COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2013-1300-D

COGHLIN ELECTRICAL CONTRACTORS, INC.,

Plaintiff,

vs.

GILBANE BUILDING COMPANY

and

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA,

Defendants.

MEMORANDUM OF DECISION AND ORDER ON THIRD-PARTY DEFENDANT DIVISION OF CAPITAL ASSET MANAGEMENT'S MOTION TO DISMISS GILBANE BUILDING COMPANY'S THIRD-PARTY COMPLAINT

Introduction

This is an action that raises, on what the Court believes is a first-impression basis, a question concerning the proper interpretation of a "Construction Manager at Risk" ("CMR") public construction contract.[1] As implied in its name, a CMR contract shifts most of the design review, management responsibility and financial risks associated with the underlying public construction project -- including the risk of cost overruns within the original project scope -- to the designated "Construction Manager" in return for a "Guaranteed Maximum

[1] This Court and the parties have identified only one prior reported Massachusetts decision, *Associated Subcontractors of Mass., Inc. v. University of Mass. Bldg. Auth.*, 442 Mass. 159 (2004), that references CMR contracts. That case describes CMR contracts generally, but does not interpret or apply such an agreement. *Id.* at 162 n.6 (describing CMR agreements as "characterized by a contract between an owner and a construction manager pursuant to which the construction manager assumes responsibility for handling all of the details of the project for a guaranteed maximum price above which the owner is not liable for payment.").

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Price." Massachusetts General Laws c. 149A, §§ 1-13, authorizing the use of CMR contracts as an "alternative delivery method" on public construction projects, first became law in 2004.

The public construction project at issue in this case is the new, 320-bed, adult and adolescent state psychiatric facility built for the Massachusetts Department of Mental Health in Worcester, Massachusetts between 2009 and 2012 (the "DMH Project" or "Project").[2] Defendant Gilbane Building Company ("Gilbane") served as the designated Construction Manager on the DMH Project pursuant to a written CMR contract with third-party defendant Massachusetts Division of Capital Asset Management ("DCAM"). Plaintiff Coghlin Electrical Contractors, Inc. ("Coghlin") was the primary electrical subcontractor on the Project. Coghlin commenced this action in July 2013 seeking compensation from Gilbane for the additional costs that Coghlin claims to have incurred as a result of Gilbane's purported mismanagement of the DMH Project, including its mishandling of certain design changes to some of the wall and ceiling areas. Complaint and Jury Demand, dated July 17, 2013 ("Complaint"), at 1-2, 13. Gilbane responded, in part, by asserting third-party claims against DCAM for breach of contract, contribution and indemnification on the ground that DCAM, as the contractual "Owner" of the DMH Project, allegedly is legally responsible for any "damages caused by design changes and design errors" that Gilbane ultimately may be required to pay Coghlin. Gilbane Building Company's Opposition to Division of Capital Asset Management's Motion to Dismiss, dated April 18, 2014 ("Gilbane Opp."), at 2.

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[2] The facts set forth in this Memorandum and Order are taken from allegations contained in Coghlin's Complaint and from the text of the parties' CMR contract itself, which is referenced in the Complaint and included (without exhibits) in the parties' motion papers. See Complaint, ¶ 12; DCAM's Motion to Dismiss, Exhibits 1 and 2. DCAM's submission of copies of the parties' underlying agreement in conjunction with its Motion to Dismiss does not require the Court to convert the motion to one for summary judgment. See *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004) ("Where, as here, the plaintiff had notice of these documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment, as required by Mass. R. Civ. P. 12(b)(6).").

Before the Court is DCAM's Motion to Dismiss Gilbane's Third-Party Complaint, filed on April 30, 2014 ("DCAM's Motion to Dismiss"). The novel question presented by DCAM's Motion to Dismiss is whether the terms of the parties' CMR contract -- which impose upon Gilbane, as Construction Manager, extensive planning and oversight duties, as well as a broad obligation to "indemnify, defend and hold harmless" DCAM from and against, *inter alia*, "all claims, damages, losses and expenses ... arising out of or resulting from the performance of the Work," including without limitation "those arising or resulting from: labor performed or furnished and/or materials used or employed in the performance of the work" -- trump long-standing Massachusetts common law principles to the effect that "where one party furnishes plans and specifications for a contractor to follow in a construction job ... the party furnishing such plans impliedly warrants their sufficiency for the purpose intended." *Alpert v. Commonwealth*, 357 Mass. 306, 320 (1970).

The Court conducted a lengthy hearing on DCAM's Motion to Dismiss Gilbane's Third-Party Complaint on June 19, 2014. Upon careful consideration of the written submissions and oral arguments of the parties, as well as the terms of their underlying agreements, DCAM's Motion to Dismiss will be **ALLOWED** for the reasons set forth below.

Additional Factual Background

The CMR agreement for the DMH Project consists of two parts: (1) a twenty-three page "Commonwealth of Massachusetts Construction Contract for Construction Manager at Risk Services - Owner-Construction Manager Agreement" (the "Main Contract"); and (2) a fifty-nine page "Commonwealth of Massachusetts Construction Manager at Risk Contract – General Conditions of the Contract" (the "General Conditions" or, together with the Main

Contract, the "CMR Contract"). DCAM's Motion to Dismiss, Exhibits 1 and 2. The General Conditions are incorporated by reference in the Main Contract. Main Contract, Article 2.1.

DCAM and Gilbane are the only parties to the CMR Contract. Gilbane is defined in the CMR Contract as the "Construction Manager or CM," and Ellenzweig Associates, Inc., a Massachusetts-based architectural firm, is defined as the project "Designer." Main Contract, pp. 1-2. Gilbane's obligations as Construction Manager on the DMH Project are spelled out in considerable detail in the CMR Contract. They include, without limitation: (1) responsibility for pre-construction and construction planning (*id.*, Article 5.1); (2) responsibility for the creation and maintenance of a "Baseline Critical Path Method (CPM) Schedule" for the Project (*id.*, Article 5.2.2); (3) responsibility for the development of "detailed estimates of the Construction Cost of the Project" (*id.*, Article 5.2.3); (4) responsibility for the selection and oversight of the various subcontractors required for the Project (*id.*, Article 5.2.7); (5) responsibility for obtaining "all governmental permits, user fees, approvals and licenses of any kind" necessary for the "construction, use and occupancy of the Project" (*id.*, Article 5.2.4); and (6) responsibility for "managing, coordinating, and supervising all aspects of the Work" as described in the contract documents (*id.*, Article 5.3.5).

In addition to overall responsibility for construction of the DMH Project, the CMR Contract gives Gilbane, as Construction Manager, extensive "Design Review" responsibilities. Article 5.2.1 of the Main Contract provides, in relevant part, that,

> [t]he CM [*i.e.*, Construction Manager] shall review, on a continuous basis, development of the Drawings, Specifications and other design documents produced by the Designer. The design reviews shall be performed with a group of Architects and Engineers, who are either employees of the CM or independent consultants under contract with the CM. Review of the

> documents is to discover inconsistencies, errors and omissions between and within design disciplines. The CM 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. Without limitation, the CM shall review the design documents for clarity, consistency, constructability, maintainability/operability and coordination among the trades, coordination between the specifications and drawings, compliance with M.G.L. c. 149A for procurement, installation and construction, and sequence of construction, including recommendations designed to minimize adverse affects [*sic*] of labor or material shortages.

The negotiated "Contract Price" for the DMH Project was $237,300,000, which DCAM agreed to "pay to the CM in current funds for the CM's proper performance of the Contract and completion of the Work."[3] Main Contract, Article 6.1. The CMR Contract further provides, however, that the "total payments to the CM (the Contract Price) shall not exceed the Guaranteed Maximum Price agreed to by the Parties, subject to authorized additions and deductions as provided in the Contract Documents."[4] *Id.* As if to drive home the "shall not exceed" point, Article II.6 of the General Conditions explicitly states,

> [t]he Contract Price constitutes full compensation to the CM for everything to be performed and furnished in connection with the Work and for all damages arising out of the performance of the Work for which DCAM is responsible, and constitutes the maximum compensation regardless of any difficulty incurred by the CM in connection with the Work or in consequence of any suspension or discontinuance of the Work.

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[3] The "Work" is defined in the General Conditions as "all of the work identified in the Contract Documents." General Conditions, p. 8.

[4] The "Guaranteed Maximum Price" is defined in the General Conditions as the same as the "Contract Price" (*i.e.*, approximately $237 million). General Conditions, p. 6.

The CMR Contract includes a mechanism to adjust Gilbane's compensation on the DMH Project in the event of "changes in the Work," but any adjustment first must be preceded by the issuance of a formal "Change Order or written directive" by DCAM. General Conditions, Article VII.1. If a particular Change Order or written directive would "cause a change in CM's cost" on the Project, then Gilbane was required to request an adjustment in the Contract Price "before commencement of the pertinent work or as soon as thereafter possible." *Id.*, Article VII.1(E). In the absence of an agreement between the DCAM and Gilbane on an appropriate price adjustment, if any, the CMR Contract gives DCAM the right to "unilaterally determine the costs attributable to the change and provide the CM with a written notice to that effect." *Id.*, Article VII.1(F).

Consistent with the CMR Contract's definition of the "Contract Price" as including "all damages arising out of the performance of the Work for which DCAM is responsible," Article XV of the General Conditions imposes a broad obligation on Gilbane, as Construction Manager, to "indemnify, defend ... and hold harmless DCAM and their officers, agents, divisions, agencies, employees, representatives, successors and assigns" 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 CM, any Subcontractor, or by any person directly or indirectly employed or used by any of them in the performance of the Work or anyone for whose acts any of them may be liable (CM, subcontractor and all such persons herein collectively called "CM's Personnel") of any Laws; violations of any provision of this Contract by CM or its subcontractors, suppliers or any other person or firm providing labor and/or materials for the work; injuries to any persons or

> damage to any property in connection with the Work; or any act, omission, or neglect of CM's Personnel.

General Conditions, Article XV.1. Article XV further states that Gilbane's indemnification and defense obligations apply "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." *Id.*

The CMR Contract for the DMH Project was executed by DCAM and Gilbane in October 2007. Main Contract, pp. 1, 22-23. Work on the Project commenced in the spring of 2009 and was substantially complete by the summer of 2012. While the DMH Project still was underway, Coghlin made a request to Gilbane for a multi-million dollar increase in the price of its electrical subcontract in order to cover Coghlin's increased project costs, which Coghlin asserts were caused by,

- Gilbane's failure to abide by the construction scheduling requirements in the contract documents;
- Gilbane's failure to properly manage and complete wall framing on the Project;
- Gilbane's failure to properly manage and complete ceiling framing on the Project;
- Gilbane's failure to properly coordinate the work of other subcontractors; and
- Gilbane's restriction of [Coghlin's] site access to the Project.

Complaint, pp. 1-2.

Gilbane eventually submitted a change order request to DCAM asking for an increase in the Contract Price to address Coghlin's claim. Gilbane's Opp. at 4. Gilbane's change order request was rejected by DCAM in June 2012 on the ground that it constitutes an "inefficiency

claim which the [CMR] Contract does not allow." *Id.*, p. 5. When additional negotiations and mediation efforts among the parties proved fruitless, Coghlin filed this action in July 2013 seeking compensation for its increased project costs from Gilbane.

Gilbane filed its Third-Party Complaint against DCAM in December 2013. Gilbane's pleadings and motion papers assert that DCAM is required to indemnify Gilbane for any damages that Coghlin may recover in this action because DCAM allegedly is responsible, under Massachusetts common law, for any increased costs in the DMH Projet resulting from "design changes and design errors and omissions." Gilbane Opp. at 8-10, 12-14. Gilbane also argues, secondarily, that the terms of the CMR Contract impose no indemnification obligation on Gilbane in the circumstances presented. *Id.* at 14.

DCAM's Motion to Dismiss Gilbane's third-party claims was filed in April 2014. It is that Motion to Dismiss that gives rise to this Memorandum and Order.

Discussion

I. The Relevant Standards.

In evaluating the sufficiency of a party's complaint (including a defendant's third-party complaint) pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any inferences that reasonably can be drawn in the claimant's favor. *White v. Blue Cross & Blue Shield of Mass., Inc.*, 442 Mass. 64, 65 n.2 (2004). A complaint should not be dismissed unless it is certain that the claimant can prove no combination of facts that would support a claim entitling the claimant to relief. *Eigerman v. Putnam Investments, Inc.*, 450 Mass. 281, 286 (2007).

At the same time, the interpretation of an unambiguous contract is a "pure question of law" that is appropriately resolved by the court on a dispositive motion. *Daley v. J.F. White Contracting Co.*, 347 Mass. 285, 288 (1964) (citations omitted). Where the wording of a contract is plain on its face, the court is bound to enforce the contract according to its unambiguous terms. *Lumber Mutual Ins. Co. v. Zoltek Corp.*, 419 Mass. 704, 707 (1995).

II. The Differences Between Massachusetts Common Law Concerning the Allocation of Risk in Construction Contracts and the Express Terms of the Parties' CMR Contract for the DMH Project.

Gilbane asserts that, notwithstanding the express allegations of Coghlin's Complaint (see page 7, *supra*), any increased costs that Coghlin may have incurred on the DMH Project actually resulted from "design changes and design errors and omissions" in the plans and specifications for the Project "that are unrelated to any wrongdoing on Gilbane's part." Gilbane Opp. at 12. On this basis, Gilbane argues that DCAM has a legal obligation to indemnify Gilbane for whatever damages Coghlin may recover because, under Massachusetts common law, a party who "furnishes plans and specifications for a contractor to follow in a construction job ... impliedly warrants their sufficiency for the purpose intended." *Id.* at 9 (quoting *Alpert*, 357 Mass. at 320).

Gilbane is correct 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, e.g., *Alpert*, *supra*; see also *M.L. Shalloo, Inc. v. Ricciardi & Sons Constr., Inc.*, 348 Mass. 682, 687-688 (1965); *Richardson Elec. Co., Inc. v. Peter Francese & Son, Inc.*, 21 Mass. App. Ct. 47, 52 (1985); *John F. Miller Co., Inc. v.*

George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 498 (1979). As explained by recognized commentators on Massachusetts construction law,

> [a]s between the owner and contractor in a traditional design-bid-build project delivery method, the owner is in the best position to ensure that the plans and specifications prepared by its design professionals are sufficient and adequate. At common law, 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. If there is a question or dispute whether the plans or specifications cover a certain element of the work, the Massachusetts appeals court has applied a test regarding the obviousness of the omission, error or discrepancy in the plans and specifications. If a contractor who examines the specifications "reasonably conscientiously, might miss a requirement which is out of sequence or ineptly expressed, the burden of the error falls on the issuer of the specifications, usually the owner...."

J. Lewin & C.E. Schaub, Jr., Construction Law, Mass. Practice vol. 57, § 7:3, at 452 (2012) ("Mass. Practice") (quoting *John F. Miller Co.* and *Richardson Elec.*, *supra*).

What makes this case different is that the CMR Contract that DCAM and Gilbane entered into in 2007 for purposes of constructing the DMH Project does not utilize a "traditional design-bid-build project delivery method." Rather, it employs what the Massachusetts Legislature (among others) appropriately has recognized is an "alternative delivery method." See M.G.L. c. 149A (titled, "Public Construction Alternative Delivery Methods"). Unlike the traditional design-bid-build construction method,

> the CMR project delivery method allows a public entity to enter into the contract with the general contractor before the design is completed. Typically, the public entity enters into the construction contract at the beginning of or early in the design phase and most industry experts agree that the earlier in the design process that the construction contract is entered into, the better for the project. The purpose of entering into a contract with the CMR contractor during the design phase of the project is to involve the CMR contractor in project planning and to benefit

> from the CMR contractor's expertise during the design phase or the project. The CMR contractor typically provides a variety of pre-construction and construction management services during the design phase, which can include, cost estimation, consultation on the design of the project, preparation of bid packages, scheduling, cost control as well as subsequently acting as the general contractor during the construction phase of the project. Significantly, the selection of the CMR contractor is different from the selection of a contractor on a design-bid-build project in that the selection of the CMR contractor focuses on fees and qualifications and the CMR contractor it is not selected simply on the basis of the lowest price.

Mass. Practice, § 17:40, at 1194.

The allocation of project cost overruns under a CMR agreement also differs from the allocation methodology typically employed on a traditional design-bid-build project. Because the accurate estimation of project costs during the early design stage of a project can present a significant challenge,

> a CMR contract is customarily amended during or at the end of the design phase to include a guaranteed maximum price ("GMP") for all of the services to be provided by the CMR contractor under the CMR contract. Although the awarding authority has the flexibility to engage a different general contractor for the construction phase of the project (in the event that the authority and the CMR contractor cannot agree on price), the CMR contractor usually continues on as the contractor during construction phase of the project. The GMP includes the cost of the construction work, the general conditions costs plus an agreed-upon fee. The GMP is the maximum amount, absent change orders, which the public agency will pay to the CMR contractor for the building project and the CMR contractor will be responsible for all costs which exceed the GMP (absent change orders).

Id. at 1194-1195.

Thus, the relationship between the Owner and the Construction Manager under a CMR contract is not the same as the relationship between Owner and General Contractor under a traditional design-bid-build arrangement. A Construction Manager working under a CMR

contract takes on additional duties and responsibilities for the project, including, in the case of the DMH Project, an ongoing duty to "review the design documents for clarity, consistency, constructability, maintainability/operability and coordination among the trades, coordination between the specifications and drawings...." Main Contract, Article 5.2.1. With these added duties and responsibilities comes additional financial exposure for the Construction Manager in the event that something goes wrong, including, again using the DMH Project as an example, a broad obligation to indemnify and defend the Owner 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," regardless of whether "such claims, damages, losses and/or expenses, are caused in whole or in part by the actions or inactions of a party indemnified hereunder."[5] General Conditions, Article XV.1.

Given the material changes in the roles and responsibilities voluntarily undertaken by the parties in a modern CMR contracts, the protections that Massachusetts courts historically have extended to construction contractors in the traditional design-bid-build context, as espoused in *Alpert*, *M.L. Shalloo, John F. Miller Co.* and the other cases cited above, simply are inapplicable to such contracts. See *Swan v. Justices of Superior Court*, 222 Mass. 542, 545 (1916) ("Every opinion must be read in light of the facts then presented. Statements of rules as applicable to that case cannot be taken out of their context and stretched to different circumstances not before the mind of the court.").

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[5] It is worth noting that the typical CMR contract is not "all stick and no carrot" for the Construction Manager. In addition to the significant pre-construction and construction fees usually received by the Construction Manager, M.G.L. c. 149A, § 7(a) permits a CMR contract on a public construction project in Massachusetts to include "an incentive clause" for the Construction Manager tied to defined "performance objectives," provided that the amount of the incentive clause does not "exceed[] 1 percent of the estimated construction cost." The Court is unable to determine, from this record, whether Gilbane was eligible to receive a contractual incentive bonus on the DMH Project.

III. Applying the Terms of the Parties' CMR Contract for the DMH Project.

The defense and indemnification obligations that Gilbane owes DCAM under the parties' CMR Contract for the DMH Project are clear and unambiguous. They require Gilbane, as previously noted, to indemnify, defend and hold DCAM harmless "from and against all claims, damages, losses and expenses ... arising out of or resulting from the performance of the Work," which, in this instance, would include any liability that might be imposed upon DCAM as a result of Gilbane's own third-party claims in this action. General Conditions, Article XV.1.

Gilbane continues to assert, however, that DCAM has no right to indemnification under the parties' CMR Contract for two reasons, neither of which the Court finds persuasive.

First, Gilbane argues that DCAM is contractually bound to issue a change order and associated price adjustment for any change in the "scope" of the DMH Project, and the design changes in the walls and ceilings of the Project that, at least according to Gilbane, caused Coghlin's cost overruns, were a "change in scope." Gilbane Opp. at 10-11. Gilbane provides no contractual support for its argument that DCAM's obligation to issue a change order and/or price adjustment on the DMH Project depends upon the "scope" of the change, and the Court has found none. Even assuming Gilbane's argument is correct, however, it is clear (and Gilbane's counel acknowledged at oral argument) that the DMH Project, as initially designed and planned, included walls and ceilings, thereby rendering those items undeniably within the original "scope" of the Project.

Second, Gilbane asserts that the exception to its defense and indemnification obligations included in Article XV.2 of the General Conditions applies in this case. Article XV.2, titled "Designer's Actions," states,

> [t]he obligations of the CM under Section 1 above [*i.e.*, Article XV.1] 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 to employees provided such giving or failure to give is the primary cause of the injury or damage.

Gilbane interprets Article XV.2 as precluding any contractual obligation on its part to defend or indemnify DCAM with respect to claims involving "design changes and design errors and omissions." Gilbane Opp. at 3-4.

Gilbane misconstrues the nature and extent of the exception contained in Article XV.2. Nothing in the language of that exception diminishes Gilbane's responsibility to indemnify and defend DCAM for anything. Rather, Article XV.2 merely limits Gilbane's obligation to indemnify and defend the *Designer*, as one of DCAM's "agents [or] representatives" on the DMH Project, from any "liability" that may be imposed upon the Designer on account of its own conduct.[6] Because the no claims have been asserted, and no liability assessed, against the Designer in this proceeding, the exception contained in Article XV.2 has no relevance.

Gilbane's duty under the CMR Contract to indemnify and defend DCAM with respect to Gilbane's own third-party claims creates an impermissible "circuity of obligation." See, e.g., *National Hydro Systems v. M.A. Mortenson Co.*, 529 N.W.2d 690, 693 (Minn. 1995) ("A circuity of obligation is created when, by virtue of pre-existing indemnity agreements or obligations, the plaintiff is in effect obligated to indemnify the defendant for claims including the plaintiff's own claim."). In such circumstances, the "plaintiff's right to recover damages

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[6] Counsel for Gilbane acknowledged at oral argument that Article XV.1 of the General Conditions, as written, obligates Gilbane to indemnify and defend the Designer of the DMH Project as an "agent[]" or "representative[]" of DCAM.

from the defendant is offset by the plaintiff's obligation to repay the same damages to the defendant." *Id.*; see also *Harmon v. Weston*, 215 Mass. 242, 248 (1913) ("[T]o avoid circuity of action[,] equity will protect those who by an enforced payment will become at once entitled by subrogation to indemnity from one who is to receive that payment."). Having established that Gilbane cannot recover from DCAM on its third-party claims as a matter of law, those claims will be dismissed pursuant to Mass. R. Civ. P. 12(b)(6).

Order

For the foregoing reasons, it is hereby **ORDERED** that Third-Party Defendant Massachusetts Division of Capital Asset Management's Motion to Dismiss Gilbane Building Company's Third-Party Complaint (Docket No. 9.0) is **ALLOWED**, and Gilbane's third-party claims against DCAM are **DISMISSED** in their entirety, with prejudice.

Brian A. Davis
Associate Justice of the Superior Court

Date: June 23, 2014