as damages. As indicated elsewhere in this article, the plaintiff subcontractor had to provide some evidence of the reasonableness of its estimate, which burden seemed from the decision to be fairly light.

This is *very* rough justice, at best. Possibly, not even 'frontier justice', a term from another era, very much in vogue when this writer was only a young lad. And, nearly four decades of my handling construction law cases have proved to me time and time again that in virtually all delay-type claim situations, no claimant is 100% without fault. Doesn't the Bible itself say 'let he who be without sin cast the first stone'? Yet, in the delay situations I have been involved with, I can't recall a single instance where any claimant was completely 'without sin'. Not that this would be applicable to me but, nonetheless, I am told that for older individuals, memory is the first thing to go. (I am told that there is *another* school of thought holding that memory is actually the *second* thing to go. I'll research this at some point and will report back further in a later *Squib*. That is, if I can only remember to do so.)

But, under the total cost theory, no deduction is necessarily made from what the costs are as to any sins of omission or commission attributable to the claimant. A substantive element of the law of damages provides that a damaged party is under an affirmative duty to mitigate (reduce) its damages. So, for example, in a period of delay, if the cost of demobilization and remobilization is less than the cost of maintaining a job presence during a period where no meaningful work is possible, then that should probably be done. There might be - should be - some obligation on the part of the claimant to *not* work during periods when there is insufficient

work to do or because of greater than minimal lost productivity attributable to factors such as acceleration and the stacking of trades. Yet, the 'total cost' method seems to make no provision for the requirement of a consideration of the claimant's fault in this regard. How fair is that?

Another problem with this method is the fact that the contractor's estimate is taken as the starting point for determining total cost damages. But, what if the contractor simply underbid the work? What if the contractor failed to take off all of the appropriate work items? What if he/she bid the job very tight to just keep working, the amount bid not necessarily being an accurate indication of what the job was really worth? In these various scenarios, the costs of the work could very well be understated, artificially inflating the total cost damages that might be awardable. Again, the Court in the *Central Ceilings* decision did state that the subcontractor had to provide evidence of the reasonableness of its estimate. The burden, however, appeared to be fairly light, largely supplied by the Plaintiff's expert witness.

Now, the reader is invited to compare the general statements of what is necessary to prove damages generally, as set forth above, with what is required to prove damages under the total cost method. To this writer, the level of proof for the total cost method can be significantly less than what the general standards require, particularly where the total cost method largely seems to assume that the amount bid is exactly correct (subject, however, to some burden of proof on that issue, which in this case appeared to be light) and it is simply assumed that the claiming party did not participate at all in the causation of any aspect of the delay, something that seems to contradict common sense. And, of course, since there are no claimant-contributed factors involved in this type of analysis, whether or not the claimant did anything to mitigate its damages seems to be completely irrelevant under the total cost method. That hardly seems fair.

7. A GENERAL CONTRACTOR'S PAYMENT BOND SURETY'S LIABILITY IS NOT THE SAME AS WHAT IS PROVIDED FOR IN THE BONDED CONTRACT.

An example is the 'pay-when-paid' clause. This is generally a defense for the general contractor, at least for a while (in cases where the subcontractor's actions and inactions are not the cause of the non-payment from the owner.) There was a case a few years ago holding that since the general contractor's surety does not bond the subcontract obligation - only the general's obligations under the general contract - this defense is not available to it in a public payment bond claim, even if such a clause might be a bar as to a subcontractor's claim in contract against the general contractor.

At least, in part, Massachusetts' very liberal (the insurance companies might say punitive) approaches to insurance company and surety liability might have played some role in this decision even where the decision isn't clear exactly as to what the surety's liability was under these facts. (A logical inference from the decision is that the surety was not held liable for the delay damages.)

8. UNDER MASSACHUSETTS PUBLIC PROCUREMENT LAW, A GENERAL CONTRACTOR FOR PUBLIC BUILDING JOBS HAS TO MAINTAIN AT ITS EXPENSE HEAT DURING VARIOUS COLD MONTHS.

I can't add anything to that title! So, I won't. (One of the more difficult lessons for a young trial attorney to learn is the value of silence: in not asking a question in cross-examination where it is absolutely not necessary.)

9. THE 'ECONOMIC LOSS DOCTRINE'.

This is a substantive principle of Massachusetts law holding that for a party to sue another party in negligence, there has to be either personal injury or property damage. And, Massachusetts has a number of cases which have held that the 'mere' loss of money (so-called 'economic loss') does not constitute property damage. There have been some cases critical of this but the rule still stands, generally speaking, as to pure negligence claims. There are some exceptions. One example is where claims are based on the fact that the design professional's plans and specifications necessarily convey a 'negligent misrepresentation' of the job and what is required. It doesn't make sense to this writer that certain negligent acts are compensable and others aren't. The common word between negligence and negligent misrepresentation is 'negligence'. Why should one be treated differently from the other in terms of either giving an avenue for redress or denying it? (For an article on other theories of architect liability to contractors, see article number thirty-three in the 'Construction Articles' section of our website, entitled "Architectural Liability to Contractors". www.sauerconstructionlaw.com)

IN CONCLUSION:

A. THREE FACTORS CONTRIBUTING TO THIS DECISION.

Three factors, in this writer's opinion, contributed towards making for this case a 'perfect storm' in terms of allowing for a total cost delay damage award in favor of a subcontractor against a general contractor. **First**, the Massachusetts public building procurement systems favor filed subbidders in a variety of ways as to their claims against general contractors. *Central* may have been a filed subbider for this project: the decision is not clear on this point. Even non-filed subbidders have a number of protections that subcontractors on private projects do not have. And**, secondly**, Massachusetts, as compared with other states, has a time-honored judicial hostility against insurance and surety companies' rights. That this decision may not have awarded these total cost damages against the surety - the decision is not clear on this point - nonetheless, this decision arose in a MGL C. 149, s. 29 case context with claims by a subcontractor against a general contractor and its surety, which claims case law makes clear are to be liberally construed in the subcontractor's favor. Also, **thirdly**, the economic loss doctrine, practically speaking, is unfair in terms of disallowing damage claims against design professionals for negligence and there have been cases critical of this doctrine. To allow design professional design errors and slowness in responding to submittals and RFI's as even an element of a total cost award against the general contractor is simply startling. At what point is the judicial system going to recognize that subcontractors and general contractors

bidding on public work have no way to realistically determine during the bidding process the sufficiency of the design by others? Most public bidders would say it's hard enough to simply accurately estimate jobs that are designed by others, particularly where there is often only a small chance that any particular public bidder will actually earn the award. Not allowing damages against design professionals for their negligence seems wrong when there is little or nothing public bidders can do to protect themselves during the bidding process and even afterwards, allowing the party which caused the damages to essentially escape scot-free even where this party got paid good money for its presumed expertise, education and experience. Many practitioners believe that the quality of bid documents has been declining over the last several years. That architects are seemingly doing more of the engineering required themselves. Also, it's not a secret that design professionals increasingly are using 'cut and paste' methods in putting together bid documents from prior bid documents, which can lead to disastrous results by my experience. Folks, if the law isn't forced to change, what is there to stop this in the future?

Given the harshness forced on the construction industry in the last half dozen years by a poor economy, one would hope that if it is absolutely necessary for some subcontractors and general contractors to fail, that this should only result from what *they* did wrong rather than be the result of what the design professional did wrong, whose work they necessarily had to depend on, their not having the time or even the competence to themselves correct.

B. THREE ASPECTS OF THIS DECISION'S IMPACT ON PUBLIC CONSTRUCTION.

This decision, if allowed to stand and/or be affirmed, could have several extremely significant impacts on Massachusetts public construction. I'll focus on **three**.

First, where this decision includes design defects as an element supporting a loss of productivity claim, there is no way of understanding this other than making the general contractor (possibly, its surety, ultimately, if this principle is extended) at least in part a guarantor of the sufficiency of the contract documents (especially plans and specifications) and of the sufficiency of the architect's performance. In this writer's view, this is extremely unfair, makes absolutely no common or legal sense and forces the general contractor (and, possibly, down the road its surety) to assume an exposure not contemplated when executing the general contract and the various subcontracts.

As mentioned elsewhere, the decision isn't completely clear whether the surety avoided liability against its payment bond for total cost delay damages. It appears that is what happened. But, even if it did, the surety is still affected by the general contractor liability in two ways, one direct and the second, possibly, indirect. The direct effect is that since the general contractor may have some liability, however limited, with regard to the design deficiencies as supporting a loss of productivity claim, this could lead to more claims against the surety's bond principal, potentially weakening the bond principal. Even if this decision is not against the surety, future cases would/could use this case as authority for extending liability to the payment bond surety for this factor. After all, generally speaking, a principal's liability and a surety's liability are largely and generally synonymous except for a surety's 'personal' defenses, which would not appear to be applicable to this point.

If extended to sureties, the cost of public construction would likely go up. Higher surety premiums due to increased potential surety exposure and probably fewer sureties willing to participate in the Massachusetts market can be anticipated. Because of the greater general contractor exposure, it's not unreasonable to think that fewer general contractors will meet surety underwriting criteria in the future, thus potentially reducing competition. Increased competition for public work lowers prices. Decreased competition for public work increases prices. It's as simple as that. And, if the prices for public work go up, it stands to reason that there will be fewer jobs actually bid and performed.

This decision? Thy name could be *disaster*, particularly to the extent that this decision is clearly extended to payment bond sureties. For, even if this decision is not specifically against the sureties at this time, progress as to such claims in the future is supported by this decision. Reasoning that the general contractor is liable for lost productivity and delay claims at least in part due to design defects and design management errors where the surety is not so liable ultimately doesn't make sense as a matter of principal-surety law. Massachusetts case law is clear, as is a lot of law around the country, that the liability of the surety is generally the same as the liability of the principal. This decision, from a surety standpoint, is a step in a very wrong direction because this decision takes the law at least halfway there to extending such liability to the payment bond surety.

I have tried any number of cases in front of judges who were essentially clueless as to construction, surety and public bid law issues. One wonders if judges sufficiently understand that with surety issues, unlike insurance issues, the bonded principal has to repay the surety as to the loss and expense payments a surety incurs with regard to that principal's jobs, even when it is ultimately proved that the principal was *right.* The principal's obligation to repay the surety is absolutely 'no fault'. With sureties, it isn't at all a situation where one can rightly say: 'Let the surety pay. After all, that's a risk they assume when accepting the premiums." Provided that the bonded principal doesn't go out of business, surety losses *will* be reimbursed by the principal and by its individual indemnitors even when the principal goes out of business and files bankruptcy.

Even if there was no surety liability in this case for the damages for delay or lost productivity as determined by the 'total cost' method, this has present significance for the surety. If a general contractor is to be liable for lost productivity in part based on design defects, there will probably be more claims and suits filed against the surety's bond principal in the future, something that sureties don't like to see. With more suits against bond principals, it is likely that the payment bond surety, one way or another, will be dragged into many of these. Also, since by case law a surety's liability is usually the same as the bond principal, whether this case extends that liability to the surety or not, this case makes it more likely that such liability will be extended to the surety in the future because this case takes that issue half-way there towards ultimate surety liability.

And, if general contractors are liable to subcontractors under the total cost method for delay, there will doubtlessly be more cases against general contractors in the future, as subcontractors won't have to actually prove what their real damages are. Proof of construction

delay damages - especially for things such as delay and lost productivity - are difficult for a lot of reasons, including the fact that a delay claim or a lost productivity claim is more likely to come at the end of the job as a 'claim backwards': a retroactive claim, if you will. Quite often, the subcontractor will not have sufficiently documented its delay costs and lost productivity as they were incurred, in part because it may not be immediately clear that those results will ultimately obtain as the job is progressing and as those costs are being incurred.

Many subcontractors, by my experience, are not as good with paperwork as general contractors typically are. Also, since many subcontractors do not require their job superintendents to prepare contemporaneous detailed daily reports specifically distinguishing between contract work and extra work/claims, they will not have a lot of the proof that they would ordinarily need to prove such claims using traditional principles. Many of my subcontractor clients don't require their superintendents to prepare *any* daily reports of *any* kind. Some subcontractors point to a 'foreman's log' as an equivalent to daily reports. But, they really aren't for two reasons. For one thing, a foreman's log is not a 'business record' for evidentiary purposes, which makes it far less useful in litigation. (Statements of fact in a business record usually are acceptable as proved without anything more.) Also, my experience has been that most foremen take the position that their logs are personal property and I frequently don't find them contained in a client's files while preparing for litigation. If the foreman and his employer are at odds at the time of a litigation years down the road – as they often are due to termination and payment issues – these logs may simply be unavailable to the party who *really* needs them. Folks, in construction litigation that is not purely a collection matter, the two best pieces of evidence are generally dated pictures and good daily reports, neither of which can be generated down the road or after the fact.

Under 'total cost' computations of delay damages, subcontractors will not have to prove the specifics to the same extent they would have to prove them using traditional rules of damage law. They probably won't have to provide a particularly vigorous defense as to the correctness of their estimates. They won't have to go into a great deal of evidence as to what extent, if any, they attempted to mitigate their damages or whether they did at all. The removal of these heretofore standard elements for a delay claim can only lead to more claims.

Secondly, if the total cost aspect of this decision is upheld on appeal, the fairly substantial proof of one's delay damages may not be required in future litigation. Granted, the law is that damages need not be proved up to the level of mathematical precision. But, damages have to be a lot more than a mere *guess.* If the standard of proof of acceptable delay damages becomes taking what something cost you less what you estimated it would cost, the difference being one's delay damages, this will make it a lot easier to prove delay damages *because the subcontractor will not actually have to really prove <u>anything</u>* other than to provide some evidence of the reasonableness of its estimate, which is not as difficult as would be proving traditional delay damage elements.

Thirdly, to the extent that the total cost method is accepted, this might tend to diminish the value of decisions requiring contract compliance as to notice of claims, the timing of the notice of claims and only being able to pursue claims where the element of notice and the element of damage are promptly reported to the general contractor. There are a large number of

Massachusetts cases currently requiring compliance with the factors mentioned in the last sentence. The whole issue of getting signed change orders and extra work authorizations from a general contractor before doing the work or advising a general contractor of a potential claim before the claim is actually incurred as is typically required by contract documents would seem to go out the window with this comparatively blunderbuss method of computing damages.

There is a silver lining for general contractors in this otherwise very dark cloud. That is that if the total cost method for computing delay damages is acceptable for subcontractor claims on public work, this should equally be acceptable for general contractor claims. And, for both subcontractors and general contractors, if this total cost method of computing delay damages is good for public jobs, it should equally be good for private jobs. (And, as stated elsewhere, for private projects there is the additional assistance of the decision in the case of Certified Power Systems, Inc. v. Dominion Energy Brayton Point, LLC *et al*, 2012 WL 384600 (Mass.Super.).) The fact that general contractors may also file such claims on public projects and that both subcontractors and general contractors can file such claims on private projects is not likely to be seen as good news to project owners, whether public or private.

One should note that this is a trial court decision. While it can be cited (quoted) as some level of authority for the elements of this decision in other court cases, typically only appellate decisions are cited as *mandatory* authority (they must be followed) for a case with the same factual and legal elements. Still, the case at its current level can be cited as *persuasive* authority, meaning that another court looking at similar issues could cite this case as being a source of legal authority.

One would think that the general contractor in this decision might appeal for a variety of reasons, as I think some elements of this decision are without legal support (particularly with regard to the issue of vicarious liability as to the acts and omissions of the architect.) By rule, this appeal would go first to the Appeals Court, the lower of Massachusetts' two appellate courts of general jurisdiction. Where this decision would seem to be so unusual, potentially effecting major changes in the law, the Supreme Judicial Court on its own initiative might take this case away from the Appeals Court, which it has the right to do and which it sometimes *does* do (as it did with my last appeal.)

Time will tell! There are excellent, well-experienced construction attorneys on both sides of this matter. Fasten your seatbelts and stay tuned!

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* A s*quib* is defined as 'a short humorous or satiric writing or speech'. If that definition doesn't float your boat, Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses." What the heck does *that* mean? I mean, aren't you sorry you asked? And, what is this *thing* that contractors have with boats? What's wrong with, like, bikes? Or, for that matter,

dogs? I mean dogs don't have a lot of bright work that has to be continuously cleaned and polished, otherwise to be lost to rust and corrosion. To be fair, a lot of bikes also have this problem with chrome and other shiny metals. Except for Harleys, which mostly come in any color you might want, provided that color is 'black'. They say they paint the bikes black to improve on their visibility. Outside of, like, bars. To, you know, attract girls and stuff.

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