Cullen | Dykman

# $15.358 Million Settlement from the State of New York for GII Industries, Inc.

September 23, 2010

Cullen and Dykman successfully represented GII Industries, Inc. f/k/a Grace Industries, Inc. ("GII") on a breach of contract claim and related delay claim against the New York State Department of Transportation (the "NYSDOT" or the "State") which recently resulted in a $15.358 million settlement with the State.

## Background

On May 12, 1998 NYSDOT had awarded GII a contract for the reconstruction of Route 9A, the West Side Highway, in the amount of $43.74MM (the "Project"). Through the issuance of $6.90MM in Change Orders, the total contract amount was increased to approximately $50.64MM. During an early stage of construction on the Project, a differing site condition was discovered that caused a significant change in the character of the work because the Project's carefully planned, "as bid" construction sequence had to be completely restaged by GII, resulting in delays and damages. Despite the delays and severe cost overruns caused by the Project's restaging, GII diligently progressed the work to successfully complete the Project for the benefit of the public. After an unsuccessful attempt at settling its claim through the State's dispute resolution process, GII brought an action against the State for its damages in federal court.

## Trials and Settlement Agreement

After initiating litigation on GII's breach of contract and related delay claim, CandD successfully participated in a series of three mini-trials with the State in federal court that resulted in the multi-million dollar settlement for GII.

The first mini-trial addressed the enforceability of the State's standard administrative settlement agreement pursuant to which the State sought to cap or limit GII's damages for its claims. The mini-trial resulted in a decision by the federal court in GII's favor finding that the State's standard administrative settlement agreement lacked the necessary consideration to form a binding contract between the parties. See, Grace Industries, Inc. v. New York State Department of Transportation, 416 B.R. 84 (E.D.N.Y. 9/23/2010).

The second mini-trial addressed the appropriate construction cost methodology required to calculate GII's multi-million dollar disruption and delay claim. We successfully argued, among other things, that a change in construction methodology on the Project constituted a Significant Change in the Character of Work within the

meaning of the State's Standard Specifications. CandD's efforts resulted in a decision by the court (i) directing GII to calculate its claim for damages using the total cost method ("TCM") and (ii) awarding GII pre-judgment interest on its claims from May 8, 2003. See, Grace Industries, Inc. v. New York State Department of Transportation, 464 B.R. 557 (E.D.N.Y. 9/30/2011).

The third and final mini-trial between GII and the State concerned the practical application of the three components of TCM. At trial, GII presented evidence of the amount of profit and overhead to which it was entitled, proof of its actual costs incurred on the Project and an allocation of responsibility for any delays on the Project caused by GII in satisfaction of the elements of TCM.

After the third mini-trial had finished but prior to a decision being issued, the parties engaged in multiple rounds of negotiations and settlement discussions regarding GII's damage claim. The final result of the parties' efforts was a settlement agreement that provided for the payment of $15.358 million dollars to GII for its damage claim on the Project.

## Practices

- Financial Institutions and Lending
- Commercial Litigation
- Construction Litigation

## Industries

- Financial Institutions
- Construction

## Attorneys

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