

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
DOCKET #: 2007-10802

COMMONWEALTH

V.

POWERS FASTENERS, INC.

DEFERRED PROSECUTION AGREEMENT

The Office of the Attorney General of the Commonwealth of Massachusetts and Powers Fasteners, Inc. ("Powers") hereby enter into this Deferred Prosecution Agreement (the "Agreement").

I. The Criminal Indictment

The Commonwealth conducted a criminal investigation into matters relating to the collapse of a portion of the I-90 Connector Tunnel ("Connector Tunnel"). The criminal violation charged against Powers as it relates to this investigation is described in the Indictment, *Commonwealth of Massachusetts v. Powers Fasteners, Inc.*, SUCR Indictment No. 2007-10802 ("Indictment"), a copy of which is attached as Exhibit A, and the Commonwealth's allegations in support of that indictment are described in the Statement of the Case, and the Amended Bill of Particulars, copies of which are attached hereto as Exhibit B. Powers entered a not guilty plea, and has filed with the Court a

Motion to Dismiss the Indictment contesting the allegations described in the Statement of the Case and Amended Bill of Particulars.

II. Statement of Facts

The facts below are set out for the purposes of this Agreement only, and shall not constitute admissions by any party for any purpose whatsoever.

1. The Central Artery/Tunnel Project (the "CA/T Project" or the "Big Dig") is a major public transportation infrastructure project built through downtown Boston, Massachusetts. The CA/T Project was planned, designed, and constructed over a period of more than twenty years from 1985 to the present.

2. The Connector Tunnel was constructed as part of the CA/T Project, to connect Interstate Route 90 (the Massachusetts Turnpike) to the depressed artery leading to the Ted Williams Tunnel and Logan Airport. Modern Continental Corporation Inc. ("MCC") contracted with the Massachusetts Highway Department ("MHD") to construct the Connector Tunnel ceiling, which was suspended from the Connector Tunnel's concrete roof by a system that included steel anchors inserted into the roof and affixed by an epoxy adhesive. Installation of the Connector Tunnel ceiling system was commenced, and substantially completed, in 1999.

3. Bechtel/Parsons Brinckerhoff ("B/PB") contracted with MHD to act as the Management Consultant to the MHD and the Massachusetts Turnpike Authority ("MTA") on the CA/T Project. B/PB was responsible for, among other items, managing the design and construction of the Project. B/PB was responsible for overseeing and monitoring the construction contractors' compliance with the construction contract.

4. On July 10, 2006, Angel and Milena Del Valle were traveling eastbound in the left lane of the Connector Tunnel to the Ted Williams Tunnel in Boston, Massachusetts when a section of the concrete suspended ceiling in the Connector Tunnel collapsed and struck their vehicle. Milena Del Valle, who was occupying the front passenger seat, was killed, and Angel Del Valle was injured.

5. The concrete panels in this section of the suspended ceiling were held in place by steel frames which were supported by adjustable hanger rods connected to roof brackets. The brackets were attached to the Connector Tunnel roof by stainless steel bolts that were held in place by an epoxy adhesive. This system was used in the easternmost section of all three bores of the Connector Tunnel and intermittently throughout the remainder of the Connector Tunnel.

6. Gannett Fleming ("Gannett") contracted with MHD to act as the designer responsible for the final design of the suspended ceiling system in the Connector Tunnel. MCC contracted with MHD and was the contractor responsible for constructing the suspended ceiling system in the Connector Tunnel. Newman Renner Colony ("NRC"), contracted with MCC to provide components of the suspended ceiling system, including the epoxy anchors.

7. The Commonwealth contends that both Gannett and MCC were dependent upon the availability of accurate and complete representations regarding the epoxy from NRC and NRC's supplier, Powers. Powers contends that as the design professionals and sophisticated users of construction materials, Gannett and MCC had an independent responsibility to investigate all characteristics of the epoxy which they considered relevant to the design and construction of the Connector Tunnel, including but not limited

to conducting independent testing; reading and heeding all available published materials concerning the epoxy; and, upon consultation with NRC and/or Powers, permitting those entities to perform on-site testing and evaluation as requested. Powers further contends that it took reasonable steps to provide NRC, Gannett and MCC with accurate and complete representations regarding the epoxy, and further, upon consultation, Powers requested permission to conduct on-site testing, which permission was denied by MCC.

8. The Commonwealth contends that the epoxy that was used to suspend the ceiling was Power-Fast, Fast Set (item ## 8402 and 8422), a product marketed by Powers and sometimes labeled as NRC-1000 Gold, item # 8431 (herein collectively referred to as "Fast Set"). Powers also sold an epoxy under the name Power-Fast, Standard Set ("Standard Set").

9. Gannett's design for the suspended ceiling for the eastern-most section of the Connector Tunnel was finalized in October 1998. The specifications called for the use of a chemical adhesive type anchor system.

10. Before making a required submission to Gannett and B/PB for their approval of the chemical adhesive type anchor system, MCC received from Powers a draft report prepared for the International Conference of Building Officials ("ICBO"). The report stated that Standard Set epoxy was approved by ICBO for use for long-term dead loads such as the Connector Tunnel's suspended ceiling, but that Fast Set was approved only for short-term loads such as those resulting from intermittent but not sustained forces. MCC included this report as part of its required submission to Gannett and B/PB. Powers contends that prior to the approval of the Power-Fast epoxy anchors for use in suspending the Connector Tunnel ceiling, Powers disclosed to numerous

entities responsible for the design, construction, materials, and safety of the Connector Tunnel either the fact that Fast Set had failed the creep test, or the ICBO limitation of Fast Set with respect to sustained loads, or both.

11. Powers' 1997 Design Manual used for the Connector Tunnel ceiling distinguished Fast Set from Standard Set with respect to attributes like gel and curing times, but did not state any limitation of Fast Set with respect to sustained loads.

12. In the fall of 1999, representatives from B/PB and MCC observed five locations where epoxy anchors used to hold the suspended ceiling in place had migrated or displaced from the roof of the Connector Tunnel approximately one month after they were first installed. The failed anchors caused B/PB to issue a Deficiency Report ("DR-1") to MCC.

13. B/PB instructed MCC to conduct a physical inspection of the anchors. Powers representatives met with MCC and B/PB onsite and observed the anchor displacement. Powers did not offer any conclusions why the anchors were failing, but did offer potential explanations and, in response to a request from MCC, offered a recommendation as to how to replace and retest the failed anchors.

14. The Commonwealth contends that in 1999, Powers knew that the Connector Tunnel contractor intended to use Power-Fast to anchor the Connector Tunnel suspended ceiling and was aware that the Fast Set formulation had failed "creep testing" under applicable industry standards. The Commonwealth contends that Powers understood that Fast Set was unsuitable for sustained loads. The Commonwealth further contends that when Project officials noted anchor displacement in the Connector Tunnel ceiling in 1999 and asked Powers for an explanation, Powers knew that either Fast Set or

Standard Set was used to secure the anchors; knew that there was a likelihood that Fast Set was used to secure the anchors and either ignored or failed to confirm that fact. The Commonwealth further contends that Powers recklessly misled Project officials into adopting an inadequate remedy for failed ceiling anchors that Powers employees observed during a 1999 inspection of the suspended ceiling. Powers contends that it believed that Standard Set was intended to be used and believed that it was used for the suspended ceiling.

15. The National Transportation Safety Board (“NTSB”) conducted an investigation into the Accident and concluded that the epoxy sold by NRC to MCC was the Fast Set epoxy, manufactured by Sika Corporation and sold by Powers to NRC. The NTSB further determined that the use of the Fast Set epoxy was the cause of the ceiling collapse, because that formulation had poor “creep resistance,” that is, it was not capable of sustaining the long-term loads inherent in the suspended ceiling design.

III. Compliance Agreement

Powers has adopted a Compliance Agreement which sets forth certain standards of conduct to protect public safety and to promote corporate integrity. (Attached hereto as Exhibit C) The Compliance Agreement is a material term of this Agreement.

IV. Deferral of Prosecution

In consideration of Powers’ entry into this Agreement and its commitment to comply with all of the terms of the Compliance Agreement incorporated into this Agreement, the Attorney General, as a condition of this Agreement, will forthwith enter a nolle prosequi of the Indictment pursuant to Mass.R.Crim.P. 16(a) upon a certification by Powers that Powers has met its obligations under Paragraphs 2-6 of the Compliance

Agreement, which certification will be made within 120 days or less of Powers' execution of this Agreement. The Indictment shall be reinstated only if within three years of the entry of the nolle prosequi, Powers knowingly and intentionally breaches a substantial and material term of the Compliance Agreement, which breach has or may adversely affect public safety, and which Powers fails to correct within ten (10) business days after notice from the Commonwealth. Upon a good faith determination by the Attorney General that such an uncured breach has occurred, the Attorney General may file the Indictment in Suffolk Superior Court and it shall have the same effect as if the nolle prosequi had not been entered. In the event of re-filing of the Indictment, Powers expressly waives all rights to challenge the re-filing of the Indictment under any statute of limitations, all rights to make any constitutional, statutory or other claim concerning pre-indictment delay, and all rights it may have to challenge the re-filing of the Indictment based on any alleged violation of Powers' due process rights and any and all rights under *Commonwealth v. Miranda*, 419 Mass. 1 (1993). Furthermore, all time between the entry of the nolle prosequi and re-filing of the Indictment shall be excluded from consideration of any speedy trial claim. Provided, however, that notwithstanding any provision contained herein, following the re-filing of the Indictment, Powers shall have the right to move to dismiss the Indictment on the ground that it was re-filed in violation of the terms of this Agreement, in addition to the rights and defenses set forth below.

Powers' entry into this Agreement does not constitute a waiver of its right to pursue any existing defense to the Indictment including but not limited to its presently pending Motion to Dismiss in the event that the Indictment is re-filed, or to otherwise contest the Indictment to such extent as it may currently do so. No additional rights shall

be created by the re-filing of the Indictment. This Agreement and any actions taken by Powers pursuant hereto are solely for resolution of a pending and contested criminal charge and cannot be used for any purpose in any civil, criminal, or administrative proceeding except and only to the extent required for purposes of enforcing the Agreement.

V. Other Terms

It is understood that this Agreement is binding on the AG but specifically does not bind any other federal, state or municipal agencies, and any other federal, state or municipal licensing, or regulatory authorities.

This Agreement sets forth all the terms of the Agreement between Powers and the AG. No modifications or additions to this Agreement shall be valid unless they are in writing and signed by the AG and Powers' attorneys, and a duly authorized representative of Powers Fasteners, Inc.

Powers' entry into this Agreement, and all waivers by Powers of rights under this Agreement, are knowing and voluntary and in express reliance on advice of counsel.

Powers does hereby bind itself to this Agreement and all of its terms and conditions by its undersigned attorney and Chief Executive Officer, pursuant to authority granted by its Board of Directors in the form of a Board Resolution (a copy of which is attached hereto as Exhibit D).

Consistent with the Commonwealth's obligations under G.L. 258B, §3, the Commonwealth has consulted with the family of the victim. The family has expressed their support for this resolution. See Letter to Attorney General Martha Coakley; March

5, 2008, and Statement on behalf of family; December 21, 2007 (copies of which are attached hereto as Exhibit E).

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COMMONWEALTH OF MASSACHUSETTS

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By its Chief Executive Officer,

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Dated: December 17, 2008

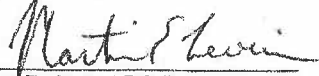
COMMONWEALTH OF MASSACHUSETTS

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