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## Eleventh Circuit Reverses Attorneys' Fee Award to Performance Bond Sureties in Dispute with Contractor arising from Claim against Subcontractor Performance Bond

On October 26, 2018, the United States Court of Appeals for the Eleventh Circuit (the “Eleventh Circuit”) issued a decision which reversed an award of prevailing party attorneys’ fees to performance bond sureties in their dispute with a contractor arising from the contractor’s claim against a subcontractor’s performance bond. Had the lower court’s decision been affirmed, the performance bond sureties would have been able to recover prevailing party attorneys’ fees against the contractor even though they were not parties to the underlying subcontract and the subcontract did not contain a prevailing party attorneys’ fee provision.

The underlying case is complicated and arose from the construction of Brickell CityCentre in Miami. Americaribe-Moriarty JV (the “Contractor”) asserted a claim against a performance bond procured by a defaulted subcontractor and issued by International Fidelity Insurance Company and Allegheny Casualty Company (collectively, the “Sureties”). The Sureties filed a declaratory judgment action against the Contractor in the United States District Court for the Southern District of Florida (the “District Court”), seeking a declaration that the Contractor failed to perfect its claim against the performance bond.

The District Court entered final summary judgment in favor of the Sureties and the Sureties thereafter filed a motion for award of prevailing party attorneys’ fees against the Contractor. The District Court ultimately entered a final judgment of prevailing party attorneys’ fees against the Contractor and the Contractor filed a timely appeal to the Eleventh Circuit.

The issue before the Eleventh Circuit was whether the District Court was wrong when it determined that the non-performing Sureties were entitled to an award of prevailing party attorneys’ fees against the Contractor. The Sureties’ argument was based on a combination of the indemnity provision of the underlying subcontract and the reciprocal fee provisions of the Florida Statutes.

Specifically, Fla. Stat. § 57.105(7) provides that, if a contract contains a “one-way” provision allowing one of the parties to recover prevailing party attorneys’ fees, the court may award attorneys’ fees to the other party if it prevails. As a result, the “one-way” provision becomes a “two-way” provision.

The Sureties’ argument was based on merging terms of the subcontract and the performance bond. The Sureties’ argument began by referencing the subcontractor’s obligation under the subcontract to pay legal fees to the Contractor – that obligation was found under the indemnity clause. The Sureties then argued that, since the performance bond requires the Sureties to perform the obligations of the subcontractor, the Sureties would then be obligated to pay



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legal fees. In turn, the Sureties argued that the Florida Statutes that expand “one-way” prevailing party attorneys’ fee provisions to “two-way” provisions should then apply.

Peckar & Abramson’s (“P&A”) Miami attorneys, Gary M. Stein and K. Stefan Chin, are familiar with the matter, having been asked by a group of industry organizations to file an *Amici Curiae* (friend of the Court) Brief in the appellate proceeding, in support of the Contractor and seeking reversal of the District Court’s decision. The organizations include The South Florida Associated General Contractors; the Associated General Contractors Inc. Florida East Coast Chapter; and the Florida A.G.C. Council Inc.

The *Amici Curiae* Brief explained that the case presented an issue of great public importance to the Florida construction industry. Owners and other construction participants would have to account for increased risks in connection with bonding and insurance when considering whether and how to proceed with a construction project in Florida, likely having a chilling effect on the construction industry.

The Eleventh Circuit found that the indemnity provision of the underlying subcontract was not a “one-way” prevailing party attorneys’ fee provision, but rather a general indemnity clause that on its face applied only to third-party claims and not to suits between the Contractor and the subcontractor. As a result, the reciprocal effect of Fla. Stat. § 57.105(7) was inapplicable. Accordingly, as the subcontractor had no right to prevailing party attorneys’ fees under the subcontract, neither did the Sureties who stepped into the shoes of the subcontractor. The Eleventh Circuit’s decision is consistent with Florida’s public policy and with established risk assessment and mitigation practices of those in the Florida construction industry.

The appellate proceeding is styled *International Fidelity Insurance Company and Allegheny Casualty Company v. Americaribe-Moriarty JV*, Case No. 17-10814. Feel free to contact us for more information.

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