

Construction Court Cases in the United States Supreme Court

Coghlin Electrical Contractors, Inc. v. Gilbane Building Company

&

URS Corp. v. Transpo Group, Inc. United States District for the Western District of Washington

Submitted to

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In Partial Fulfillment of the Requirements for the Course

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By

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Case I

Case Number and Title

Coghlin Electrical Contractors, Inc. vs. Gilbane Building Company & another; Division of Capital Asset Management and Maintenance, third party

Case Docket No. SJC - 11778

Parties Involved

Plaintiff (Petitioner): Coughlin Electrical Contractors, Inc.

Defendant (Respondent): Gilbane Building Company

Division of Capital Management and Maintenance (DCAMM)

Project Specification (Name, Type, Contract Amount, Location)

Name: Massachusetts Department of Mental Health

Type: Building Construction

Contract Amount: Undisclosed

Location: Worcester, Massachusetts

Court/Case Location and Date

Court Location: The Massachusetts Supreme Judicial Court (County of Worcester)

Argued: March 2, 2015

Date: June 24, 2014

Summary of Case

In 2014, the Gilbane Building Company contracted with, Massachusetts based, Division of Capital Management and Maintenance (DCAMM) for the construction and preconstruction of a 320-bed, adult and adolescent state psychiatric facility for the Massachusetts Department of Mental Health in Worcester, Massachusetts. The Gilbane Building Company was the construction manager at risk (CMAR) for this project. For that reason, Gilbane subcontracted Coghlin Electrical Contractors, Inc. for the electrical construction work on the project in accordance to the specifications prepared by the designer. Ellenzweig Associated, Inc. was the Designer of this project which was contracted by DCAMM. According to Coghlin Electrical Contractors, Inc., errors and omissions in the design furnished by the public owner and prepared by an A/E firm were a primary cause for labor increases of 49% for the electrical work. When the parties, Coughlin Electrical Contractors, Inc. , Gilbane Building Company, DCAMM and Ellenzweig Associated, Inc. were unable to resolve the claims in mediation, Coughlin then sued Gilbane, who asserted a “third party” complaint against DCAMM, seeking recovery for the change order claimed based on the long-established Owner’s implied warranty of plans and specifications (Alpert v. Commonwealth, 357 Mass. 306 (1970)).

In traditional design-bid-build construction, the owner presents the contractor with a completed set of drawings and specifications, and impliedly warrants that designs against defects. As stated nearly a century ago in United States v. Spearin, “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for defects” in the design. In the CMAR project delivery system the CMAR typically has responsibilities with respect to the design, while the A/E is still preparing it. During the design phase, a CMAR typically provides advice, consultation, and commentary regarding the design,

and may influence the final design. In this case, the public owner argued that the CMAR's involvement during the design eliminated the CMAR's ability to benefit from an applied warranty or design. The trial court agreed with the owner's position, finding that the CMAR method entails "material changes in the roles and responsibilities" of the parties, and that as a result the owner did not impliedly warrant the design to the CMAR (EJCDC, 2016).

Court Decision:

The Massachusetts Supreme Judicial Court reversed the lower court decision, holding that the owner continues to impliedly warrant the design under the CMAR. The court reasoned that despite the CMAR consultation during the design, the owner (and the owner's A/E) ultimately controlled the design. Mere consultation should not make the CMAR a "guarantor" against all design defects.

In limiting the scope of the implied warranty, the court noted that even under the law applicable to implied warranty of design in a traditional setting, the warranty is not absolute; ^Tthe contractor's reliance on the design must be given in good faith, essentially meaning that a contractor may not ignore obvious omissions or errors in the design. In a CMAR situation, the court held that there must be a good faith reliance on the design and the CM must act "reasonably" in light of its own "design responsibilities." According to the decision, the greater the CMAR's design responsibilities in the contract, the greater the burden on the CMAR to show that its reliance was in good faith and reasonable (EJCDC, 2016).

Further action(s) by the Parties, if any

No further actions were taken by either party in this case.

Commentary:

(a) Provide your opinion of the case.

In my opinion, this case was very interesting because I was able to identify several pros and cons with being a construction manager at risk (CMAR). A CMAR is a delivery method which entails a commitment by the construction manager to deliver the project within a guaranteed maximum price (GMP). The construction manager acts as a consultant to the owner in the development and design phases, but as the equivalent of a general contractor during the construction phase. When a construction manager is bound to a GMP, the most fundamental characteristic of this relationship is changed. For that reason, the construction manager must manage and control construction cost to not exceed the GMP, which would be a financial lost to the construction management company.

Upon reviewing this case several times, I was able to identify a few pros of being a CMAR. Some of the pros being a CMAR is that this process increases the speed of a project. Also, a CMAR has the ability to strengthen coordination between the architect/engineer and the construction manager. For that reason, the client is able to hire a construction manager based on qualifications, thus better ensuring a construction manager with strong allegiance to the client, because their business relies on references and repeated work. Also, construction managers, architects/engineers, and the client are able to collaborate with each other which will ultimately create enhanced cooperation throughout the construction and preconstruction process.

However, the cons outweighed the pros for this case because there was a lack of communication which resulted in labor increases of 49% for the electrical work due to errors and omissions in the design furnished by the public owner and prepared by the Architect/Engineer. The Massachusetts Superior Court has originally stated that a Construction Manager who provides design assistance services could not make a claim against the owner when later problems arise on the job due to defects in the plans and spec. Due to the fact that the Construction Manager had minimal input on the design, the Massachusetts Supreme Judicial Court reversed the lower courts decisions because the CMAR would not have been able to detect defects in the plans and specifications.

(b) Define/describe/explain contract issues involved.

(1) **Breach of Contract** – Breach is an unjustified failure to perform the act promised. It may occur when a party fails to perform on time, does not perform in accordance with the terms of the agreement, or does not perform at all. A breach by one party may discharge the other party from all further obligations thereafter. One has to perform his/her contract duties in order to recover what was agreed to in the contract (findlaw.com). In terms of this case, a breach of contract refers to the non-conformance by the subcontractor, Coughlin Electrical Contractors Inc., with not being able to complete the scope of work in on time which has caused the contractors to increase their labor by 49%.

(2) **Damages** – The remedy most often used for a breach of contract is damages.

Damages are payments in some form or another made by the breaching party to the

non-breaching party (findlaw.com). Here, the damages may be those that were expected to be paid by the contractor Gilbane.

(3) **Delay** – A contract must be performed within a specified period of time. A failure to fully perform all contractual obligations within a stipulated time may be referred to as a delay (constructiolawtoday.com).

(4) **Change Orders** - Work that is added to or deducted from the original scope of work of a contract, which alters the original contract amount and/or completion date.

Depending on the severity of a change order, it can cause significant changes to a project. In this case, the subcontractor Coughlin initially presented a change order to the CMAR, Gilbane, which was denied by the owners.

(5) **Forum-Selection Clause** – A contractual agreement that designates the court and the location where the parties would like to have their legal dispute decided

(law.cornell.edu). This clause was the pivotal factor in the case around which the dispute arose, in being defied by the subcontractor. Through this case, standards for consideration and analysis of the clause were further clarified by the Massachusetts Supreme Court.

(c) Prior action/arrangements, the parties should have taken/made to settle the case before it went to court.

While it is nearly impossible to avoid litigation on some construction projects, there are certainly steps that one can take to avoid potential disputes. First, it's essential to understanding that a CMAR is not a design professional and should not have genuine "design responsibilities." I say this because a CMAR begins its design-related task before

the design completed which could ultimately make an impact on the final construction price or guaranteed maximum price (GMP). In addition, the CMAR looks for the potential impact of the design on construction costs, and constructability. However, it's important to recognize that a CMAR is not qualified to apply engineering expertise to a review of the design. A CMAR's review of the design is not a peer review. Therefore, a CMAR's contract should be explicit in emphasizing the two very different roles played by the A/E and the CMAR, which would have prevented this case from going to court.

(d) What could have been done by whom in the past (or what could be done in the future) to avoid problems of this nature?

In order to avoid future problems, I would suggest that construction managers at risk do not partake in any design implications. I say this ~~because~~ through implied warranty, the owner is legally responsible for the designer's plans and specifications. It's stated that the CMAR, Gilbane, had a contractual relationship with the owner but not the designer. For that reason, the State Auto Prop & Cas. Ins. v. Hargis states that a subcontractor is not required to indemnify the contractor for losses or injuries caused by the architect's plans and specifications, where indemnification provision stated that subcontractor's obligations "shall not extend to the liability of the Architect." If Gilbane wants to file a third-party complaint, they must first defend against Coughlin's claims.

Case II

Case Number and Title

URS Corp. v. Transpo Group, Inc. United States District Court for the Western District of Washington

Case Docket Number C14-00860

Parties Involved

Plaintiff (Petitioner): URS Corporation, A Nevada Corporation

Defendant (Respondent): Transpo Group, Inc., A Washington Corporation

Project Specification (Name, Type, Contract Amount, Location)

Name: Unnamed Project

Type: Building Construction/ Signage Contract

Contract Amount: Suing for \$1.5 M

Location: Seattle, Washington

Court/Case Location and Date

Court Location: United States District Court for the Western District of Washington at Seattle

Decided: June 19, 2015

Summary of Case

On a design-build highway project, the design-builder, Flatiron withheld payment from the lead design firm, URS, asserting that certain signs that were part of the project failed to meet project criteria. URS in turn withheld payment from the sign consultant, Transpo. Eventually, URS sued Transpo, contending that deficiencies in Transpo's services had resulted in damages of about \$1.5 million.

During the project formation stage, URS and Transpo had entered into a teaming agreement for the pursuit of the work on the project. This teaming agreement included a clause waiving consequential and indirect damages, indicating that the clause would survive the termination or expiration of the teaming agreement. Subsequently, Flatiron awarded the design work to URS, and URS entered into a subagreement with Transpo regarding sign-related services. The subagreement did not contain a waiver similar to the one in the teaming agreement, and contained a typical integration clause asserting that the subagreement superseded all prior agreements regarding the same subject matter. As the litigation commenced, the court was called upon to decide whether the limitation on liability in the teaming agreement applied as a defense to the URS's claim damages (EJCDC, 2016).

Confirm

Court Decision

The court pointed out that whether the damages that URS sought from Transpo were indeed consequential or indirect damages, in whole or in part, was an issue that was not before the court, and would need to be determined in a different proceeding.

The court concluded that the subject matter of the teaming agreement and the subagreement involved the provision if sign-related services. If the subject matter of two contracts is not the same, the integration clause of the second contract must explicitly revoke and supersede the first contract by name. This had not been done in the subagreement. Therefore, the court's final conclusion was that the teaming agreement did not cover the same subject matter as the subagreement; the teaming agreement's provisions addressed limitations on damages which may be applicable to the URS-Transpo dispute (EJCDC, 2016).

Further action(s) by the Parties, if any

No further actions were taken by either party in this case. The court hereby finds in favor of Transpo and against URS on all claims. This matter is CLOSED.

Commentary:

(a) Provide your opinion of the case.

In my opinion, this case was very difficult to interpret during my first time reading. I say this because I was not unaware of all the contract issues involved that affected the outcome of this case. Once reading this case thoroughly, I was able to identify several contract issues that may have caused URS to believe that Transpo was in fault of \$1.5 million.

(b) Define/describe/explain contract issues involved.

(1) **Breach of Contract** – Breach is an unjustified failure to perform the act promised. It may occur when a party fails to perform on time, does not perform in accordance with the terms of the agreement, or does not perform at all. A breach by one party may discharge the other party from all further obligations thereafter. One has to perform his/her contract duties in order to recover what was agreed to in the contract (findlaw.com). In terms of this case, breach of contract refers to the initial issues that occurred prior to the teaming agreement. These issued created issues during the continuation of this project because teaming agreement was found not to supersede the subagreemnt, which resulted in Transpo not being liable for any indirect damages.

(2) **Damages** – The remedy most often used for a breach of contract are damages.

Damages are payments in some form or another made by the breaching party to the non-breaching party (findlaw.com). Here, the damages of structural redesign of all structures that did not meet forward compatibility requirements costed \$6,786.06.

(3) **Delay** – A contract must be performed within a specified period of time. A failure to fully perform all contractual obligations within a stipulated time may be referred to as

a delay (constructiolawtoday.com). In this case, the redesign of all steel structures resulted in approximately 503 hours of extra work.

- (4) **Comparative Fault** – A doctrine of tort law which permits plaintiff and defendant to compare their liability for the accident. It allows proportionate recovery if both the plaintiff and defendant were negligent and thereby contributed to the cause of an injury (uslegal.com). In this case, the evidence does not support a finding of fault against Transpo for the damages or issues in this matter. Also, having found that Transpo is not liable for any damages alleged by URS, and having previously dismissed Transpo's counterclaim seeking an order apportioning fault amongst the parties, the Court makes no further findings with respect to fault.
- (5) **Negligence** – The law imposes the obligation upon the developer /general contractor/ subcontractor to exercise the reasonable degree of care, skill and knowledge that is ordinarily employed by such building professionals. The duty of care is extended to all who may foreseeably be injured by the construction defect, including subsequent purchasers. Developers and general contractors are responsible for the negligence of their subcontractor (findlaw.com). In this case, URS has failed to establish a preponderance of the evidence that Transpo negligently performed services under its contract with URS. Also, URS failed to provide evidence that Transpo owed any common law duty to the dimension sign structure or locate sign structures other than by the station along the roadway.
- (6) **Jurisdiction and Venue**- Limits to legal authority of each other court to hear and decide a case. For a court to be able to decide a case, it has to have jurisdiction. While jurisdiction say in what state and what court you file your lawsuit, “venue” is the

country where you file your action. In this case, the court has subject matter jurisdiction to 28 U.S.C 1332 because parties are citizens of different states and the amount in controversy exceeds \$75,000. In addition, venue is proper in the United States District Court for the Washington pursuant to 28 U.S.C 1391 and because the events or omissions giving rise to the lawsuits occurred in the judicial district.

(c) Prior action/arrangements, the parties should have taken/made to settle the case before it went to court.

URS could've taken several different advanced settlement techniques prior to taking Transpo to court. Once the lawsuit has been filed, the best way to settle a case is to treat it as if is going to trial. This includes developing a habit of propounding key witnesses as soon as they received the answer to file a complaint. In my opinion, I believe that URS sat back and hoped for a favorable settlement without doing any work or spending any money. Therefore, they did not convince their opponent that they were prepared to take the case to trial.

Also, the reality is that the case will not settle until the key depositions are taken. The key depositions are of the defendant, any eyewitnesses and the plaintiff. The defense recognized that the value of a case may increase or decrease depending upon the believability and likeability of the plaintiff. However, the plaintiff did not provide enough factual information to be able to file a complaint on Transpo. If this case was given more thought it could've prevented this case from going to court because the teaming

agreement was found not to supersede the subagreement, which resulted in Transpo not being liable for any indirect damages.

(d) What could have been done by whom in the past (or what could be done in the future) to avoid problems of this nature?

This case was very interesting because it caused URS to lose the money that they expected to gain with their \$1.5 million lawsuit. The problem initially started when Flatiron withheld payments from the lead design firm URS because certain signs did not meet the design criteria. As a result, URS withheld payments from the sign consultants, Transpo.

As the project continued, URS and Transpo entered a teaming agreement. A teaming agreement is a commonly used markets tool whereby a prime contractor and subcontractor agree to combine resources to bid on a major government contract.

Typically, a teaming agreement is not considered a government contract, but a private one between two or more parties and is governed by contract law. No government acquisition regulations must be referenced in the agreement- those are usually negotiated and included within the subcontract. However, this teaming agreement included a clause waiving consequential and indirect damages, indicating that the clause would survive the termination or expiration of the teaming agreement. Once the subagreement was created this was supposed to supersede all previous documents but it did not because the subject matter was quite different.

For that reason, URS could not justify the case that they were making against Transpo.

References

“Contract Law.” Contract Law. N.p., n.d. Web. 2 Feb.2016

“State Auto Property and Casualty Insurance Company v. Lori Hargis.” United States Court of Appeals. N.p., n.d. Web. 5 Feb. 2016

“FindLaw’s United States Supreme Court Case and Opinions.” FindLaw. N.p., n.d. Web. 5 Feb. 2015

“Justia US Law.” URS Corporation v. Transpo Group Inc. N.p., n.d. Web 7 Feb. 2016

“Justia US Law.” Coghlin Electrical Contractors, Inc. vs. Gilbane Building Company. N.p., n.d. Web 7 Feb. 2016

“Engineering Joint Contract Documents Committee.” Recent Court Decisions of Relevance to Contract Documents. Web. 20. 2016

“Alpert v. Commonwealth.” N.p., n.d. Web. 23 Feb. 2015

Appendix A

Coghlin Electrical Contractors, Inc. vs. Gilbane Building Company & another; Division of
Capital Asset Management and Maintenance, third party

Case Docket No. SJC - 11778

Parties Involved

Plaintiff (Petitioner): Coughlin Electrical Contractors, Inc.

Defendant (Respondent): Gilbane Building Company

Project Specification (Name, Type, Contract Amount, Location)

Name: Massachusetts Department of Mental Health

Type: Building Construction

Contract Amount: Undisclosed

Location: Worcester, Massachusetts

Court/Case Location and Date

Court Location: The Massachusetts Supreme Judicial Court (County of Worcester)

Argued: March 2, 2015

Date: June 24, 2014

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SJC-11778

COGHLIN ELECTRICAL CONTRACTORS, INC. vs. GILBANE BUILDING COMPANY & another;¹ DIVISION OF CAPITAL ASSET MANAGEMENT AND MAINTENANCE, third-party defendant.

Worcester. March 2, 2015. - September 2, 2015.

Present: Gants, C.J., Spina, Cordy, Botsford, Duffly, Lenk, & Hines, JJ.

Contract, Public works, Construction contract, Delivery, Warranty, Indemnity. Warranty. Indemnity. Public Works, Construction management at risk.

Civil action commenced in the Superior Court Department on July 17, 2013.

A motion to dismiss a third-party complaint was heard by Brian A. Davis, J.

The Supreme Judicial Court granted an application for direct appellate review.

John W. DiNicola, II (Michael Brangwynne with him) for Gilbane Building Company.

James A. Sweeney, Assistant Attorney General, for Division of Capital Asset Management and Maintenance.

The following submitted briefs for amici curiae:

¹ Travelers Casualty & Surety Company of America.

David J. Hatem, Cheryl A. Waterhouse, & Amanda E. Mathieu for American Council of Engineering Companies of Massachusetts & another.

Shannon A. Reilly for Construction Industries of Massachusetts.

Joel Lewin, Robert V. Lizza, Jonathan T. Elder, & Robert T. Ferguson, Jr., for Associated General Contractors of Massachusetts, Inc.

Hugh J. Gorman, III, & Jeffrey J. Pyle for Columbia Construction Company.

GANTS, C.J. This case requires us to resolve three issues regarding a public construction contract that implements the construction management at risk delivery method, pursuant to G. L. c. 149A: (1) Does the owner who furnishes the plans and specifications in a public construction management at risk project give an implied warranty of their sufficiency for the purpose intended, as the owner does under our common law in traditional design-bid-build construction projects? (2) If so, did the parties to the construction management at risk contract in this case disclaim the implied warranty? (3) If they did not, did the indemnification provision in the contract prohibit the construction manager at risk (CMAR) from filing a third-party complaint against the owner in a case brought by a subcontractor seeking reimbursement of additional costs, thus requiring the CMAR to file a separate complaint against the owner to recover the additional costs caused by an insufficient or defective design under the implied warranty?

We conclude: (1) under our common law, a public owner of a construction management at risk project gives an implied warranty regarding the designer's plans and specifications, but the scope of liability arising from that implied warranty is more limited than in a design-bid-build project; (2) the construction management at risk contract in this case did not disclaim the implied warranty; and (3) the indemnification provision in the contract did not prohibit the CMAR from filing a third-party complaint against the owner that sought reimbursement under the implied warranty for damages claimed by the subcontractor arising from the insufficiency of or defects in the design.²

Background. The Division of Capital Asset Management and Maintenance (DCAM) is the owner of a construction project to build a psychiatric facility at the site of the Worcester State Hospital (Project). DCAM entered into a contract with Ellenzweig Associates (Designer) to prepare the Project's designs. See G. L. c. 7C, § 44 ("Designer" is individual or other entity "engaged in the practice of architecture, landscape architecture, or engineering" and registered in discipline

² We acknowledge the amicus briefs submitted by American Council of Engineering Companies of Massachusetts and Massachusetts Chapter of the American Institute of Architects; Associated General Contractors of Massachusetts, Inc.; Construction Industries of Massachusetts; and Columbia Construction Company.

required for project). When the designs were partially completed, DCAM entered into a contract with Gilbane Building Company (Gilbane) as the CMAR.³ Gilbane entered into a subcontract with Coghlin Electrical Contractors, Inc. (Coghlin), to perform electrical work. The subcontract incorporated by reference the terms of the contract between DCAM and Gilbane.

On July 19, 2012, approximately one month before it substantially completed its work, Coghlin submitted to Gilbane a request for equitable adjustment of the contract price. Nearly one year later, on July 17, 2013, Coghlin filed a complaint in the Superior Court against Gilbane, alleging, inter alia, that Gilbane committed a breach of its subcontract with Coghlin by causing Coghlin to incur additional costs resulting from various scheduling, coordination, management, and design errors.⁴ Gilbane then filed a third-party complaint against DCAM, asserting that, "in the event that Coghlin proves its claims against Gilbane," DCAM committed a breach of its contract with

³ The contract between Gilbane Building Company (Gilbane) and the Division of Capital Asset Management and Maintenance (DCAM) states that Gilbane "is an independent contractor and is not an agent or employee of, or a joint venturer with, DCAM."

⁴ Coghlin Electrical Contractors, Inc. (Coghlin), also named Gilbane's surety under a payment bond, Travelers Casualty and Surety Company of America, as a defendant in its complaint. See G. L. c. 149, § 29.

Gilbane by refusing to pay Gilbane the amounts claimed by Coghlin.

Because DCAM's liability on the third-party complaint is contingent upon Coghlin prevailing on its complaint, we recite the relevant factual allegations in both the complaint and the third-party complaint.⁵ In October, 2009, Coghlin began performing electric work on the first of two sets of buildings and, for the first year, was generally able to perform on schedule. However, beginning around November, 2010, various errors, omissions, and changes severely affected Coghlin's performance, causing Coghlin to incur a forty-nine per cent increase in labor hours. Coghlin's increased costs resulted both from Gilbane's alleged mismanagement of the Project, such as its failure to issue monthly schedules and coordinate the

⁵ The judge declined to convert the motion to dismiss into a motion for summary judgment, so we do not consider the affidavit and the attached correspondence submitted by Gilbane with its opposition to the motion to dismiss as part of the record on appeal, and rest solely on the allegations in the pleadings, as well as the contracts referenced in the pleadings. See Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004) (where offering memorandum and subscription agreement were not attached to complaint but plaintiff had notice and "relied on them in framing the complaint," attachment of such documents to motion to dismiss did not convert motion to one for summary judgment). See also Sher v. Desmond, 70 Mass. App. Ct. 270, 281 n.14 (2007) (attached correspondence in support of motion to dismiss did not convert motion into summary judgment motion where judge did not give notice to parties "that the judge intended to treat the motion to dismiss as one for summary judgment").

various subcontractors, and from design defects and changes. As to the design, Coghlin alleged that the ceilings in the project were designed to leave two feet of space between the ceilings and the bottom of the structural steel, but "[w]hen Project work began, it was revealed that the design required approximately five feet of mechanical and electrical work to be placed in the ceiling area." After six weeks of attempting to resolve the discrepancy, Coghlin was directed to place the electrical work as high as possible in the ceiling, and was told that the Designer and Gilbane would address the issue later. Coghlin also alleged that, "[w]hen wall framing began, based upon design changes and for other reasons not related to Coghlin's performance, it became evident that the floors would not be framed in a logical and sequential fashion." In addition, Coghlin alleged that the Designer specified that Coghlin use certain specific electrical fixtures on the Project, but the Designer rejected them when Coghlin filed the product submittals.

In its third-party complaint, Gilbane claims that it performed its work in accordance with the contract, and that DCAM has not paid Gilbane for the amounts sought by Coghlin. DCAM filed a motion to dismiss the third-party complaint. After conducting a hearing, the judge allowed the motion and judgment was entered in favor of DCAM.

In his decision, the judge recognized that Gilbane's third-party complaint effectively alleged that DCAM should indemnify Gilbane for "damages caused by design changes and design errors," that were "unrelated to any wrongdoing on Gilbane's part," for which Gilbane may be liable to Coghlin. The judge, citing J. Lewin & C.E. Schaub, Jr., Construction Law § 7:3, at 452 (2012) (Lewin & Schaub, Jr.), acknowledged that Massachusetts common law "traditionally has been protective of construction contractors in circumstances where the owner has supplied erroneous or, perhaps, ambiguous plans and specifications." See Lewin & Schaub, Jr., supra at § 7:3, at 464 (2014-2015) ("where a party provides a contractor with a set of plans and specifications for construction to follow, there is an implied warranty that those plans and specifications are adequate and sufficient"). The judge concluded, however, that the implied warranty of the owner applies only where the construction project uses the traditional design-bid-build construction method, in which the owner retains a designer to design the project, construction bids are submitted based on that design, and the general contractor who wins the contract is expected to build the project in accordance with the plans and specifications of the design. The judge determined that this implied warranty does not apply where, as here, the construction project uses the construction management at risk method, given

the "material changes in the roles and responsibilities voluntarily undertaken by the parties" to such contracts.

The judge also determined that the indemnification provision in the contract between DCAM and Gilbane, which requires Gilbane to indemnify, defend, and hold harmless DCAM from all claims, damages, losses, and expenses "arising out of or resulting from the performance of the Work," as defined in the contract, imposes liability on Gilbane for any damages it might win in its third-party claims against DCAM. The judge concluded that, because Gilbane effectively is suing itself in its third-party complaint, Gilbane's third-party claims create "an impermissible 'circuitry of obligation'" (citation omitted). Gilbane appealed, and we allowed its motion for direct appellate review.

Discussion. "We review the allowance of a motion to dismiss de novo," accepting as true the facts alleged in the plaintiff's and the third-party plaintiff's complaints as well as any favorable inferences that reasonably can be drawn from them. Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 164 (2014). To survive a motion to dismiss, the facts alleged and the reasonable inferences drawn therefrom must "plausibly suggest . . . an entitlement to relief." Flagg v. Alimed, Inc., 466 Mass. 23, 26-27 (2013), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

1. Construction management at risk contracts under G. L. c. 149A. a. Construction project delivery methods. The construction management at risk contract at issue in this case differs from contracts made pursuant to the conventional design-bid-build method. In a design-bid-build project, "the owner retains an engineer or an architect on a separate contract to complete the design of the public facility," and once the design is complete, the design is made available to potential bidders and the construction contract is advertised for bid. Associated Subcontractors of Mass., Inc. v. University of Mass. Bldg. Auth., 442 Mass. 159, 165 n.8 (2004), quoting D. Gransberg, The Cost of Inaction: Does Massachusetts Need Public Construction Reform? at 3 (1999). Contractors submit prices, and the project is awarded to the "lowest responsive and responsible bidder." Associated Subcontractors of Mass., Inc., supra, quoting Gransberg, supra. The construction services contract between the owner and the contractor allocates to the contractor the responsibility of "selecting, coordinating, and administering the work of all of the various subcontractors." Lewin & Schaub, Jr., supra at § 2:6, at 14. "[T]he risk of the design is allocated to the engineer or architect, while the risk of construction is allocated to the contractor." Id. at 14-15.

On January 1, 2005, § 27 of the "Act further regulating public construction in the Commonwealth" became effective, see

St. 2004, c. 193, § 27, authorizing public agencies to use two additional delivery methods: design-build and construction management at risk. In a design-build project, the owner contracts with a single party that assumes both the design and the construction responsibilities. See G. L. c. 149A, § 15 ("Design build" defined as "construction delivery system that provides responsibility for the delivery of design services and construction services within a single contract"); Lewin & Schaub, Jr., supra at § 2:6, at 15. By replacing two entities with one, owners may reduce delays and focus responsibility on a single entity. See J. Sweet & M.M. Schneier, *Legal Aspects of Architecture, Engineering and the Construction Process* § 14.09E (9th ed. 2013) (Sweet & Schneier) ("Owners are often frustrated when they look to the designer who claims that the contractor did not follow the design, with the latter claiming that the problem was poor design"). In Massachusetts, a public agency is only authorized to use the design-build method for certain public works projects, not public building projects. G. L. c. 149A, § 14.

The construction management at risk method is available to public agencies for the "construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost not less than [\$5 million]." Id. at § 1. Similar to the design-bid-build method, the owner enters into

separate contracts, one with the designer and one with the CMAR. Id. at § 3 (public agency must procure services of designer, who is "independent of the owner's project manager and [CMAR]," before submitting application to use construction management at risk method). However, in the construction management at risk method, the owner may contract with the CMAR before the design has been completed. Id. at § 7 (total dollar amount for CMAR services is based on design documents "which are no less developed than [sixty] per cent"). See Office of the Inspector General, Experience of Massachusetts Public Agencies with Construction Management at Risk Under M. G. L. c. 149A, at 9 (Oct. 2009) (OIG Report) (CMAR "selected during the design stage of the project"). By contracting during the design phase, the owner may "involve the [CMAR] in project planning and . . . benefit from the [CMAR's] expertise." Lewin & Schaub, Jr., supra at § 17:42, at 1226. See P.L. Bruner & P.J. O'Connor, Jr., On Construction Law, § 6:59 (2002) (Bruner & O'Connor, Jr.) (CMAR "provides preconstruction services tailored to introduce construction expertise into the design phase"). The CMAR provides its services in exchange for a guaranteed maximum price (GMP), representing the maximum amount that the owner will pay. See G. L. c. 149A, § 2; id. at § 7. Absent a change order, the CMAR is generally responsible for any costs that exceed the GMP. See Lewin & Schaub, Jr., supra at § 17:42, at 1227.

b. Implied warranty of the designer's plans and specifications. We now consider whether the owner in a construction management at risk contract made pursuant to G. L. c. 149A impliedly warrants the sufficiency of the designer's plans and specifications. In design-bid-build projects, "[i]t 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." Alpert v. Commonwealth, 357 Mass. 306, 320 (1970). See United States v. Spearin, 248 U.S. 132, 136 (1918) ("if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications"). See also Richardson Elec. Co. v. Peter Francese & Son, 21 Mass. App. Ct. 47, 50 (1985) ("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"). This implied warranty between the owner and the contractor "is a representation that the design is defect-free," and the contractor "need only show that the defect exists and that he suffered damages as a result thereof" in order to recover. Bruner & O'Connor, Jr., supra at § 9:82, at 670, 671 n.5, quoting Harrington, Thum, & Clark, The

Owner's Warranty of the Plans and Specifications for a Construction Project, 14 Pub. Con. L. J. 240, 259-260 (1984). In design-bid-build projects, the implied warranty of the owner "is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work." Spearin, supra. However, the implied warranty does not absolve a contractor of all liability related to design; where the contractor does not rely in good faith on the designer's plans and specifications, the contractor is responsible for the increased costs arising from design defects. See Alpert, supra. Consequently, where a contractor encounters an "obvious omission, inconsistency, or discrepancy [in the design], he should take steps, by way of his own investigation, or by putting questions to the owner (or owner's representatives), to bridge gaps in the documents." Richardson Elec. Co., supra at 52. Compare John F. Miller Co. v. George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 498 (1979) (if discrepancy is subtle, and if reasonable, conscientious contractor examining design "might miss a requirement which is out of sequence or ineptly expressed, the burden of the error falls on the issuer of the specifications").⁶

⁶ Because the issue is not raised, we do not address the distinction between "performance" specifications and "design" specifications. See J. Lewin & C.E. Schaub, Jr., *Construction Law* § 7:4, at 467 (2014-2015) (design specifications "describe

Until today, we have not considered whether the owner's implied warranty of the designer's plans and specifications applies in public construction management at risk projects. See generally Bruner & O'Connor, Jr., supra at § 6:67, at 617 ("Because construction management is a newer approach and has not been the subject of as many court decisions, there is less certainty as to interpretation of the contract documents, and less uniformity as to the extent and allocation of responsibilities, and it is more difficult to predict liabilities"). When we adopted the implied warranty as part of our common law, public agencies were generally limited to using the design-bid-build method, see Lewin & Schaub, Jr., supra at § 17:41, at 1225; OIG Report, supra at 1, where the owner "is in control of the design development process" and the contractor "has no ability or opportunity to contemporaneously, meaningfully, or otherwise influence the process of design development and is required to construct in strict conformance with the furnished project design." Peterson, One Small Step in

the materials to be used in the work and the manner in which the contractor's work is to be constructed in detail" while performance specifications "focus on the result to be achieved" and give contractor discretion as to how to complete final product). We assume for the purposes of reviewing the allowance of the motion to dismiss that the designs at issue in this case contain design specifications. See id. at 468 (contractor "cannot rely on an implied warranty to shield itself from liability arising out of defective performance specifications").

Mindset, One Giant Leap for the Construction Law Industry: How the Judicial Stage Is Set for IPD and the Only Thing Missing Is Willing Participants, 39 N. Ky. L. Rev. 557, 561-562 (2012), quoting Hatem, Design Responsibility in Integrated Project Delivery: Looking Back and Moving Forward 14 (Jan. 2008) (unpublished manuscript).

The relationship between the owner and the CMAR is different from the traditional relationship between the owner and the general contractor in a design-bid-build project. The act defines "construction management at risk" as

"a construction method wherein a construction management at risk firm provides a range of preconstruction services and construction management services which may include cost estimation and consultation regarding the design of the building project, the preparation and coordination of bid packages, scheduling, cost control, and value engineering, acting as the general contractor during the construction, detailing the trade contractor scope of work, holding the trade contracts and other subcontracts, prequalifying and evaluating trade contractors and subcontractors, and providing management and construction services, all at a [GMP], which shall represent the maximum amount to be paid by the public agency for the building project, including the cost of the work, the general conditions and the fee payable to the construction management at risk firm" (emphasis added).

G. L. c. 149A, § 2. Unlike design-bid-build projects where the designer designs and the contractor builds, the CMAR may provide consultation regarding the design of the project and therefore may influence the project's final plans and specifications. See OIG Report, supra at 9 ("final design may reflect or incorporate

substantial input from the [CMAR]"). Additionally, the CMAR agrees to a GMP and has the opportunity when negotiating the contract to consider the risk of incurring additional costs. See id. at 32 (construction management at risk contracts contain "CM Contingency," which is monetary amount intended to cover risk of "project costs that are not associated with scope changes or latent conditions encountered during the construction phase"). See also Bruner & O'Connor, Jr., supra at § 9:84, at 678 ("If . . . it can be clearly established that the contractor did or should have accounted for possible errors in the plans and specifications when pricing the work, then it appears inappropriate to hold the owner to this implied warranty standard").

As significant as these differences in relationship are, we are not persuaded that the relationships are so different that no implied warranty of the designer's plans and specifications should apply in construction management at risk contracts made pursuant to G. L. c. 149A and that the CMAR should bear all the additional costs caused by design defects. See OIG Report, supra at 12-13, 58 ("Owner-generated design changes and incomplete or flawed plans and specifications may . . . warrant change orders that increase the contract price" and "owner is also responsible for the cost of change orders, which increase the original GMP"). See also Hackenbrach, An Overview of Major

Project Delivery Methods and Their Design Risk Allocation, in Shared Design § 3.01[C], at 3-11 (2011) (CMAR generally bears risk that actual costs to complete project may exceed price it has agreed upon with owner, "unless it can show that the costs increased due to owner-directed changes, the owner's actions or omissions, or other circumstances which the contract treats as within the owner's responsibility"). The CMAR may consult regarding the design of the project, but the owner, through the designer, ultimately controls the design and is the final arbiter of it; unless the contract states otherwise, the owner is generally under no obligation to accept the CMAR's suggestions regarding the plans and specifications. The implied warranty derives in part from the basic principle that "responsibility for a defect rests on the party to the construction contract who essentially controls and represents that it possesses skill in that phase of the overall construction process that substantially caused the defect." Sweet & Schneier, supra at § 16.02A. Although the CMAR may be more likely to bear some responsibility for a design defect than a general contractor in a design-bid-build project, we adhere to this basic principle by applying the implied warranty to public construction management at risk contracts, where the owner maintains control of the design by contracting a separate designer and may be able to transfer liability to the designer

responsible for the defect. See Hackenbrach, supra at 3-12 ("In a 'textbook' [construction management at risk contract], the [CMAR] does not bear the risk of design deficiencies, as the owner retains a separate design professional and the [owner's implied warranty] applies . . .").

Nor are we persuaded that the Legislature, when it enabled the construction management at risk method in public building projects by enacting G. L. c. 149A, intended to abolish the owner's implied warranty and to require the CMAR to bear the entirety of the risk arising from design defects. The statute states that the CMAR "may" provide "consultation" regarding the design but is not required to do so. Ordinarily, to "consult" means to discuss, give advice, or confer. See Milton v. Massachusetts Bay Transp. Auth., 356 Mass. 467, 474 n.8 (1969), quoting Webster's Third New International Dictionary 490 (1963) ("consult" defined as "to deliberate on," "discuss," "to ask advice of," "to take counsel," and "confer"). The possibility that the CMAR may consult regarding the building design does not suggest that the CMAR should be the guarantor against all design defects, even those that a reasonable CMAR would not have been able to detect. Although the statute requires a GMP for the CMAR's services, the GMP may be established when only sixty per cent of the design documents have been developed. The Legislature could not reasonably have intended that the CMAR, by

agreeing to a GMP, would bear all the risk arising from the design when the CMAR may not have seen as much as forty per cent of the design documents before agreeing upon a GMP. Even where a CMAR is given substantial consultative responsibilities regarding the design, the owner remains free to reject the CMAR's advice and suggestions. In addition, under G. L. c. 7C, § 51 (e), "[a] public agency shall not enter into a contract for design services unless the public agency or the designer . . . has obtained professional liability insurance covering negligent errors, omissions and acts of the designer," and the total amount of insurance "shall at a minimum equal the lesser of [\$1 million] or [ten] per cent of the project's estimated cost of construction, or such larger amounts as the public agency may require." The statute does not permit a lesser amount of professional liability insurance in construction management at risk projects. Based on the language of G. L. cc. 149A and 7C, we understand that the legislative intent in providing the construction management at risk alternative was to permit the CMAR a greater consultative role regarding the project's design, not to eliminate the owner's responsibility for design defects.

Although the owner's implied warranty applies in a public construction management at risk contract, the differences between the responsibilities of a general contractor in a design-bid-build project and those of a CMAR affect the scope of

the implied warranty. The general contractor in a design-bid-build project may benefit from the implied warranty where it relied on the plans and specifications in good faith, but the CMAR may benefit from the implied warranty only where it has acted in good faith reliance on the design and acted reasonably in light of the CMAR's own design responsibilities. The CMAR's level of participation in the design phase of the project and the extent to which the contract delegates design responsibility to the CMAR may affect a fact finder's determination as to whether the CMAR's reliance was reasonable. The greater the CMAR's design responsibilities in the contract, the greater the CMAR's burden will be to show, when it seeks to establish the owner's liability under the implied warranty, that its reliance on the defective design was both reasonable and in good faith. See generally Sweet & Schneier, supra at § 14.04 ("all of the modern variations [on the design-bid-build method] have as a common denominator: a blurring of the lines of responsibility"). Therefore, the CMAR may recover damages caused by the breach of the implied warranty, but only if it satisfies its burden of proving that its reliance on the defective plans and specifications was reasonable and in good faith. The amount of recoverable damages may be limited to that which is caused by the CMAR's reasonable and good faith reliance

on design defects that constitute a breach of the implied warranty.

2. Express disclaimer of implied warranty. Having found that there is an implied warranty of the designer's plans and specifications in construction management at risk contracts made pursuant to G. L. c. 149A, we now consider whether the contract between DCAM and Gilbane expressly disclaims the owner's implied warranty. See Daniel O'Connell's Sons v. Commonwealth, 349 Mass. 642, 647-648 (1965) ("express disclaimer" of owner's responsibility for accuracy of geological data precluded liability based on contractor's reliance on such data); D. Federico Co. v. Commonwealth, 11 Mass. App. Ct. 248, 252 (1981) (implied warranty not recognized "where the contract terms specifically precluded warranty of, or reliance on" designer's quantity estimates). See also White v. Edsall Constr. Co., 296 F.3d 1081, 1085 (Fed. Cir. 2002) ("Only express and specific disclaimers suffice to overcome the implied warranty that accompanies design specifications"); Lewin & Schaub, Jr., supra at § 7:3, at 466 ("implied warranty [of design sufficiency] . . . may be mitigated by an express disclaimer of liability").

We find no express disclaimer of the implied warranty of the designer's plans and specifications in the contract between DCAM and Gilbane. We note that DCAM, on appeal, concedes that "the Superior Court's dismissal in this case does not negate

principle that the owner remains liable to the [CMAR] for design changes, errors and omissions which flow from the work of the designer" and that "[i]f Gilbane is found liable to Coghlin and the liability flows from design issues rather than other aspects of [Gilbane's] responsibilities, then there would have to be an allocation of that liability between Gilbane, [DCAM] and the [D]esigner." DCAM and Gilbane agree that the contract does not impose full responsibility for design defects on Gilbane, and the contract supports their interpretation.

As the judge recognized, the contract delegates extensive responsibilities to Gilbane to "carefully study" and "carefully compare" all design-related documents; "take field measurements and verify field conditions," compare them to the designs, and "report to the Designer any questions, errors, inconsistencies, or omissions." Gilbane must "review" the designs "on a continuous basis" with a group of architects or engineers in order to "discover inconsistencies, errors and omissions," and "review the design documents for clarity, consistency, constructability, maintainability/operability and coordination among the trades." Gilbane also must attend Project meetings with DCAM and the Designer and "consult with DCAM and the Designer concerning planning for construction of the Project."

Although Gilbane undertakes significant design-related obligations, there is no express abrogation of the implied

warranty. See White, 296 F.3d at 1085, citing Spearin, 248 U.S. at 137 ("general disclaimers requiring the contractor to check plans and determine project requirements do not overcome the implied warranty, and thus do not shift the risk of design flaws to contractors who follow the specifications"). The contract instead states that the "recommendations and advice of [Gilbane] concerning design modifications and alternatives shall be subject to the review and approval of DCAM," and, the Designer "shall decide all questions which may arise as to the interpretation of the [designs] and as to the fulfillment of this Contract on the part of [Gilbane]." Such provisions show that the Designer and DCAM maintain authority and control over the Project's design. In comparison, when describing some of Gilbane's design-related responsibilities, the contract states:

"[Gilbane] shall consult with DCAM and the Designer regarding the selection of materials, building systems and equipment, and shall recommend alternative solutions whenever design details affect construction feasibility, schedules, cost or quality (without, however, assuming the Designer's responsibility for design) and shall provide other value engineering services to DCAM" (emphasis added).

In stating that Gilbane shall recommend alternative design-related solutions, without assuming "the Designer's responsibility for design," the plain language of the contract supports, rather than disclaims, the implied warranty.⁷

⁷ The "No Personal Liability; Consequential Damages" provision of the "Miscellaneous Provisions" article, stating,

Thus, in the absence of an express disclaimer, the owner's implied warranty of the designer's plans and specifications applies. Here, Gilbane has undertaken extensive design review and consultation obligations while the Designer remains responsible for producing the designs. If Gilbane is found liable for additional costs to Coghlin, Gilbane may be able to recover, but only to the extent that the additional costs were caused by Gilbane's reasonable and good faith reliance on the defective plans and specifications that resulted in a breach of the owner's implied warranty, despite Gilbane's own contractual design responsibilities.

3. Indemnification provision. Section one of the indemnification provision of the contract provides in pertinent part:

"To the fullest extent permitted by law, [Gilbane] shall indemnify, defend . . . and hold harmless DCAM and their officers, agents, . . . employees, [and] representatives . . . from and against all claims, damages, losses and expenses, including but not limited to court costs and attorneys' fees, arising out of or resulting from the performance of the Work, including but not limited to those arising or resulting from: labor performed or furnished and/or materials used or employed in the performance of the Work; violations by [Gilbane] . . . of any Laws; violations of any provision of this Contract by [Gilbane] . . . ; injuries to any persons or damage to any property in

"In no event shall DCAM or [Ellenzweig Associates (Designer)] be liable to the [CMAR] except for obligations expressly assumed by DCAM or the Designer under the Contract Documents," does not constitute a specific or express disclaimer of the implied warranty of the designer's plans and specifications.

connection with the Work; or any act, omission, or neglect of [Gilbane's] Personnel.^[8]

"[Gilbane] shall be obligated as provided above, regardless of whether or not such claims, damages, losses and/or expenses, are caused in whole or in part by the actions or inactions of a party indemnified hereunder. . . ."

Section two of the provision, titled "Designer's Actions," states:

"The obligations of [Gilbane] under Section [one] above shall not extend to the liability of the Designer, its agents or employees, arising out of (i) the preparation or approval of maps, Drawings, opinions, reports, surveys[,] Change Orders, designs or Specifications, or (ii) the giving of or the failure to give directions or instructions by the Designer, its agents or employees provided such giving or failure to give is the primary cause of the injury or damage."

The judge concluded that the indemnification provision required Gilbane to indemnify DCAM for "any liability" that might be imposed upon DCAM as a result of Gilbane's own third-

⁸ "Work" is a defined term in the contract:

"The Work consists of all the work identified in the Contract Documents. The Work comprises the completed construction required by the Contract Documents and includes all labor, tools, materials, supplies, equipment, permits, approvals, paperwork, calculations, submittals, and certificates necessary to develop, construct and complete the Work in accordance with all Laws, and all construction and other services required to be supervised, overseen, performed or furnished by [Gilbane] or that the Contract Documents require [Gilbane] to cause to be supervised, overseen, performed or furnished. [Gilbane] shall provide and perform for the Contract Price all of the duties and obligations set forth in the Contract Documents."

party claims. Thus, according to the judge, Gilbane's third-party complaint created an impermissible "circuitry of obligation," because Gilbane may not seek damages from DCAM when DCAM would have a right to be indemnified by Gilbane for those same damages. Furthermore, the judge rejected Gilbane's contention that section two excluded any obligation to indemnify, defend, and hold harmless DCAM for design defects, and found that section two only excused Gilbane from the obligation to indemnify, defend, and hold harmless the Designer, as one of DCAM's "agents [or] representatives."

The judge's reasoning was premised on his conclusion that Gilbane did not have the benefit of the implied warranty of the designer's plans and specifications. We instead interpret the indemnification provision in light of the implied warranty and conclude that, although broad in scope, the indemnification provision does not cover claims, damages, losses, and expenses arising out of the Designer's work, as opposed to Gilbane's design-related duties. Here, the contract states that the indemnification provision is triggered by claims, damages, losses, and expenses "arising out of or resulting from the performance of the Work," which we interpret to mean Gilbane's performance. See Bruner & O'Connor, Jr., supra at § 10:58 ("Nearly every indemnity provision contains language limiting the indemnitor's obligation to loss occasioned in some way or

another to the activities or work of the indemnitor").⁹ As part of its "Work" under the contract, Gilbane is responsible for "construction and other services required to be supervised [and] overseen," but Gilbane does not "supervise" or "oversee" the Designer's work. See Department of Community Affairs v. Massachusetts State College Bldg. Auth., 378 Mass. 418, 430 (1979), quoting Fluet v. McCabe, 299 Mass. 173, 179 (1938) ("to supervise" means "to oversee, to have oversight of, to superintend the execution of or performance of [a thing], or the movements or work of [a person]; to inspect with authority; to inspect and direct the work of others"). Rather, the contract provides that Gilbane's recommendations are subject to the review and approval of DCAM and that the Designer has authority over the interpretation of the designs. Gilbane reviews and consults regarding the designs, but the contract expressly declares that Gilbane does not assume the "Designer's responsibility for design." In light of the implied warranty of the designer's plans and specifications, and the contractual definition of "Work," we conclude that claims, damages, losses, and expenses that arise out of the Designer's performance, as

⁹ In its brief, DCAM states that the contract "requires Gilbane to defend DCAM from all claims "arising out of the performance of Gilbane's work." Moreover, DCAM describes the contractual definition of "Work" as defining "'Work' for which Gilbane is responsible."

opposed to Gilbane's design consultation and review performance, do not trigger the indemnification provision.¹⁰

Furthermore, we conclude that section two of the indemnification provision exempts Gilbane of its obligations to defend, indemnify, or hold harmless both the Designer and DCAM for additional costs caused by design defects. The judge interpreted this section as exempting only the Designer from Gilbane's duties under section one of the indemnification provision. But where the owner, through the implied warranty, is legally responsible for the designer's plans and specifications, and where the CMAR has a contractual relationship with the owner but not the designer, the apparent purpose of this provision can be wholly accomplished only by interpreting it to include both the designer and the owner who impliedly warrants the designer's plans and specifications. See Key Constr., Inc. v. State Auto Prop. & Cas. Ins. Co., 551 F. Supp. 2d 1266, 1268, 1270-1271 & n.2 (D. Kan. 2008) (applying Oklahoma law, subcontractor not required to indemnify contractor for losses or injuries caused by architect's plans and specifications, where indemnification provision stated that

¹⁰ Because Gilbane has plausibly alleged that the claims of Coghlin, for which it seeks recovery from DCAM, arise out of design defects attributable to the Designer, and are therefore outside of the triggering language of the indemnification provision, we do not address DCAM's circuitry of obligation argument.

subcontractor's obligations "shall not extend to the liability of the Architect"). If we were to interpret section two as the judge did, the Designer effectively would be indemnified by Gilbane for increased labor and material costs arising from defects in its design, even though the contract expressly declares that Gilbane has no duty to indemnify the Designer. The reason is that Gilbane can only sue DCAM, not the Designer, to recover these additional costs under its contract, and would be barred from doing so under the judge's interpretation, thus negating any possibility that the Designer would need to defend a third-party claim brought by DCAM to recover these damages. Therefore, we conclude that Gilbane is exempt from its obligations to indemnify, defend, and hold harmless DCAM for damages caused by defects in the Designer's plans and specifications that constitute a breach of the implied warranty, and that the indemnification provision does not bar Gilbane's third-party complaint.

4. Third-party complaint. DCAM contends that, even if it may be found liable to Gilbane for defects in the Designer's work, the third-party complaint was properly dismissed, because Gilbane may only bring a claim against DCAM after Coghlin wins a judgment against Gilbane based at least in part on a finding of "liability" attributable to the Designer's work. According to DCAM, Gilbane's filing of a third-party complaint against DCAM

is inconsistent with its duty to defend DCAM under the indemnification provision. It contends that compliance with that provision requires Gilbane first to defend against Coghlin's claims to final resolution. Pursuant to this argument, only if Gilbane is found liable to Coghlin, and that liability is attributable to the Designer's work, may Gilbane pursue a claim against DCAM.

Rule 14 of the Massachusetts Rules of Civil Procedure, as amended, 385 Mass. 1216 (1982), seeks to avoid the duplicative efforts that DCAM's interpretation would dictate, by allowing a defendant to file a third-party complaint against a party "who is or may be liable" to the defendant "for all or part of the plaintiff's claim against him." "Because Rule 14 expressly allows what is in effect anticipatory litigation, a third-party defendant may not and should not object on the grounds that the defendant's liability has not yet been established." Reporters' Notes to Rule 14, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 335 (LexisNexis 2014-2015). Where the claims alleged do not trigger the indemnification provision, and a two-step procedure would run counter to the purposes of rule 14 and common practice in construction law, we shall not interpret the duty to defend or any other obligation in the indemnification provision to require Gilbane to forebear from filing suit against DCAM until a judgment has been obtained in the Coghlin

suit, unless there is express language in the contract requiring these two steps. See Sweet & Schneier, supra at § 2.06 ("In construction disputes, it is common for the defendant to assert a counterclaim against the plaintiff or to make claims against third parties arising from the same transaction"). See, e.g., Campbell Hardware, Inc. v. R.W. Granger & Sons, 401 Mass. 278, 279 (1987) (public construction dispute in which subcontractor sued general contractor for additional work performed and general contractor brought third-party action against public owner). There is no such express language in the contract between DCAM and Gilbane. Therefore, we decline to prevent Gilbane from bringing its third-party complaint.

Conclusion. Because Gilbane's third-party complaint against DCAM plausibly states a claim for relief, we vacate the allowance of the motion to dismiss and the entry of judgment, and we remand the case to the Superior Court for further proceedings consistent with this opinion.¹¹

So ordered.

¹¹ We acknowledge that Gilbane has requested that we take judicial notice of the contract between DCAM and the Designer as a public record, even though it was neither referenced in nor appended to the pleadings. In light of our reversal of the dismissal in this case, we need not decide the issue.

Appendix A

URS Corp. v. Transpo Group, Inc. United States District Court for the Western District of Washington

Case Docket Number C14-00860

Parties Involved

Plaintiff (Petitioner): URS Corporation, A Nevada Corporation

Defendant (Respondent): Transpo Group, Inc., A Washington Corporation

Project Specification (Name, Type, Contract Amount, Location)

Name: Unnamed Project

Type: Building Construction/ Signage Contract

Contract Amount: Suing for \$1.5 M

Location: Seattle, Washington

Court/Case Location and Date

Court Location: United States District Court for the Western District of Washington at Seattle

Decided: June 19, 2015

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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8)
9 URS CORPORATION, a Nevada) CASE NO. C14-00860 RSM
corporation,)
10)
11 Plaintiff,) ORDER GRANTING IN PART AND
12) DENYING IN PART DEFENDANT'S
v.) MOTION FOR SUMMARY JUDGMENT
13)
14 TRANSPO GROUP, INC., a Washington)
corporation,)
15)
Defendant.)

16 I. INTRODUCTION

17 This matter comes before the Court on Defendant Transpo Group Inc.'s ("Transpo")
18 Motion for Summary Judgment. Dkt. #21. Transpo seeks an Order from this Court applying
19 the terms of the contract at issue and ruling as a matter of law that:
20

21 (a) pursuant to the terms of the agreements between Transpo Group and
22 URS, URS is barred from recovering incidental, consequential, or special
23 damages from Transpo Group; [and] (b) pursuant to Transpo's Teaming
24 Agreement, when estimating sign structure lengths Transpo Group was
25 entitled to rely on the accuracy and completeness of roadway cross-sections
applicable to the cross-sections.

26 Dkt. #21 at 2. Plaintiff URS Corporation ("URS") opposes the motion, arguing that questions
27 of fact preclude summary judgment and that Transpo's interpretations of certain contract
28 provisions are incorrect and unreasonable. Dkt. #23 at 1-3. Having reviewed the record before

1 it, and neither party having requested oral argument on this motion, the Court now GRANTS
2 IN PART and DENIES IN PART Transpo's motion for the reasons set forth below.

3 II. BACKGROUND

4 The essential background of this case has previously been set forth by the Court. Dkt.
5 #17. This case arises from construction related to a local road project, namely, the I-405 N.E.
6 6th to I-5 Widening and Express Toll Lanes Design-Build Project ("the Project"). Dkt. #6 at
7 *Counterclaim* ¶ 1. The design-builder for the Project is non-party Flatiron Constructors, Inc.
8 ("Flatiron"). Dkt. #3-1 at ¶ 6. "Design build" or "design construct" is a term used in the
9 construction industry to denote a method of construction whereby a contractor or subcontractor
10 provides both the design and the construction of a particular system in the project. Plaintiff,
11 URS, is the lead-designer on the Project pursuant to a Subcontract for Design Services with
12 Flatiron. Dkt. #3-1 at ¶ 7. Defendant, Transpo, is a member of a design-build team established
13 to construct the Project. Dkt. #6 at *Counterclaim* ¶ 2. Transpo contracted with URS to provide
14 services relating to the design of sign panels for the Project. *Id.* Flatiron contends damages
15 have been incurred as the result of the failure of certain sign structures, intended to hold the
16 sign panels designed by Transpo, to meet certain Forward Compatibility requirements imposed
17 by the Project Contract Documents. *Id.* at ¶ 3. As a result, Flatiron has withheld payments
18 otherwise due to URS, and URS has withheld payments otherwise due Transpo, for the purpose
19 of covering alleged damages. *Id.* at ¶ 4.

20 On June 3, 2014, URS filed a Complaint in King County Superior Court, alleging
21 breach of contract, negligence and indemnity claims against Transpo, and seeking damages of
22 not less than \$1,474,155.77. Dkt. #1. Transpo then removed the action to this Court. *Id.*
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26
27
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1 In response to the Complaint, Transpo also asserted a declaratory action counterclaim,
2 which has since been dismissed as duplicative of its affirmative defenses. *See* Dkt. #17.
3 Transpo now moves for summary judgment, seeking to limit certain damages from potential
4 recovery by URS.

5 III. DISCUSSION

6 A. Standard of Review

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8 Summary judgment is proper where “the movant shows that there is no genuine dispute
9 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
10 P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202
11 (1986). In ruling on summary judgment, a court does “not weigh the evidence or determine the
12 truth of the matter but only determine[s] whether there is a genuine issue for trial.” *Crane v.*
13 *Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *FDIC v. O’Melveny & Myers*, 969 F.2d
14 744, 747 (9th Cir. 1992), *rev’d on other grounds*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d
15 67 (1994)). Material facts are those which might affect the outcome of the suit under
16 governing law. *Anderson*, 477 U.S. at 248.

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19 The Court must draw all reasonable inferences in favor of the non-moving party. *See*
20 *O’Melveny & Myers*, 969 F.2d at 747. However, the nonmoving party must “make a sufficient
21 showing on an essential element of [its] case with respect to which she has the burden of proof”
22 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91
23 L. Ed. 2d 265 (1986). “If a party fails to properly support an assertion of fact or fails to
24 properly address another party’s assertion of fact as required by Rule 56(c), the [C]ourt may . . .
25 consider the fact undisputed for purposes of the motion” or the Court may “grant summary
26 judgment if the motion and supporting materials . . . show that the movant is entitled to it.”
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1 Fed. R. Civ. P. 56(e)(2)-(3). Whether to consider the fact undisputed for the purposes of the
2 motion is at the Court's discretion and the Court "may choose not to consider the fact as
3 undisputed, particularly if the [C]ourt knows of record materials that should be grounds for
4 genuine dispute." Fed. R. Civ. P. 56, advisory committee note of 2010. On the other hand,
5 "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be
6 insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."
7 *Anderson*, 477 U.S. at 252.

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9 In the context of a contract dispute, interpretation of a contract is a matter of law
10 properly decided on summary judgment. *United States v. King Features Entm't, Inc.*, 843 F.2d
11 394, 398 (9th Cir. 1988). Both parties appear to agree that Washington State law applies to this
12 diversity action. *See* Dkts. #21 at 10 and #23 at 11 fn. 1; *see also* Dkt. #22, Ex. 1 at Article 13
13 and Ex. 16, Attachment C at Section 17.4.

14 15 **B. Contracts Between URS and Transpo**

16 *1. Applicable Contracts*

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18 As an initial matter, this Court must address which contract(s) may govern this dispute.
19 Transpo argues that the Teaming Agreement is applicable to this case. However, URS argues
20 that the Teaming Agreement was superseded by the Master Subcontractor Agreement between
21 URS and Transpo once the Project was awarded to Flatiron. The Court agrees with Transpo to
22 the extent it argues the Teaming Agreement liability provisions may be applicable to this
23 dispute.
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25 The Teaming Agreement between URS and Transpo specifically states:

26 In no event shall any party be liable to the others for any indirect,
27 incidental, special or consequential damages (including, but not limited to,
28 loss of profits, loss of interest or other financing charges, or loss of use),
whether arising in contract, tort (including negligence) or pursuant to other

1 legal theory, with respect to its decision regarding any of the foregoing
2 issues. The Parties hereto agree that the provisions of this Agreement,
3 which, by their nature, are intended to survive termination or expiration of
4 this Agreement, including, but not limited to, releases or limitations on
5 liability or remedies, **shall survive and continue in full force and effect**
6 **following any such termination or expiration.** To the fullest extent
7 permitted by law, limitations on liability set forth in this Agreement are
8 intended to apply in the event of default, negligence or strict liability on the
9 part of the Party whose liability is limited or released.

10 Dkt. #22, Ex. 1 at ¶ 16 (emphasis added).

11 While URS relies on the integration clause contained in the Master Subcontractor
12 Agreement, that clause provides that the Subcontract “supersedes all prior or contemporaneous
13 communications, representations, or agreements . . . with respect to its subject matter.” Dkt.
14 #22, Ex. 17 at ¶ 18.11 (emphasis added). The subject matter of the Master Subcontractor
15 Agreement is not the same as the subject matter of the Teaming Agreement. Indeed, as
16 Transpo highlights, the Teaming Agreement involved the development and execution of a
17 pursuit plan with URS, while the Master Subcontractor Agreement involves the provision of
18 services post-award of the contract with the State of Washington as set forth by future work
19 orders, which services will be “in furtherance of work undertaken by URS under a prime
20 contract (“Prime Contract”) between URS and its client (“Client”).” *Id.* at Section 1, ¶¶ 1.1-
21 1.3 and Section 2, ¶ 2.1. According to URS, the relevant work order described the scope of
22 Transpo’s services as “all professional supervisory and technical personnel, services,
23 equipment, materials and supplies necessary to prepare and provide the traffic signal, signing,
24 pavement marking and MOT design for the project.” Dkt. #23 at 7 (citing Dkt. #24, Ex. 12 at
25 Attachment A).

26 As other federal district courts have explained, “a subsequent contract not pertaining to
27 ‘precisely the same subject matter’ will not supersede an earlier contract unless the subsequent
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1 contract has definitive language indicating it revokes, cancels or supersedes that specific prior
2 contract.” See *CreditSights, Inc. v. Ciasullo*, 2007 U.S. Dist. LEXIS 25850, *18 (S.D.N.Y.
3 Mar. 29, 2007). While *CreditSights* relied on New York State law, Washington law is similar
4 in that it requires *inter alia* a subsequent contract to cover the same subject matter in order to
5 rescind the prior contract. See *In re Estate of Kazmark*, 2012 Wn. App. LEXIS 2077, *13 (Div.
6 III Sept. 6, 2012) (“Generally, contracts are in conflict if the legal effect of a subsequent
7 contract rescinds an earlier contract and becomes its substitute, making the subsequent contract
8 the only agreement between the parties covering the same subject matter.”); *Clark v Clark*,
9 1999 Wn. App. LEXIS 390, *15-16 (Div. I Mar. 1 1999) (“Generally, when two contracts are
10 in conflict, the legal effect of a subsequent contract made by the same parties and covering the
11 same subject matter, but containing inconsistent terms, ‘is to rescind the earlier contract. It
12 becomes a substitute therefor, and is the only agreement between the parties upon the subject.’”
13 (citation omitted)). Likewise, other states in the Ninth Circuit require the same. See *Adelman*
14 *v. Christy*, 90 F. Supp.2d 1034, 1039 (D. Ariz. 2000) (“A contract will be considered as having
15 been rescinded by the substitution of another and subsequent contract relating to the same
16 subject-matter, where it appears to have been the intention of the parties, that the later contract
17 should supersede the first one. . . . Where the entire subject-matter is covered, and there is
18 nothing on the face of the second agreement to show that it is intended to be supplemental to
19 the original agreement, it supersedes and rescinds the original, not as a question of intention,
20 but by operation of law, as a result of steps taken by the parties. . . .” (citations omitted)).
21 Accordingly, this Court finds that the Teaming Agreement provisions survive and may be
22 applicable to the instant dispute because it does not cover the same subject matter as the Master
23 Subcontractor Agreement.
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2. Applicable Provisions

The Court now turns to Transpo's argument that certain damages have been waived by URS. As noted above, Transpo argues that the terms of the Teaming Agreement preclude URS from recovering incidental, consequential, or special damages from Transpo. Transpo relies on the limit of liability contained in the Teaming Agreement between Flatiron and URS, which provides:

In no event shall any Party be liable to the others for any indirect, incidental, special or consequential damages (including, but not limited to, loss of profits, loss of interest or other financing charges, or loss of use), whether arising in contract, tort (including negligence) or pursuant to other legal theory, with respect to its decision concerning any of the foregoing issues.

Dkt. #22, Ex. 1 at ¶16. Transpo further relies on the "flow-down" provision in the Teaming Agreement between it and URS, which provides that the covenants and agreements of the Flatiron-URS Agreement "flow down" to Transpo through the URS-Transpo Teaming Agreement. *Id.* at 1, Preamble. Further, the URS-Transpo Teaming Agreement contained an additional limitation on damages:

In no event shall Team Members be liable to each other for any loss of profits; any incidental, special, exemplary, or consequential damages in connection with any claims or demands brought against the other.

Dkt. #22, Ex. 1 at Article 11.

URS appears to acknowledge that the covenant in the URS-Flatiron Teaming Agreement would be applicable, but argues that Transpo has failed to prove that the covenant actually flows down:

Nonetheless, the Flatiron/URS Prime Contract states in ¶16 that "neither contractor nor designer may be liable to the other for lost profit, indirect damages or for consequential damages of any sort." *Steckmest Decl.*, Ex. 10. That language only applies to the URS/Transpo relationship if it flows down through the Transpo Subcontract, of which Transpo has not made the

1 requisite showing. Because Transpo bears the burden of proof on summary
2 judgment, URS does not concede that the Prime Contract waiver provision
3 flows down to Transpo, and Transpo's motion regarding the consequential
4 damages waiver should be denied.

5 Dkt. #23 at 12. The Court rejects this argument.

6 The Court has already determined that the Teaming Agreement between URS and
7 Transpo survives the Master Subcontractor Agreement. The plain language of the Teaming
8 Agreement states:

9 The covenants and agreements specified in the soon-to-be-fully-executed
10 Teaming Agreement between Flatiron and URS, (**Exhibit A**), will
11 flowdown, and will be in addition to, the Teaming Agreement herein. . . .

12 Dkt. #22, Ex. 1 at 1, Preamble (bold in original). Washington courts regularly enforce such
13 provisions:

14 The subcontracts incorporate by reference the prime contract documents. In
15 general, "[i]f the parties to a contract clearly and unequivocally incorporate
16 by reference into their contract some other document, that document
17 becomes part of their contract." Incorporation by reference and flow-down
18 provisions in prime contracts that bind subcontractors are enforced by
19 courts "in a wide variety of contexts." Here, the "flow-down" provisions in
20 the subcontracts plainly provide that if Hunt Kiewit is liable to PFD because
21 of the subcontractors' defective workmanship or materials, then the
22 subcontractors are liable to Hunt Kiewit to the same extent.

23 *Wash. State Major League Baseball Stadium Pub. Facilities Dist. V. Huber, Hunt & Nichols-*
24 *Kiewit Constr. Co.*, 176 Wn.2d 502, 517-18, 296 P.3d 821, 829 (2013) (citations omitted).

25 As a result, this Court finds that the limitation on liability precluding the recovery of
26 consequential and indirect damages between the parties "flows down" to the agreement
27 between URS and Transpo. "This follows from (a) the 'flow-down' provisions in the
28 subcontracts stating that the subcontractors assume the same obligations and responsibilities to
the general contractor that the general contractor assumes to the owner and (b) the provisions
that incorporate the applicable parts of the prime contract into the subcontracts." *Id.* at 527.

1 3. *Consequential/Incidental Damages*

2 This Court now turns to what damages may be precluded, and finds that this question
3 cannot be resolved at this stage of the proceedings. In this case, liability has not yet been
4 established, as further discussed below, and damages have not yet been identified and/or
5 calculated. Further, Transpo does not specifically identify which damages it believes are
6 precluded as incidental or consequential. Instead, they speak of consequential damages in
7 general terms. Accordingly, at this time, the Court finds genuine issues of fact preclude
8 summary judgment as to specific damages and declines to determine which, if any, damages
9 are actually precluded from recovery. Therefore, the Court also declines to dismiss URS's
10 claim for damages in its entirety.
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12 **C. Reliance on URS Cross-Sections**

13 Finally, Transpo asks this Court to determine that, when estimating sign structure
14 lengths, Transpo was entitled to rely on the accuracy and completeness of roadway cross-
15 sections provided to it by URS, including any forward compatibility requirements applicable to
16 the cross-sections. Specifically, Transpo argues that it was responsible for designing signs, not
17 sign structures, and therefore it was entitled to rely on reference data provided to it in the form
18 of cross-sections prepared by URS, which failed to include forward compatibility requirements.
19 Dkt. #21 at 14-17. In other words, Transpo asks the Court to determine liability, arguing that
20 “no reasonable factfinder could conclude Transpo Group is liable to URS for damages arising
21 out of the sign structure dimensional errors.” Dkt. #21 at 16-17. The Court finds that genuine
22 issues of material fact preclude summary judgment on this claim.
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26 Transpo acknowledges that it was responsible for completing the signing matrix, and
27 used information provided by URS through its cross-sections. Transpo also acknowledges that
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1 the cross-sections did not reflect forward compatibility requirements, although it does not
2 discuss whether it recognized that at the time of receipt or whether anyone from Transpo
3 reviewed the RFP to determine whether such information was reflected prior to completing the
4 sign matrix. Likewise, Transpo acknowledges that after creating the signage matrix, it offered
5 to “estimate” the lengths of sign structures based upon the information contained in the cross-
6 sections it received by URS. Dkt. #22, Ex. 8 at 1 and #24, Ex. 6. However, Transpo argues
7 that URS has no evidence that Transpo agreed to include forward compatibility requirements
8 into those estimations. The Court disagrees.

10 URS presents the contract itself, which indicates that Transpo was in charge of the
11 following aspects of the design: Transpo Lead: MOT [Maintenance of
12 Traffic]/Staging/Signal/Signing/Striping; Transpo Support: ITS/Lighting/Electrical Service.
13 Signing requirements of which Transpo was the identified lead under the URS/Transpo
14 Teaming Agreement were contained in Section 2.19 of the RFP. Dkt. #24, Exs. 2 and 3. That
15 section originally required the signing plans to be Forward Compatible with “Future Active
16 Traffic Management projects, which will place new structures at approximately ½ mile
17 spacings.” *Id.*, Ex. 3. Section 2.19 of the RFP was amended on November 3, 2011 to add the
18 specific requirement that the overhead sign structures be forward compatible. *Id.*, Ex.8 at ¶6.
19 Significantly, that requirement was not yet made a part of the RFP when URS transmitted the
20 sign structures to Transpo on October 28, 2011. This raises material questions about the
21 various responsibilities of each member of the Team, and when such responsibilities arose.

25 In addition, the parties appear to dispute what the term “signing” includes, and whether
26 that included responsibility for the sign foundations. Transpo indicates that URS was
27 responsible for sign foundations, but acknowledges that its own signing requirements were
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1 included in Section 2.19 of the RFP. Interestingly, Section 2.19 references some requirements
2 for sign structure foundations. See Dkt. #22, Ex.2 at ¶ 2.19.4.2.1. As a result, for all of these
3 reasons, the Court declines to grant summary judgment in favor of Transpo on liability.

4 **IV. CONCLUSION**

5 Having reviewed the relevant pleadings and the remainder of the record, the Court
6 hereby finds and ORDERS that Defendant's Motion for Summary Judgment (Dkt. #21) is
7 GRANTED IN PART and DENIED IN PART as detailed above.
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10 DATED this 30th day of January 2015.

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13 RICARDO S. MARTINEZ
14 UNITED STATES DISTRICT JUDGE
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