

FLORIDA COURT BARS MULTIPLE LITIGATION OF MULTIPLE CLAIMS

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Without expressing any opinion, on May 10, 2011, the Florida Supreme Court declined to accept an appeal from an April 20, 2010, intermediate appellate court decision that limited the right of contractors to litigate construction disputes. The lower court Decision is *AMEC Civil LLC. v. Florida Department of Transportation*, 41 So.3d 235 (Fla. App., 2010), which was decided by a 2-1 vote. As a result of the Supreme Court action, the lower appellate court decision is now precedent in Florida.

AMEC contracted with FDOT to construct a major highway interchange. Shortly after work commenced in November, 2001, AMEC filed a claim with FDOT alleging, according to the Court, that FDOT breached the contract by failing to obtain noise permits from the city of Jacksonville for necessary night work. (The Court used the term “breach” with regard to all claims by AMEC, including those covered by contract clauses and not ordinarily deemed to be breach.)

The claim was submitted to the DRB, which in a 2-1 vote ruled against AMEC. AMEC filed suit for breach of contract in August, 2003. Work continued on the project but the litigation was still pending upon final acceptance in May, 2006. In December, 2006, FDOT began contending in the trial court litigation that all claimed breaches of the contract should be adjudicated in a single lawsuit and moved the pending litigation should be stayed. In April, FDOT again moved for a stay pending submission of all claims to the DRB. AMEC opposed these Motions and the litigation proceeded. In October, 2007, a jury found for AMEC on its noise permit claim, in the amount of \$8.5 million.

Meanwhile, the DRB had been disbanded and a second DRB was established in March, 2004. AMEC submitted over 60 claims to the second DRB. The second DRB issued many recommendations on entitlement, some favoring the FDOT and some favoring AMEC. It had not yet held hearings on all of the claims submitted when DRB proceedings were suspended for several months due to the illness of a DRB member. When the DRB was ready to resume in the late spring of 2007, FDOT declined to participate further on the grounds that there could be one only one litigation and that once AMEC commenced litigation and carried it through to judgment, no further claims could be filed under the Contract.

In February, 2008, AMEC commenced litigation on this issue, seeking a declaratory judgment that it had a right to a hearing under the DRB process. FDOT filed a motion for summary judgment claiming that, having filed one action and prosecuting it to judgment precluded AMEC from pursuing further claims because “the doctrine of splitting a cause of action requires that all damages sustained or accruing to one as a result of a single wrongful act must be claimed and recovered in one action.” The trial court found in FDOT’s favor and AMEC appealed to the District Court of Appeal, the intermediate appellate court.

The Contract contained a provision that no court proceedings on any claim could be filed until after the later of final acceptance or claim denial. However, this clause was not the basis for the Court’s decision since the trial court had knowingly disregarded it and allowed the noise permit litigation to proceed.

Rather, the appellate Court applied the principle of res judicata, ruling that the judgment on the merits of the noise permit claim was conclusive not only as to every matter which was litigated, but also every other matter which might properly have been litigated in

that action. The court held that both the permit litigation and the subsequent claims were based on a single contract between the parties, a single indivisible agreement for construction of the interchange; by its nature the contract was not divisible.

According to the Court, the noise permit dispute litigation was premature, AMEC was not required to file the legal action in 2001 and in fact filing before final acceptance could itself have been deemed to be a breach. The numerous breaches of the indivisible contract that AMEC alleged could properly have been litigated and determined in a single action.

The dissenting judge held that the case involved separate unrelated breaches of a contract between AMEC and FDOT over the course of a four-and-a-half year highway project, each new breach constituting a new and separate cause of action, *i.e.*, the contract was in fact divisible.

As a result of this decision, contractors and attorneys in Florida should be very wary of taking a case to court or to arbitration when work is still progressing so that there is a possibility of additional claims or if that case as filed does not include all existing claims. It is impossible to predict the extent to which courts in other states will follow this precedent.

The Decision may well pose a serious problem on long-term construction contracts. Holding off commencing litigation of a large-dollar dispute may deprive a contractor of needed working capital for an extended period. If a state statute of limitations on a dispute arising early in performance will expire prior to completion and acceptance, what can a contractor do to preserve its rights to obtain compensation? One possibility, commencing a court action and then asking the court to stay proceedings, may not be possible in all jurisdictions.