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EASIER ENFORCEMENT

SJC Ruling Brings Law in Line With Industry Practices

Decision Injects Common Sense into Breach of Contract Analysis for Construction Agreements

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SPECIAL TO BANKER & TRADESMAN

Since at least 1940, parties to construction contracts have been held to high standard of showing "complete and strict performance of all [of the construction contract's] terms." This has historically turned otherwise straightforward disputes over payment into battles where the parties could point to any performance failure as a basis to avoid liability. It also impacted construction projects in the context of termination where any breach of a construction contract was a default that could lead to termination. The result was that owners and upstream contractors had significant leverage to enforce their contracts.

That rule changed on June 13 when the commonwealth's Supreme Judicial Court issued its decision in *G4S Technology LLC v. Massachusetts Technology Park Corporation*, in which a design-builder on a publicly funded broadband installation project had its breach of contract claims dismissed due to evidence of having submitted false payment certifications. The SJC expressly overruled its prior decisions and instituted a new rule that more accurately reflects the realities of an industry that is infinitely more complex than it was in the 1940s.

Instead of requiring complete and strict performance of each and every provision of the contract, parties will now be required to show that they strictly complied with the terms relating to the design and construction itself. Breaches of other non-construction-related provisions, like payment certifications, submissions of required manuals, display of project logos or owner field office conditions – among myriad other requirements embedded in typical construction contracts – will be analyzed under the more practical "materiality rule" that applies to virtually every contract claim.

Thus claimants will no longer face the risk of losing their ability to enforce the terms of their contract for minor violations of their agreements. Of course, if a breach of a non-construction-related provision is found to be material, its remains a disqualifying breach of contract.

A More Deliberative Process

As is often the case when the law catches up with the practical realities of industry, there have been signs that the law was moving in this direction over the past few years.

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A Massachusetts Superior Court awarded over $5 million to a subcontractor that executed false lien waivers on a private power plant project in 2012. Another Superior Court ruling in 2015 denied summary judgment due to disputes of material fact regarding the materiality of a highway site work subcontractor not providing a surety bond.

In an age where public construction contracts routinely weigh in at more than 1,000 pages and the standard American Institute of Architect's general conditions form is 38 pages of 10-point, single-spaced text, this change in the law is long overdue.

The problem for members of the construction industry, however, was that the prior decisions that applied the materiality standard to construction disputes did not require that the next court faced with a similar situation apply a similar approach. Now, with the *G4S* decision, developers and contractors have predictability with respect to how courts will approach violations of non-construction provisions in their contracts.

Owners and upstream contractors will now be incentivized to engage in a more deliberative process before denying a downstream party its rights under a construction contract because that same process will be applied by the courts. This process will involve weighing the impact of the alleged breach of contract, whether a declaration of breach of contract would cause the other party to suffer a forfeiture, whether the breaching party can fix their alleged breach, and other factors outline by the court in *G4S*.

Getting parties to construction contracts to more productively engage with each other over disputes has been a construction industry goal for years, as evidenced by the adoption of BIM, LEAN construction principles, Integrated Project Delivery and the widespread acceptance of the design-build delivery method. In the *G4S* decision, the law is catching up to industry by encouraging parties to fix issues between themselves rather than leveraging severe penalties like non-payment or termination to force the other party into performance.

For some developers and contractors, this represents a new way of doing business. For most, it brings the law into harmony with a more efficient way of doing business. ◀

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