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"WATCH OUT FOR BID DOCUMENTS REQUIRING 'DELEGATED DESIGN' IN MASSACHUSETTS PUBLIC CONSTRUCTION"

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I. INTRODUCTION.

Earlier this year, I had a general contractor come to me on a MGL C. 44 A-H per plans and specifications project, who told me that notwithstanding the fact that the bid documents contained buildable plans and specifications, the engineer said that the general contractor would have to have certain aspects of the project re-designed. The basis for this was a statement in the bid document that the contractor would be responsible for a 'delegated design', even though those specific words were only used with regard to work items that were not going to be performed by for the general contractor, the fabrication of exterior steps, but which work would be performed by a filed subbidder. A fairly complete definition of what 'delegated design' is can be found in the AG bid protest decision, referenced and discussed below.

Shortly thereafter, I had an electrical subcontractor (EC) contact me. He had also bid a C. 149, s. 44 A-H per plans and specifications project for renovations with the construction of an additional building. Notwithstanding the fact that the plans and specifications contained within the bid document provided complete plans and specifications for a fire alarm system, the architect was going to hold him responsible for his own post-bid re-design of the fire alarm system contained within those documents. The bid document did not reference in any way the actual words 'delegated design'.

However, there was a lot of language in the bid document which fairly clearly sought to transfer the obligations for a re-engineering of the entire fire alarm system to the electrical subcontractor, notwithstanding the fact that the electrical subcontractor bid the project by the plans and specifications prepared by the project engineer, which were seemingly comprehensive and complete. The project engineer is a nationally well-known firm, whose name almost all of our readers would recognize.

That is what 'delegated design' language – or its equivalent - attempts to do. Namely, a project is first designed by the project engineer, this design being the basis of the EC's bid. And, then, the fire alarm system has to be re-designed by the EC's engineer once the EC is on the 'time and money clock' for project conclusion and after bids have gone in.

Does this sound fair?

In my view, it's irrelevant with regard to interpreting a bid specification whether or not the words 'delegated design' actually appear in order for a contractor to have such a

responsibility. Courts interpret documents by their substance, not by their titles. The issue is, whether or not, the plans and specifications, taken in their entirety, state (or don't state) that either the general contractor or a specific subcontractor – here, electrical – has to itself have the architect's/engineer's work re-designed by its own design professional after being awarded a job, with new drawings stamped by the bidder's own engineer.

After the EC was under contract with the general contractor, the Architect insisted on the EC doing its own re-design of the fire alarm system. The EC contracted with another engineer to do just that. Other than the cost of hiring this professional – which was not included in the EC bid price – other problems developed.

The second engineer's design for the fire alarm system was more extensive than the original design. (Another way of saying that he thought the original design was insufficient, defective.) The second engineer's design had a number of features that were not included in the original plans and specifications, which would add another forty thousand dollars, or more, to the cost of this system, none of which additional features were figured into the EC's filed subbid. The EC contacted me and asked if he could submit the second design to the owner for approval, crossing out all of the features that were not to be included in EC's subcontract but which were provided for by the EC engineer's design. I told him that my sense was 'no', because I thought that the original engineer would treat this as a submittal and would be more than happy to approve a claimed superior design with additional features that were not included in what was called for by the original plans and specifications and for the price responsive to those original plans and specifications.

Adding to this, is that because the second subcontractor-hired engineer has no contract with either the owner or the owner's engineer, there is no clear-cut mechanism to resolve these issues between the engineers as to which design should prevail. And, what sense does it make to either the owner or to the contractor, including filed subbidders, to commence a project with a dispute right off the bat as to scope and price because of an issue, such as this one, before even the EC has made its first submittal? Again, who benefits?

The general contractor for that project has complained that this delay – in ascertaining/finalizing the fire alarm plans and specifications and design - was damaging the scheduling logic for the project. As stated by the general contractor, this could result in claims for delay not only by the general contractor but also by other of the subcontractors. In addition, the project has liquidated damages.

All of this, not being the slightest fault of the electrical filed subbidder.

II. DELEGATED DESIGN.

That is what 'delegated design' language – or its equivalent - attempts to do. Namely, a project is first designed by the project engineer, which design is the basis of the EC's bid. But, the architect/engineer requires that the project engineer's design be re-designed by the EC's own engineer once the EC is on the 'time clock' for project conclusion and tied in to a subcontract

with a certain, fixed price. So, since the EC is not going to go to this additional expense in hiring an engineer until he has the job – certainly, not at the bidding stage - there is a built-in delay of a month or two before the EC has the re-design sufficiently completed to submit for the first engineer's approval, all this completely apart from the engineering costs the bidder will incur to prepare the second design and for any difference in price between the system as originally designed and that system as was subsequently designed..

In my view, it's irrelevant with regard to interpreting a bid specification whether or not the actual words 'delegated design' are included within the bid document. The issue is whether the bid document language taken in its entirety states (or doesn't state) that either the general contractor or a specific subcontractor – here, electrical – has to itself have its work re-designed by a design professional after being awarded a job which was solely based on the plans and specifications contained within original the bid document.

III. BIDDERS ON A MGL C. 149, S. 44A-H 'PLANS AND SPECIFICATIONS' PROJECT HAVE A RIGHT TO DEPEND ON THE SUFFICIENCY OF THE TECHNICAL REQUIREMENTS OF THE BID DOCUMENTS.

On a per plans and specifications project bid under MGL C. 149, s. 44A-H, Massachusetts law is very clear that a bidder has the right to depend on the sufficiency of the bid documents. Some sample cases:

It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended. M. L. Shalloo, Inc. v. Ricciardi & Sons Constr. Inc., 348 Mass. 682, 687—688, 205 N.E.2d 239; Hollerbach v. United States, 233 U.S. 165, 169—172, 34 S.Ct. 553, 58 L.Ed. 898; Christie v. United States, 237 U.S. 234, 239—242, 35 S.Ct. 565, 59 L.Ed. 933; United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166; Faber v. New York, 222 N.Y. 255, 259—261, 118 N.E. 609. Alpert v. Commonwealth, 357 Mass. 306,320; 258 N.E.2d 755, 763 (1970)

There is implied in a set of construction plans and specifications a warranty that they are accurate as to descriptions of the kind and quantity of work required. See M.L. Shalloo Inc. v. Ricciardi & Sons Constr., 348 Mass. 682, 686–688, 205 N.E.2d 239 (1965); Alpert v. Commonwealth, 357 Mass. 306, 321, 258 N.E.2d 755 (1970)**.** Richardson Electrical Company, Inc. v. Peter Francese & Son, Inc. et al.; 21 Mass.App.Ct. 47, 484 N.E.2d 108, 111 (1985).

In fact, *not* strictly complying with the requirements of the bid documents can be rewarded by the imposition of a hefty fine and, in extreme cases, even be a *crime:*

M.G.L.A. 30 § 39I. Deviations from plans and specifications:

"Every contractor having a contract for the construction, alteration, maintenance, repair or demolition of, or addition to, any public building or public works for the

> commonwealth, or of any political subdivision thereof, shall perform all the work required by such contract in conformity with the plans and specifications contained therein. No wilful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority or by the engineer or architect in charge of the work who is duly authorized by the awarding authority to approve such deviations. In order to avoid delays in the prosecution of the work required by such contract such deviation from the plans or specifications may be authorized by a written order of the awarding authority or such engineer or architect so authorized to approve such deviation. . . .
>
> Whoever violates any provision of this section wilfully and with intent to defraud shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than six months, or both."
>
> So, if this is required for MGL C. 149, s. 44A-H projects, how can a bidder be held to the technical requirements and costs of a bid document where the architect/engineer requires the successful bidder to have these re-done post-bid? In other words, the ultimate technical plans and specifications aren't those included in the bid document but those that are included in the successful contractor's redoing of the bid document's technical requirements developed post-bid.

Allowing for different bidders to ultimately being held to different designs of their own making violates key, core bid law principles.

It has long been held by our courts that each bidder must bid on the *same specifications*. As stated by the Supreme Judicial Court in the case of Sweezey v. Mayor of Malden, 273 Mass. 536, 542 (1931):

"To permit each bidder to furnish his own specifications for the construction of the wearing surface might, and probably would, allow a substantial variance in the manner of construction and its cost. Such a method of bidding would not result in bids being submitted on any common basis. Where, as here, each bidder is invited to bid upon his own specifications, it is plain that there can be no real competition between such bidders. . . . . To allow a bidder to furnish his own specifications for any material part of the contract in question would destroy genuine and fair competition and be subversive of the public interests. The purpose of the ordinances is to prevent fraud and favoritism and to protect the financial interests of the city." (Cases cited)

But, in the case of the fire alarm system in the project under discussion, as one example only, different electrical bidders could ultimately come up with different systems if they, themselves, are required to have re-designed the original technical bid documents, which are supposed to form the exact basis of *everyone's* bids.

IV. RELEVANT PROVISIONS IN THE BID DOCUMENTS FOR THE FIRE ALARM SYSTEM THAT, OVERALL, ATTEMPT TO PLACE RESPONSIBILITY FOR FINAL DESIGN ON THE EC BIDDER. HOWEVER, SOME SECTIONS SUGGEST RESPONSIBILITY ON THE PART OF THE OWNER.

Language in the bid documents created confusion as to who had ultimate responsibility for the design.

For example, are statements such as follow: "The Contractor shall have a registered Professional Engineer (PE) licensed in the State of Massachusetts as part of their team**. The Engineer shall design/stamp all drawings, documents, submission, etc. They shall take responsibility for the design to the end."** (Emphasis added) ('Engineer' in the bid documents was defined as the Project Engineer.) This seems fairly clear that this is an owner responsibility.

However, other portions of the original bid document seemed to provide differently.

In answer to a question in an addendum: "The Contractor is responsible for developing detailed plans for switching over from the existing fire alarm system to the new fire alarm system with no downtime." This seems like a contractor responsibility.

Elsewhere in the fire alarm specification: "During the execution of the work, required relocation, etc., of existing equipment and systems in the existing building areas where new work is to be installed or new connections are scheduled to be made, shall be performed by the Electrical Subcontractor , as required by job conditions and as determined by the Designer in the field. . ." ('Designer' means the engineer of record.) This would seem to make this a contractor responsibility for execution but a Designer's obligation for design.

As contained in the Fire Alarm specifications): "The Contractor shall coordinate this work with the Owner. **This shall include the Contractor verifying all fire alarm system components and ancillary system functions, developing detailed plans for switching over from the existing fire alarm system to the new fire alarm system with no downtime**." (Emphasis added) This would seem to make this a contractor responsibility.

Elsewhere, as contained within the fire alarm specifications : "The Contractor shall make the following submission for review and comment by the Owner's Representative and the Engineer: ". . **. 100% Design (installation) submittal".** (Emphasis added) Again, this makes this seem to be a contractor responsibility.

And, in the general conditions: "When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, such certification must be stamped by a registered Massachusetts professional in the discipline required. **The Designer shall be entitled to rely upon the accuracy and completeness of such calculations and certifications."** (Emphasis added) Here, the EC seems to have primary responsibility for design with the 'Designer's' obligation being one of supervision only.

Demonstrating only one of the deficiencies of designing the fire alarm design twice, the electrical subcontractor's engineer re-designed a fire alarm system that would cost forty thousand dollars more than what the electrical subcontractor bid, its engineer's finding the first design lacking.

Where is this additional money going to come from? Will the first engineer accept, at all, the second engineer's findings? How will a dispute between engineers be resolved where neither has any direct contractual nexus to the other? Will the time necessary to resolve such a dispute be added to the contract time to complete the job? Weren't proper fire alarm systems installed, up to now, using just the services of just the original project engineer?

Why now the change? In what ways does this benefit the Owner?

How can a bidder submit a fixed price bid if it is required to then provide subsequent engineering in re-designing the fire alarm system after receiving the job, which redesign was not the basis of its original bid? Why should a public owner pay twice for the performance of the same work: designing the fire alarm system? Because, without question, the owner will be paying for the original design. And, if the affected contractor or subcontractor recognizes further design requirements, it will include within its price the cost of the second and subsequent design.

The EC necessarily will have a delay in its performance if it has to get separate engineered drawings. This could impact all other aspects of the job, leading to potential delay and disruption claims on the part of the general contractor and of other subcontractors. And, if the EC has to wait to commence performance while *his* engineer redesigns the job, this (unfairly) cuts into his performance time and there were LD's of 500 per day for this job.

Other questions suggest themselves. Why wouldn't the general contractor and any affected subcontractors be entitled to additional time while this re-design takes place? Has the architect/engineer factored into the time of completion of this project the additional time required to have a redesign for just a portion of the job? For all intents and purposes, at least as with regards to the fire alarm system, isn't the architect essentially trying to convert a plans and specifications job into a design build job? How can a general contractor submit a schedule to the owner when it does not have complete information from the electrical subcontractor until after the redesign is approved? A great deal of any EC's work is (or should be) on the critical path. A delay in submitting a schedule within the time allowed for in the bid documents is arguably a breach of contract for that subcontractor who is being required to redesign its work.

V. THE ATTORNEY GENERAL'S READ ON 'DELEGATED DESIGN' AND ITS RELATIONSHIP TO THE BID LAWS.

Of great importance to those general contractors and subcontractors working in public construction is what position the AG will take on any particular issue.

A case where 'delegated design' was involved in a bid protest was In re: City of Fall River Wastewater Treatment Plant Facility Improvements, Protest of Fall River Electrical

Associates, Inc. (FREA) (June 27, 2019). While prior court decisions and a few AG decisions have dealt with related or similar concepts, this would appear to be a case of first impression at the AG's Office.[2]

At issue was whether or not the owner's engineer could delegate some elements of the fire alarm system design to the electrical subcontractor.

I do think that the AG consistently turns out high quality, well-reasoned decisions in the vast majority of cases. The principal hearing officer is to be commended for the depth of her knowledge of the bid laws.

Respectfully, however, I am not seeing this decision as being one of them for the five numbered reasons set forth in bold and then discussed below. Respectfully, once again, I don't think this decision sufficiently considers the actual reality of public construction. Meaning, other than fairness to bidders, some of the real issues applicable here are not really legal issues but are purely *construction* issues, things that the AG is not really set up – or trained - to deal with.

Preliminarily, decisions on bid protests are written by lawyers, not by contractors. (As well it should, given that the bid laws are complex *laws.)* At the same time, an understanding of bid issues based on a contractor's perspective of construction is lacking sometimes, as attorneys don't share that perspective of the more practical bidders/contractors who are tasked to accomplish the construction. In other words, how does this decision or that decision really make sense considering the realities of actual construction?

As to the AG decision being discussed, as stated by Specification Section 284621.11, Addressable Fire-Alarm Systems, Paragraph 1.5 (D), entitled "Delegated-Design Submittal.":

"For notification appliances and smoke and heat detectors, in addition to submittals listed above, indicate compliance with performance requirements and design criteria, including analysis data signed and sealed by the qualified professional engineer responsible for their preparation.

> Drawings showing the location of each notification appliance and smoke and heat detector, ratings of each and installation details as needed to comply with listing conditions of the device."

> FREA stated that this is a process known as 'stamping'. The Protestor argued that the stamper ultimately has legal responsibility for the work and that if a fire were to occur, the electrical contractor and/or its delegated engineer would be liable, not the Architect's engineer. Further, it was argued that there could be a a difference of opinion (**ED,** as there was in the case reported above) between the EC's engineer and CDM's engineer as to what products and processes were necessary to the task of installing a new fire alarm system.

> "The former might conclude, for instance, that a working fire alarm system requires more or different pieces of fire alarm equipment than CDM specified. The delegated engineer

cannot simply stamp CDM's drawings; he must prepare his own drawings. This could lead to "dueling engineers" and create conflicts that must be resolved by the change order process during construction."

As stated by the AG:

"The issue in this case is whether "delegated design" is prohibited by the Massachusetts public bidding laws. I find that the delegation described in the instant case is permissible, since the designed drawings and calculations cannot be finalized until the equipment is installed. In addition, the design and performance criteria needed to measure compliance with the project's specifications are clearly articulated, thereby providing the filed sub-bidder with the quantity of the work with as much certainty as is *practicable.*"

To facilitate a discussion of the AG's comments, I have numbered the issues from this bid protest decision I would like to discuss below.

(1) " "**Delegated design**" can be described as the delegation, by the provision of design and performance criteria, of the design responsibility for a specific portion of a construction project by the designer of record to a specialty subcontractor. **It is often used** when there is a close relationship between the manufacturing of a product and design documentation**, when installation is a prerequisite to completion of design details, or when specialized design services are required**. Designers often want contractors to participate in design decisions which recognize that installation expertise and give them a better understanding of the project and its goals." (Emphasis added, as is the addition of number (1))

(2) "**In Massachusetts, G. L. c. 149A, the "Design/Build" statute, specifically allows for unfinished design prior to bidding. In projects procured under G.L. c. 149, in comparison, there is no express provision allowing design to be delegated to a contractor. There is also no prohibition of this practice.** The circumstances of each case must be examined to determine whether the delegation complies with the purposes of the public bidding laws in general, and the proprietary specifications law, G.L. c. 30, s. 39M(b), in particular." (Emphasis added, as is the addition of number (2))

(3) "**Delegated design should take place *after* the award of the contract: the bidder should not have to design the project in order to bid it**. Pre-bid design discourages bidders, resulting in less competition and higher prices. (case cited)." (Emphasis added, as is the addition of number (3))

(4) "**Since the bidders are allowed to select among named or substitute manufacturers for the smoke detectors and notification appliances after contract award, the selected product is *a fortiari* not knowable by the engineer of record prior to the bidding process. Similarly, the devices cannot be tested until they are installed in the building.** In the words of *Sweezey,* greater specificity is simply not "practicable."' (case citation). FREA has not suggested an alternative resolution of this dilemma facing the engineer of record. . . .

The fact that smaller design and construction firms may incur extra costs to obtain specialized design services does not mean that equal footing is violated." (Emphasis added, as is the addition of number (4))

(5) **The protestor's concerns regarding the shifting of some responsibility and liability from the designer to the filed sub-bidder, who must build the cost of this risk and the design costs into its bid, and the potential for contested change orders caused by inconsistent drawings, are very legitimate concerns but they are not procurement law issues."** (Emphasis added, as is the addition of number (5))

First numbered point above. ("Delegated design" . . . It is often used . . .when installation is a prerequisite to completion of design details, or when specialized design services are required.") On a per plans and specifications job, it is the architect or engineer or some combination who come together to identify the products required to meet design intent. At least three such equal products must be specified by law, unless the owner specifies a proprietary product. To the extent that 'specialized design services are required', this is generally done by an architect's having subcontracts with a variety of different engineering disciplines, each of which is supposed to be expert as to the subject matter of that discipline. Since Massachusetts law requires three products to be acceptable to accomplish the desired result, isn't determining which three equal products best meet the design intent of the design professional? And, isn't the fact that the A/E lists three products a representation by the A/E that any of them *does* mean design criteria? Conversely, to arrive at a list of at least three products that are acceptable, doesn't this not necessarily also mean that other possible products were considered but were not deemed to be equal?

Massachusetts procurement law allows for an identification of a product as 'an equal' even where a proprietary specification has been issued. Does this mean, then, that the design professional is therefore itself entitled to hire at the owner's cost an additional design professional to advise it if whether or not any proposed substituted products other than the three products/processes it specifies meets design criteria? This makes little, if any, sense. For, if a design professional designates three products that can meet design requirements, doesn't that mean that the design professional not only understands the advantages/disadvantages of the three products it has delegated but also understands why additional seemingly acceptable products do *not* meet design requirements? A contractor bids on the bid documents. It doesn't write the bid documents. That is the responsibility of the design team. Isn't that what the owner is paying the design team to do? The original design team?

Second numbered point above. ("In Massachusetts, G. L. c. 149A, the "Design/Build" statute, specifically allows for unfinished design prior to bidding.") I submit that the differences between the 'design/build' procedures and those involved with a straight C. 149, s. 44A-H project are so significant that there may not really be any actual comparison possible. Among other factors, a variety of tests are involved with the design/build process that do not translate over to plans and specifications projects, such as value testing, a project's not necessarily going to the lowest price general contractor and the fact that a design build contract involves a negotiation between the contractor and the owner under certain circumstances. Of course, one

of the biggest differences is that the design/build contractor is being *required* up front to submit an acceptable design and then build according to it, which responsibilities those involved with this process willingly assume and expect to assume.

A big issue here is that under design/build contracts, the contractor is compensated for both its design responsibilities and for its construction responsibilities. Under a 'delegated design' project, the owner/architect gets the benefit of having the contractor having design responsibilities without compensating the contractor anything for it. Under what possible theory can this be seen as fair?

No design professional intentionally does any aspect of its design without being compensated for it. Then, why should the contractor not only *not* be entitled to compensation for its 'delegated design' but also not for such efforts as are required to clean up errors with the original design? Because, in the final analysis, isn't that what 'delegated design' is all about: the original design professional's not being sufficiently comfortable with its own design to the point of then requiring the contractor to build in accordance with it and accomplish an acceptable result without change order?

Third numbered point above. ("Delegated design should take place *after* the award of the contract: the bidder should not have to design the project in order to bid it.") This is going to prove to be impractical much of the time. How can a bidder submit a fixed price bid when it doesn't know what it is submitting a bid for? To bid a project on such a basis, at minimum, the bidder will have to obtain quotes for designers to meet these requirements. That's an extra step during the bidding process. And, one would think that design professionals are not going to provide such services without being paid to do so. Why would anyone expect them to evaluate another engineer's professional product for its advantages and disadvantages and then propose a cost for correcting the same for nothing? Who is going to pay them for that work?

Why would a filed subbidder agree to incur these costs pre-bid with no guarantee that it will get the job? And, to obtain this information pre-bid, apart from cost issues, this would significantly increase the amount of time filed subbidders would need in order to submit a bid. As things stand now, for many projects, they barely have enough time to supply prices for what the design professional has clearly told them to submit a bid for.

In addition, if the bidder's work will not be finalized until after submitting a bid, minimal fundamental fairness would require the owner's design professional to build into the schedule the two or three months it will take for the general contractor or filed subbidder to obtain a design and then have that design approved for a system that the A/E has already specified and prepared? And, as happened in the fire alarm project under discussion, what happens when the second A/E hired by the filed subbidder disagrees with the design provided by the first A/E hired by the owner, upon whose drawings and specifications the bid was based? If, as per the AG decision under discussion, the actual *final* design will not be prepared until after the bids have gone in, how can a filed subbidder protect itself against something like this happening where there is a significant cost differential between the two designs? And, with the project at issue, the electrical subcontractor's 'delay' in getting the fire alarm system designed by a new engineer

and then approved by the original engineer may be causing delay to the general contractor and other subcontractors.

Fourth numbered point above. ("Since the bidders are allowed to select among named or substitute manufacturers for the smoke detectors and notification appliances after contract award, the selected product is *a fortiari* not knowable by the engineer of record prior to the bidding process. Similarly, the devices cannot be tested until they are installed in the building.") While this might make sense legally from a theoretical standpoint, it does not make any construction sense to me. The original design should have three approved products/processes contained within it. If it does, then why is any more engineering required? And, the determination of what is an 'equal' is one of the jobs an owner hires an architect to do, who then hires engineers as needed. Shall an owner have to rely on the work product of an additional architect/engineer that it doesn't even have a contract with when other products and systems apart from the original three are considered? And, if the acceptability of a product cannot be determined until after it has been installed, does that mean the design professional no longer has an obligation to review and approve submittals? Does this mean the contractor essentially has to *guess* as to the suitability of a particular product/system in order to price *something*, then supply and install it so that only *then* the design professional has to agree whether or not it is acceptable? The tried and true process has architects/engineers passing on a contractor's proposed materials and methods before they are purchased and installed. Under this 'delegated design' it sounds as if the submittal process before installation has been pushed to the side of the road.

Now, we are talking about, potentially, *four* or more stages of design: (1) that contained within the original bid document; (2) such 'as equal' products as the contractor guesses that the design professional *might* accept; (3) an additional design step after the design professional has rejected such materials as supplied and installed by the contractor; (4) a required next design.

If one extends this logic throughout the job, does that mean that no piece of equipment can ever be finally approved and tested until after it is installed. This seems to put the cart in front of the horse. How can a general contractor prepare coordination drawings until all of the requisite materials have been installed and approved? Similarly, how can a critical path be established when no one is quite sure whether or not installed materials will be approved?

And, this way of handling approvals could take a simply enormous amount of *time.* Speaking of which, does this mean the architect will be willing to add to the amount of time the general contractors/subcontractors have to do the job an amount of time necessary to have performed testing on (unapproved) installed equipment and/or for such further design as is necessary once the installed equipment is rejected?

Frequently school projects take place throughout the summer. This is a very small amount of time. I cannot see how delegated design would be successful for this type of construction because of the fact that it *just takes too long*.

A further practical consideration. If the design professional does not pass on materials/equipment until after they have been installed (and now rejected), does that mean the

owner is now willing to pay for any restocking charges the contractor will have to pay as to materials/products the contractor ordered in good faith, believing that would meet the design criteria?

Mechanical contractors generally work together in more or less the same space and at about the same time. Since contractors are installing parts before approval, what happens when the parts don't fit together? What happens when someone's installed materials damage either someone else's materials and/or the building being constructed? What if someone installs materials which are ultimately approved but which cause someone else's materials and systems to fail?

Does 'delegated design' mean that some/all of the above-referenced legal decisions as to a bidder's having the right to rely on the owner's bid documents no longer have any application to public construction? This causes one to wonder *exactly* what is an owner paying for if the design professional's work necessarily will have to be redone post-bid by the successful bidder.

As they say in Latin, *cui bono?* Who benefits? Certainly not the owner, who may have to pay for two designs and risk delay claims while the second design has been finalized and approved.. Certainly not the poor contractor, who simply wants to evaluate the designer's bid documents, submit a price based on them and have enough money in the job to actually perform it in a timely manner. Who else is left? Just the guys with the bow ties and pocket protectors, who under the theory of delegated design don't apparently want (or need) to take full responsibility for their own design, something for which they have been fully paid for If owners were to poll architects/engineers as to whether they would be willing to work for half pay for only preparing half a design, what response would you think they could expect on receiving?

Fifth additional point above ("The protestor's concerns regarding the shifting of some responsibility and liability from the designer to the filed sub-bidder, who must build the cost of this risk and the design costs into its bid, and the potential for contested change orders caused by inconsistent drawings, are very legitimate concerns but they are not procurement law issues. . .")

I couldn't disagree more that these are not procurement law issues. These are and *will be* legitimate concerns if the two designers disagree on what is necessary to accomplish the result indicated in the bid documents. In the case reviewed above, the second engineer thought an additional forty thousand dollars' worth of work would be necessary over and above the amount bid by the electrical filed subbidder. For the sake of the job, who is going to resolve these issues as to which design should be used? It shouldn't be the first architect, as s/he is a party in interest. S/he can hardly be expected to say, "I guess I should eat these costs, as I screwed up here." 'Contested change orders' lead to litigations and litigations result in the parties incurring sometimes very substantial costs. 'Inconsistent drawings' lead to litigations. The margins for current public work will not support litigation for these purposes, which could substantially increase employing the delegated design method. This will force many contractors to move to private construction, reducing the bidder pool interested in public work which *will* increase prices. Delegated design will lead to litigation for the reasons stated above, which list is by no means exhaustive.

In this bid protest, FREA, the protestor, objected to delegated design being applied to the project under discussion. The facts are complex, as are the positions taken by the parties. It is for these reasons that I have not discussed them in any great detail.

For any trade likely to be have to deal with delegated design issues, this decision should be read. And, *studied*.

In any event, the protest was denied.

VI. THE NUMBER OF PROBLEMS DELEGATED DESIGN RAISES WITHIN THE CONTEXT OF MASSACHUSETTS PUBLIC WORK IS EXTENSIVE.

How would this issue of delegated design work out in the real world? Undoubtedly, not very well.

Earlier, a case was cited for the proposition that all bidders have to be bidding on the same specifications. Since the 'design' as stated in the plans and specifications will not be the design after the EC's re-design *after* winning the job, I don't understand what it is that an EC can base its bid on. It has to perform a take-off on *something.* But, it will have an eye towards what happens after s/he becomes low bidder and then has to have performed the *real* design. The EC when bidding must have a general idea as to where s/he will be going with the design, in terms of the general system and the various material components. Each bidder, then, will be bidding on his/her own specifications. That necessarily means that each bidder will be bidding on his/her specifications, which seriously violates a long-standing and fundamental bid law concept that each bidder is bidding on the same specifications. Because, they won't be.

Again, who benefits from this madness? Certainly not the owner and not the general contractor and not the affected subcontractor. The only person/entity benefiting from this is the design professional, who will charge the owner for a complete design only to have the successful affected filed subbidder or general contractor have to re-design what has already been designed once it gets the job. Such being the case, the original design becomes all smoke and mirrors. As to all other parties to a construction project, what *value* does delegated design bring to the table? As far as I can see, *none.* If the owner wants a design/build contract, then have it advertise the job in this manner. At least, then, the general contractor and/or affected subcontractor will get paid for doing the design. To my way of thinking and understanding, the idea underlying delegated design is that the contractor will ultimately be performing the design for nothing. Sort of like a design build contract while not getting paid for the design. And, since the general contractor or affected subcontractor will not be compensated for performing the design, the design, at best, will be quick and dirty with corners cut everywhere they can be cut.

Is this *really* what an owner wants? The owner is going to have an unhappy and resentful general contractor or affected subcontractor, which will mean s/he is going to be bringing a real attitude to the table. Not at all what an owner *wants* or *should* want. One way or another, that general contractor or affected subcontractor is going to make that owner *pay.*

Here are some of the additional issues this raises. And, by no means, is this a comprehensive, all-inclusive list. The EC's engineer does not have a strong contractual nexus to this project, such as exists between the EC and the general contractor, the general contractor and the owner, the owner and its architect and between the architect and its engineer(s). While the EC's engineer *might* be indirectly tied into these various levels of contractual levels to some extent practically, it would appear unlikely that an engineer brought in for this limited purpose would agree to incorporate into its contract with the EC fully all of the upstream contractual documents. And, if that were the case, the EC's engineer would not be entitled to participate or be required to participate in the change order process or be bound by decisions made through the change order process to the same extent the other parties are bound by the same process.

Whose fire alarm system will prevail? How will that be determined? Are the parties going to be required to bring a third engineer in to decide? And, if the *idea* of this delegated engineer is that the delegated engineer is just supposed to practically realize the engineer's intent as demonstrated through the bid documents, why would there be a need to have a change order process, as no change has been ordered? The owner very well could end up with *two* engineered fire alarm systems: the one designed by the engineer of record and that designed by the EC's engineer. Whatever process there might be, this could eat up a great deal of contractual time. Will the construction parties be allowed to have an open-ended completion date with a day for day time extension based on the amount of time necessary for the delegated design process to go forward? Won't this delay the project? What about liquidated damages? How can the general contractor schedule the project when it's not clear when (and if) there will be a finalization of the fire alarm design, just using this one designed system as an example?

Further, the AG opinion seems to assume that since there are a lot of fire alarm systems out there, the owner's engineer can't possibly understand the nuances of each. Well, the engineer sufficiently understood what products were available for the purposes of finalizing the three products listed/required. Taken within the context of 'three equal products,' it is unlikely that picking a different fire alarm manufacturer or products is going to occur all that often. And, in any event, the determination of what is an 'as equal' is placed upon the owner's engineer. Isn't an engineer that only designs fire alarm systems supposed to know all of this? Doesn't that present an inherent conflict of interest situation between the first and second engineers? If an impasse on the design results between the two of them, is the owner going to have to bring in a *third* engineer to resolve it?

VII. CONCLUSION.

To protect your company from having to deal with 'delegated design' issues after your company is already committed to a job, those applicable aspects of the bid documents which deal with your trade, including both specifications and plans, have to be examined for more than just taking off your labor, materials and equipment. To what extent is the design professional attempting to withdraw from potential responsibility for its design, placing such obligations on you, the bidder? If you are not sure about any particular job, submit RFIs before bidding the job. If you don't have answers or acceptable answers, you should probably consider walking

away from that job or put in a *really* good number which, in all likelihood, will make you non-competitive.

Why should the owner have to pay *twice* for the design of a fire alarm system? The cost of this figures into the price charged by the architect. Then, the cost of this is figured into the price of the electrical subbidder.

This is going to substantially increase bid costs if the electrical subcontractor has to essentially design the electrical system – at least, the fire alarm system - before submitting a bid. In addition, this will definitely increase prices and shorten the list of filed subbidders willing to put up with they are likely to regard as sheer nonsense. Question: why would *any* electrical filed subbidder bid this type of work if other work were available?

This is going to substantially increase bid costs if the electrical subcontractor has to essentially cause to be designed the electrical system – at least the fire alarm system. This will definitely shorten the list of filed subbidders willing to put up with this additional nonsense, thus increasing prices.

If the original architect/engineer does not want to stand behind the sufficiency of its plans and specifications, then the owner should make the job a design/build job. Or, get a new architect. At least under that design system, if a filed subbidder will be submitting its own design, then it will at least be paid for its design services.

As 'delegated design' seems to be a concept that will be increasingly used in Massachusetts public construction, understanding what this is and how this can affect your company in performing any particular job is of paramount importance. This is particularly important for Massachusetts public work inasmuch as the AG has expressed a willingness to consider such projects as legitimate and not in violation of the bid laws.

Public owners need to be educated to the fact that if they allow their projects to go forward with delegated design as to key, critical path aspects of it, other than the fact they could be paying for two designs, they may, in addition, be paying for delay claims from general contractors and other subcontractors whose own construction is being placed on hold while the electrical subcontractor obtains an additional design.

One last comment. Thousands of Massachusetts public projects, which have included a fire alarm system, have been successfully performed and completed with just *one* design.

What has changed in Massachusetts public construction that now requires *two* designs?

Cui bono?

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[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. 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."

[2]It is hard to say this with complete accuracy and confidence. The AG bid protest decisions are indexed under a system that, at times, thwarts significant accurate research. For example, there are several different legal issues involved with aspects of 'Paragraph E'. All of the cases on 'Paragraph E' issues, however, are simply listed together with no case summaries provided, which, with a complicated issue such as this one, could cause a lawyer to have to spend many, many hours sifting through the case list and looking at a great many case decisions just to find ones that are or might be relevant.