

STA Participates in Appellate Victory Restoring Subcontractors \$3 Million Claim Against NYC-DDC

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The STA, by filing an *amicus curiae* appellate brief supporting a successful appeal in Brooklyn appellate court has just won a victory for fairness in public contracting.

In this case, involving a \$3 million claim on the New York City Department of Design and Construction ("DDC") Office of Emergency Management project at Cadman Plaza (the "Project"), Bovis Lend Lease Lmb, Inc. ("Bovis"), and New York City Corporation Counsel on behalf of DDC, had won respective motions to dismiss Navillus Tile Inc., d/b/a Navillus Contracting's ("Navillus") claim, in its entirety, for the alleged failure of Navillus to follow the dispute resolution procedures of the prime contract between Bovis and DDC (the "Prime Contract"). The critical issue in this case was whether Bovis could bind its subcontractor, Navillus, to all of the terms of the Prime Contract, including its dispute resolution procedures, by mere blanket incorporation of the Prime Contract, by cross-reference, in the Navillus subcontract with Bovis. The court below said that it could, completely dismissing all of Navillus' claims. On the appeal, handled by Goldberg & Connolly, the appellate court in Brooklyn reversed the harsh finding below, and completely reinstated Navillus' claim.

There is nothing more disheartening than a contractor, with a perfectly legitimate claim against a public owner, being thwarted by the procedural traps found in most public contracts. We have continually warned about the dangerous trend of public owners asserting form over substance and using procedural issues such as notice requirements, damage recordkeeping requirements and cumbersome dispute resolution procedures to defeat otherwise valid construction claims. Public owners and their counsel have become shameless in this regard.

Public owners have become far too reliant on exploiting legal technicalities. The dismissing of claims on legal technicalities, when contractors would otherwise be entitled to relief, clearly causes untold financial harm to contractors.

The City, through DDC, entered into the Prime Contract with Bovis to act as the "construction manager" on the Project. The Prime Contract contained an agreement to use certain alternative dispute resolution procedures ("ADR Procedures"), as well as to abide by the City's Procurement Policy Board Rules ("PPB Rules"), which were expressly incorporated into the Prime Contract.

Bovis subcontracted with Navillus to be the "general contractor". The contract between Bovis and Navillus (the "Trade Contract") consisted of the Trade Contract, the General Conditions, the Special Conditions and the Prime Contract. The General Conditions provided that nothing in any contract document would impair a Trade Contractor's rights under the lien law, and that all claims arising under the Trade Contract would be litigated in state court.

Eventually Navillus filed a mechanic's lien against the Project seeking monies that were owed to Navillus for the work it performed at Bovis and/or DDC's direction. Navillus hired an attorney and commenced a lawsuit alleging breach of contract, seeking payment of monies owed to Navillus and to foreclose its mechanic's lien. However, the City and Bovis both moved to dismiss the Complaint based on the fact that Navillus failed to follow the ADR Procedures required by the Prime Contract. The motion court held that because the ADR Procedures and the PPB Rules were expressly incorporated in the Trade Contract, the same ADR Procedures and PPB Rules applied directly to Navillus.

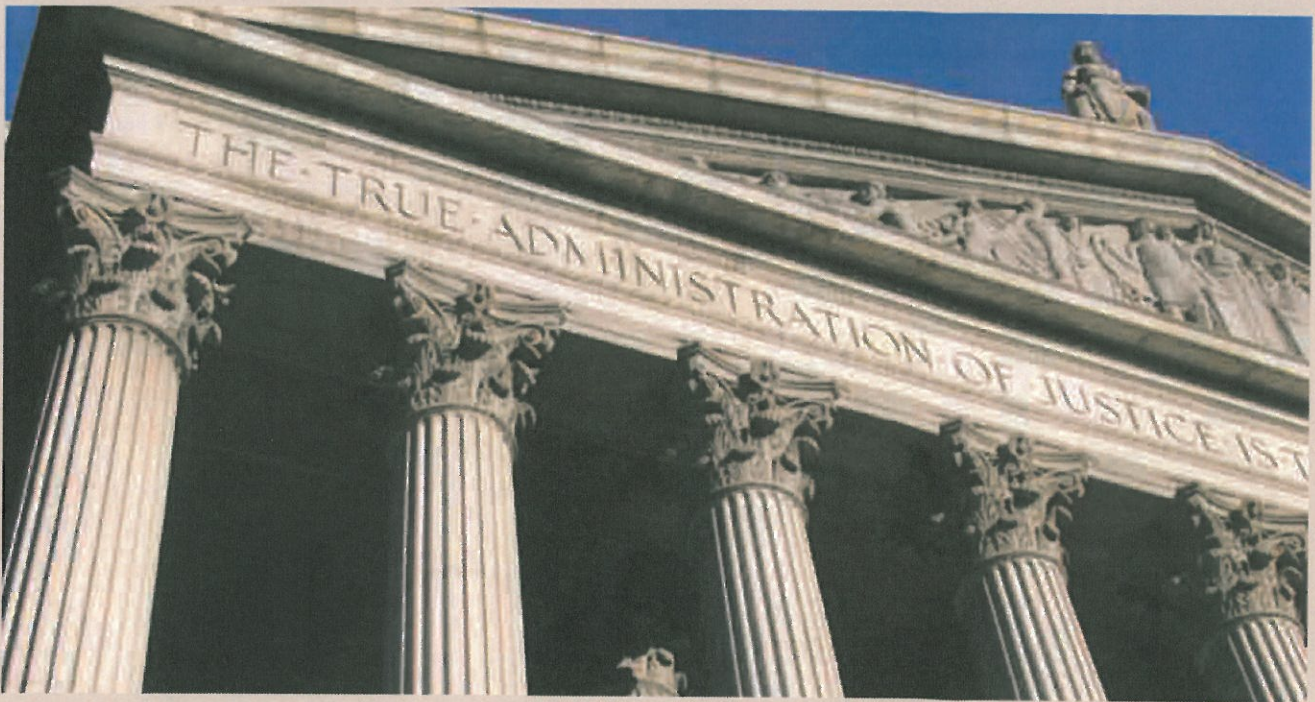
As indicated, Bovis and NYC won their motions and Navillus' Complaint was dismissed in its entirety. Navillus then turned to Goldberg & Connolly to determine if an appeal could and/or should be prosecuted. After carefully reviewing the matter, we filed an appeal on Navillus' behalf arguing, among other things, that the ADR Provisions and the PPB Rules did not apply to Navillus, as they were not properly incorporated into the Trade Contract.

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The NYS Appellate Division, has just (June 29, 2010) agreed, holding that “[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor.” The Court applied this rule to find that the ADR Procedures and PPB Rules were not properly incorporated into the Trade Contract absent an “explicit reference.” The general incorporation clause in the Trade Contract was insufficient to incorporate the ADR Procedures, the PPB Rules, the record keeping requirements, and the 30-day notice of claim period found in the Prime Contract.



G&C COMMENTARY

This is a milestone decision that will hopefully begin the process of re-establishing a sense of basic fairness into the public contracting process. The contractual “gotcha” approach of public owners, particularly New York City, in attempting to hide behind technical contractual defenses, has gone on for far too long. It’s really very simple – issues should be resolved fairly on their merits. Fair compensation should not turn on whether a contractor or subcontractor did or did not send an owner a 24 hour, 72 hour or 10 day notice, particularly where it can be conclusively determined that the owner had ample, actual knowledge of the event or issue involved.

This is all the more so, as the appellate court acknowledged, when a mere reference in a subcontract to an entire 300 page Prime Contract would cause a Trade Contractor to “waive” valuable rights for failure to strictly follow every provision therein. If an owner or CM wanted a contractor or subcontractor to restrict the method and procedure by which it could resolve disputes, is it too much to ask that the owner or CM affirmatively make that clear in the subcontract itself?

As the appellate court stated, in agreement with our principal arguments, “[a]n alternative dispute resolution agreement, like an arbitration agreement, must be clear, explicit and unequivocal...and must not depend upon implication or subtlety...it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.” Incorporation of a Prime Contract’s dispute resolution procedure in a subcontract by mere reference should not, as the appellate court held, be deemed adequate.