



## **Robert T. Ferguson, Jr.**

Partner

Boston

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### **Practices**

Construction & Public Contracts, Compliance, Crisis Response & Management, Dispute Resolution, Government & Internal Investigations, Procurement, Risk Management & Surety, Transactions, Insurance Coverage

### **Education**

Villanova University School of Law, J.D., 2007

*Villanova Sports and Entertainment Law Journal*

*Villanova Journal of Catholic Social Thought*

*J. Willard O'Brien American Inn of Court*

College of the Holy Cross, B.A., 2004

St. Sebastian's School, 2000

### **About**

Bob handles complex cases involving construction, commercial/business disputes and insurance recovery. In addition to civil practice in both state and federal court, including frequent practice in the Massachusetts Business Litigation Session, Bob also has significant experience relating to arbitration, mediation and civil appeals.

Bob has served clients in both the private and public construction contexts, including cases arising out of Boston's Central Artery/Tunnel Project. Bob's construction experience

includes contract, surety, and tort-based litigation, mechanic's lien claims, and bid protest disputes. Bob has successfully obtained pre-judgment attachments and injunctive/equitable relief for construction clients. In addition, Bob played an important role on behalf of the Perini/Kiewit/Cashman joint venture in extensive Big Dig litigation which resulted in a final payment of \$88.7 Million by MassDOT in December 2014.

A significant facet of Bob's practice involves litigation of business disputes, such as disputes arising out of commercial leases and real estate transactions, joint ventures/partnerships, professional services agreements, business torts, and insurance coverage disputes. As a general litigator, Bob has also served clients in landlord-tenant, professional malpractice, personal injury and property law cases.

Bob is a contributing researcher, writer, and editor of West's Massachusetts Practice Series volume on Construction Law as well as the USLAW Network, Inc.'s Massachusetts Construction Law Compendium. Bob is also a regular contributor to construction industry periodicals, including Utility Contractors' Association of New England, Inc's (UCANE) Construction Outlook Magazine. Bob played a significant role authoring the amicus brief for AGC Massachusetts in the appeal of *Coghlin v. Gilbane* – a first-of-its kind Massachusetts case involving the Construction Manager-at-Risk delivery method under Chapter 149A.

## **Credentials**

### **Work Experience**

Hinckley Allen

- Partner (2017-Present)
- Construction Technology Liaison Group (2016-Present)
- Associate (2007-2016)
- Associate Liaison Committee, Original Member (2013-2016)
- Summer Associate (2005-2006)

The Honorable Denis P. Cohen, Philadelphia Court of Common Pleas

- Student Externship (2006)

### **Honors & Awards**

- Super Lawyers, Rising Stars, Massachusetts (2009)
- Villanova Sports and Entertainment Law Journal, Distinguished Service Award/Staff Writer of the Year (2007)

### **Charitable & Civic Involvement**

- Holy Cross Club of Boston
- Town of Weston, MA, Permanent Building Committee

- Villanova Law Alumni Association, New England Chapter

## **Professional Affiliations**

- American Bar Association Forum on Construction Law & Young Lawyers Division
- Associated General Contractors (AGC) Massachusetts Young Contractors Professional Institute (2014)
- Boston Bar Association
- Federal Bar Association
- Utility Contractors' Association of New England, Inc. (UCANE)

## **Bar Memberships**

- Massachusetts, 2007
- Pennsylvania, 2007
- United States Court of Appeals, First Circuit, 2015
- United States Court of Federal Claims, 2016
- United States District Court, District of Massachusetts, 2008

## **Experience**

# **Representative Cases**

### **Insurance Coverage Dispute – Mediation**

Bob successfully represented a client on a significant insurance claim arising under a specialized insurance policy. Bob obtained a 7-figure settlement at mediation without having to file suit.

### **Insurance Coverage Dispute – Settlement**

Bob was a critical part of a Hinckley Allen team representing a client on an insurance claim for business income losses arising out of a roof collapse. The team obtained a very favorable settlement without significant litigation.

### **Bid Protest Dispute – Bid Unit of the Massachusetts Attorney General's Office**

Bob successfully represented a contractor in a bid protest before the Bid Unit of the Massachusetts Attorney General's Office. Although the contractor-client submitted the low bid for the project, the awarding authority rejected the bid. The awarding authority asserted past experience as grounds for the rejection. Bob filed a protest and the Attorney General's Office concluded that the awarding authority had wrongfully rejected the bid. It was an extremely rare instance in which the Attorney General's Office upheld a bid protest in a bidder responsibility case.

### **Bid Protest Dispute – Bid Unit of the Massachusetts Attorney General's Office**

Bob filed a protest on behalf of a contractor-client who had submitted the second-low bid

for a project. The low bidder had certified in its bid that it was a minority-owned business enterprise when, in fact, it was not. The Bid Unit of the Attorney General's Office upheld the bid protest, which involved the implications of a recently amended Massachusetts statute.

### **Bid Protest Dispute – Bid Unit of the Massachusetts Attorney General's Office and Massachusetts Superior Court**

Bob successfully defended a contractor client in a bid protest action involving the late submission of MBE/WBE bid forms. Bob successfully defeated the bid protest in a proceeding before the Bid Unit of the Attorney General, and again in Massachusetts Superior Court.

### **Review of an Engineer's Decision under M.G.L. c. 30, s. 39J – Business Litigation Session, Massachusetts Superior Court**

Bob played an important role representing the Perini/Kiewit/Cashman joint venture in extensive Big Dig litigation against MassDOT, including the joint venture's challenge of a series of MassDOT engineer's decisions concerning the arbitrability of claims. Bob successfully briefed these issues in the Business Litigation Session of the Suffolk Superior Court. One of only a handful of Massachusetts decisions to vacate engineer decisions under the Massachusetts statute, the Court vacated MassDOT's engineer decisions and reinstated a series of arbitration awards exceeding \$50 Million. The Court's 103-page decision – one of the longest known decisions of the BLS – paved the way towards an \$88.7 final payment by MassDOT in December 2014.

### **Construction Manager-at-Risk – Massachusetts Supreme Judicial Court**

Bob played a significant role authoring the amicus brief for AGC Massachusetts in the *Coghlin v. Gilbane* appeal – a first-of-its kind Massachusetts case involving the Construction Manager-at-Risk delivery method under Chapter 149A. The issues in the case included important questions regarding whether the CM-at-risk should bear ultimate design responsibility. The SJC issued a decision in September 2015 favorable to the interests of AGC Massachusetts and CMs-at-risk.

### **Subject Matter Jurisdiction – Federal Court, District of Massachusetts**

Bob was part of the team representing the winning bidder for an MBTA contract to build new subway cars. When the disappointed bidder filed a bid protest action in federal court, Hinckley Allen moved to dismiss. Bob played a significant role authoring the briefs seeking dismissal on subject matter jurisdiction grounds, which the federal court granted.

### **Injunctive Relief/Bid Protest – Business Litigation Session, Massachusetts Superior Court**

Bob was part of the team representing the winning bidder for an MBTA contract to build new subway cars. The disappointed bidder filed an action in federal court, and Bob played a significant role authoring the briefs which successfully dismissed the federal court

action. When the disappointed bidder filed a new action in state court, Bob played a significant role authoring the briefs opposing the disappointed bidder's request for injunctive relief. The case resolved after the court denied the request for injunctive relief.

### **Real Property/Adverse Possession – Massachusetts Superior Court**

Bob served as first-chair counsel representing defendants in a real property case. The plaintiff claimed rights to pass over a "paper road" running through the defendants' property. Bob settled the case on the eve of trial, obtaining a better result for the clients than if they had won at trial.

### **Breach of Contract – Federal Court, District of Massachusetts**

Bob served as second-chair trial counsel representing an investment company in a week-long federal Jury trial in Boston. The dispute arose out of the original owner-developer's claim for an "earnout payment" under a purchase and sale agreement for a newly constructed residential living complex. The jury returned a verdict in favor of the investment company and also awarded damages in favor of the insurance company. The court subsequently awarded the investment company costs and attorneys' fees.

### **Big Dig Litigation – Arbitration**

Bob was part of the arbitration team representing the Perini/Kiewit/Cashman joint venture with respect to its claims against MassDOT arising out of the Big Dig. In the fall of 2014, the parties arbitrated the issue of interest on prior arbitration awards issued in favor of the joint venture. The arbitrators awarded the joint venture an additional \$38 Million in interest, an award which ultimately led to an \$88.7 settlement of the case.

### **Pre-Judgment Security/Bank Account Attachment – Massachusetts Superior Court**

Bob successfully represented a pipeline contractor in litigation to recover sums due and owing under a bill of sale. Bob obtained a court order freezing/attaching the defendant's bank accounts and subsequently settled the case.

### **Summary Discharge of Mechanics' Lien – Massachusetts Superior Court**

Bob successfully represented a contractor client against a mechanic's lien claim. When the lien claimant refused to drop the lien claim, Bob commenced an action for the summary discharge of the lien under the Massachusetts statute. Within 8 days of filing the action, Bob had obtained a Court Order dissolving and discharging the lien.

### **Site Contractor Claim – Binding Mediation**

Bob successfully represented a site contractor in connection with a lack of access and suspension claim arising out of a municipal roadway rehabilitation project. The parties participated in a novel "high-low" binding mediation – meaning that if the parties could not reach an agreement, the mediator would impose a settlement amount within a bracketed range. When the parties reached an impasse, the mediator imposed a favorable settlement for the site contractor, which the municipality paid. This innovative form of mediation worked well for this case, ensuring payment and avoiding costly litigation.

## **Nuisance Claim – Mediation**

Bob successfully represented a construction project owner at the mediation of an abutter's nuisance claim. The abutter claimed to have been damaged as a result of construction activities at the construction site. The case settled at mediation with the project owner contributing nothing towards the settlement.

## **Business Torts – Business Litigation Session, Massachusetts Superior Court**

Bob played a significant role authoring summary judgment papers on behalf of a project owner in a Business Litigation Session case arising out of a project at Logan Airport. A subcontractor asserted tort claims – including defamation and international interference with contract – against the project owner. Through summary judgment, Hinckley Allen successfully extracted the project owner from the litigation, which also involved other project participants.

## **Latest News & Insight**

### **Publications**

Massachusetts Supreme Judicial Court Addresses Prevailing Wage Act Issues, June 28, 2019

The Bid Unit v. The Superior Court, May 30, 2019

The Problem of Bad Actors in Construction, March 1, 2019

The Bid Unit of MA Issues Its First Significant Bid Protest Decision of 2019, February 28, 2019

Massachusetts High Court Bars Chapter 93A Claim as Untimely, September 5, 2018

Minding Your Manners: Personality Issues and Bidder Responsibility, August 3, 2018

The SJC Weighs in on Termination for Convenience, June 5, 2018

The Bid Unit of the Massachusetts Attorney General's Office Releases Decision on Bidder Responsibility, May 3, 2018

The Bid Unit of the Massachusetts Attorney General's Office Issues a Bid Protest Decision Concerning MassDOT's Mobilization Cap, February 1, 2018

Minimum Experience Requirements, January 3, 2018

Legal Corner: Minimum Experience Requirements, January 1, 2018

Massachusetts Supreme Judicial Court Sets Limits on an Insurer's Duty to Defend, November 14, 2017

The Bid Unit of the Massachusetts Attorney General's Office Rejects Mandatory Minimum Unit Price Requirements in MassDOT Procurement, October 3, 2017

Post-Bid Acceptance of WBE/WBE Forms, September 1, 2017

Bid Protest Decision Invalidates Mandatory Minimum Unit Prices, August 16, 2017

Post-Bid Change Orders, August 1, 2017

False Claims Act Liability: Deviation from Project Specifications, May 5, 2017

False Claims Act Liability: Deviation from Project Specifications, March 8, 2017

MBE/WBE Bid Protest Issues, March 4, 2017

Front-Loaded and Inflated Pay Apps, March 1, 2017

Collaborative Procurements: Traps for the Unwary?, January 7, 2017

The First Circuit Rules on FAAAA Preemption of the Massachusetts Independent Contractor Law as Applied to Motor Carriers, March 18, 2016

Massachusetts High Court Rules That Parties Cannot Agree to Change the Scope of Judicial Review of Arbitration Awards, March 9, 2016

The First Circuit Rules on FAAAA Preemption of the Massachusetts Independent Contractor Law as Applied to Motor Carriers, March 4, 2016

MA SJC Limits Court Options for Major Development Permit Appeals, February 12, 2016

Massachusetts Attorney General's Bid Protest Unit Has No Jurisdiction to Oversee Compliance With Affirmative Action Requirements, February 2, 2016

Federal District Court in Boston Dismisses Claims Based on Plaintiff's Non-Disclosures in Bankruptcy, January 25, 2016

Broad Arbitration Agreement Not Enough, January 14, 2016

MA SJC Holds AAA Arbitrators Cannot Award Attorneys' Fees Pursuant to M.G.L. c. 231, s. 6F, January 7, 2016

The Sun Is Setting on the Safe Harbor Provision of the New Earned Sick Time Law, December 10, 2015

Massachusetts' Highest Court Vacates Coghlin v. Gilbane: The Construction Manager at Risk Method Does Not Eliminate the Owner's Implied Warranty of Plans and Specifications, December 10, 2015

## **Firm News**

Hinckley Allen Promotes Conrad, Ferguson, Hershman and Lemke, January 23, 2017

## **Events**

Lorman Educational Services Seminar: Legal Issues in Green and Sustainable Construction, October 17, 2008

Lorman Educational Services Seminar: Legal Issues in Green and Sustainable Construction, October 7, 2008



Albany Boston Chicago Hartford Manchester New York Providence