



CONSTRUCTION LAW E-UPDATE

GOLDBERG & CONNOLLY WINS APPEAL AGAINST BOVIS LEND LEASE TO RESTORE MULTI-MILLION DOLLAR CONTRACT CLAIM

By **Henry L. Goldberg**

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Goldberg & Connolly is pleased to announce the firm was able to restore the multi-million dollar claim of Navillus Tile Inc. (Navillus) against New York City Department of Design and Construction (DDC) and Bovis Lend Lease LMB, Inc. (Bovis).

DDC and Bovis had alleged that Navillus failed to follow the dispute resolution procedures and the claim notice and damage recordkeeping provisions of the prime contract between Bovis and DDC. The critical issue in this case was whether Bovis could bind its subcontractor, Navillus, to all the terms of the Prime Contract, including its dispute resolution procedures, and its notice requirements, by mere blanket incorporation, or cross-reference, to the Prime Contract in the Navillus subcontract with Bovis. The lower court originally said that it could and dismissed Navillus' lawsuit in its entirety. On the appeal handled by Goldberg & Connolly, the appellate court in Brooklyn reversed, completely reinstating Navillus' lawsuit.

Bovis, as the City's CM, had subcontracted with Navillus. 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 DDC and Bovis both moved to dismiss Navillus' lawsuit based on the fact that Navillus failed to follow the ADR

procedures of the Prime Contract. The lower court held that because the Prime Contract's ADR Procedures, and the New York City Procurement Policy Board (PPB) Rules, were expressly referenced in the Trade Contract, the same ADR Procedures and the PPB Rules should apply to Navillus.

Goldberg & Connolly handled the appeal on Navillus' behalf arguing, among other things, that the ADR provisions and PPB Rules did not apply to Navillus, as they were not properly incorporated into the Trade Contract.

While parties may be strictly held to the terms of a contract they sign, it must be clear that any provision in an "extrinsic" document (i.e., another contract to which they are not a party) must be clearly and properly "incorporated" into their contract for a party to be strictly held to its terms. It's a matter of basic fairness, but one that is often very problematic in construction controversies given the alleged "flow down" relationship between Prime Contracts and Subcontracts. This is a milestone decision that has the potential to re-establishing a sense of basic fairness in the construction contracting process.

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