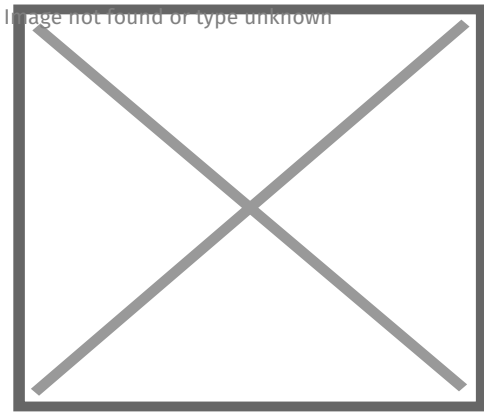




# Trial Directing Use of Total Cost Method on a Public Construction

October 5, 2011



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

The Firm 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 (“TCM”) and (ii) awarding Grace prejudgment interest from May 8, 2003.

On May 12, 1998, NYCDOT 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.

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 Grace, resulting in delays and damages.

After commencing litigation on Grace's multi-million dollar disruption and delay claim, the Firm promptly proposed and engaged NYSDOT in an alternative dispute resolution process which resulted in a Court-approved agreement to use a series of three trial phases to manage the highly complex issues in this dispute. The Firm successfully represented Grace in the first trial phase, addressing the enforceability of the State's standard settlement agreement, resulting in the Court setting aside NYSDOT's standard settlement agreement as unenforceable because it lacked consideration. In support of its finding, the Court noted that the State had acknowledged contractual liability for Grace's delay claim. See, Grace Industries, Inc. v. New York State Department of Transportation, 416 B.R. 84 (E.D.N.Y. 9/23/2010)

The second trial phase addressed the appropriate cost methodology, if any, to calculate Grace's damage claim and whether or not Grace was entitled to prejudgment interest on its contract claim. The Court's September 28, 2011 Decision directing Grace and the NYSDOT to calculate Grace's damages using a total cost method ("TCM") was based upon its findings that (i) a Significant Change in the Character of Work ("SCCW") had occurred on the Project within the meaning of the State's Standard Specifications because to complete the Project, Grace had to use means and methods that were fundamentally different from those set forth in the original "as bid" plans and specifications for the Project and (ii) the SCCW effectively destroyed the unit-price basis of the contract for purposes of accurately tracing or separating the costs of the work impacted by the SCCW from the unit-priced based costs of the original contract work. Finally, notwithstanding the State's arguments to the contrary, the Court awarded Grace prejudgment interest on its claim from May 8, 2003, pursuant to Section 110-01 of the Standard Specifications, which provide for interest if NYSDOT unjustifiably fails to make final payment within a certain time frame. The third trial phase will address the calculation of Grace's claim using TCM.

Equally important, the Court found that TCM was the appropriate cost methodology to use to calculate Grace's damages on the Project in the third trial phase because the severe and pervasive impact of the restaging on the Project and upon the unit prices of the items on the Contract made "tracing particular cost items to the delay" "prohibitively difficult or speculative". Under the circumstances and despite the State's argument that Grace was not entitled to any compensation for its damages because it had not kept daily MURK or force account records pursuant to the Standard Specifications, such recordkeeping would not have traced or segregated the additional costs caused by the SCCW and restaging on Grace from the costs of the original contract work on the Project. Moreover, the Court found that the State had by its conduct waived the right to insist on Grace's strict compliance with MURK/force account recordkeeping as a contractual condition precedent to recovering on its claim for damages.

Despite the protracted delays and severe cost overruns experienced by Grace on the Project, Grace diligently progressed the work to successful completion of this capital infrastructure project for the benefit of the public.

The Court's recent Decision is an advance in public construction contract law in New York because, among other reasons, contractors can now seek to apply TCM to calculate their delay damages based on an SSCW, 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 contract is a Significant Change in the Character of Work pursuant to Section 109-16 of the State's Standard Specifications.

## Practices

- Bankruptcy and Creditors' Rights
- Construction Litigation

## Industries

- Construction
- Insurance
- Business Reorganization and Financial Restructuring

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