



# Obtains Precedent-Making Decision after Trial Directing Use of Total Cost Method on a Public Construction Contract

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Cullen and Dykman Obtains Precedent-Making Decision after Trial Directing Use of Total Cost Method on a Public Construction Contract to Calculate Multi-Million Dollar Damages because of a Significant Change in the Character of the Work

Cullen and Dykman successfully represented GII Industries, Inc. f/k/a Grace Industries, Inc. (“Grace”) on the second trial phase of a contract disruption and delay claim against the New York State Department of Transportation (the “NYSDOT” or the “State”) resulting in a recent decision by the Honorable Carla Craig, Chief Bankruptcy Judge of the United States Bankruptcy Court for the Eastern District of New York (i) directing Grace to calculate its claim for damages using a total cost method and (ii) awarding Grace prejudgment interest from May 8, 2003.

On May 12, 1998 NYSDOT awarded Grace a contract for the reconstruction of Route 9A, the West Side Highway, in the amount of \$43.74MM. Through the issuance of \$6.90MM in Change Orders, the total contract amount was increased to approximately \$50.64MM.

After commencing litigation on Grace’s multi-million delay claim against the State, the Court held a trial to address the appropriate cost methodology to calculate Grace’s claim and whether or not Grace was entitled to prejudgment interest on its claim. After trial, the Court directed Grace to use the total cost method to calculate its damages because a Significant Change in the Character of the Work had occurred on the Project that materially altered the Project’s original staging and awarded Grace pre-judgment interest from May 8, 2003.

The Court’s decision is an advance in public construction contract law in New York because, among other reasons, contractors can now seek to apply the total cost method to calculate their delay damages based on a Significant Change In Character of the Work and not a Cardinal Change, especially where it can be demonstrated that MURK/force account recordkeeping required by the State Standard Specifications will not accurately “trace particular cost items to the delay.” The Court’s Decision is also noteworthy because it establishes that a material change in the methodology of construction on a public construction project is a Significant Change in the Character of Work pursuant to Section 109-16 of the State’s Standard Specifications.

The Cullen and Dykman trial team was lead by C. Nathan Dee, a partner in the firm's construction litigation group, with the assistance of Timothy Flanagan, Thomas Baylis, Jean Pierre Van Lent and Elizabeth Usinger.

## Practices

- Construction Litigation

## Industries

- Construction

## Attorneys

- Thomas Baylis
- Timothy J. Flanagan
- Elizabeth Usinger
- Jean-Pierre van Lent