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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-001178
Case No. 2018-CP-23-04740

Flatiron-Zachry, a Joint Venture, Appellant,

v.

Civil Engineering Consulting Services, Inc. c/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International, Defendants,

Of which Stantec Consulting Services, Inc. is the Respondent.

RETURN TO RESPONDENT'S MOTION TO DISMISS

Respondent Stantec Consulting Services, Inc.'s ("Respondent" or "Stantec") Motion to Dismiss omits important context regarding the procedural history of this matter which demonstrates the timeliness of Appellant Flatiron-Zachry, a Joint Venture's ("FZJV") appeal. The Court should deny Respondent's motion.

Stantec incorrectly posits that the arbitration award at issue in this appeal was issued on November 5, 2021. As detailed below, the arbitration had not proceeded to a final award at that time and, furthermore, that order itself was not final. For purposes of triggering the FAA's limitations period for moving to vacate, the earliest time that the arbitration panel's order could be

considered "final" was upon the arbitration panel's order amending the original summary judgment order.[1] However, even then, there had not been a "final arbitration" triggering the deadlines because one of FZJV's claims against Stantec remained pending, along with FZJV's claims against the other Defendants. Moreover, even if any deadlines had been triggered, equitable tolling should apply under these circumstances.

The dispute that forms the basis for the parties' underlying arbitration arises out of the design and construction of part of the 85/385 Gateway Project in Greenville, South Carolina. FZJV brought this action seeking to recover nearly $60 million dollars in damages that were caused directly by the designer Defendants', including Stantec's, negligent and deficient performance of their work.

The timeline of events leading to this appeal is as follows:

9/14/2018 – FZJV files suit in the Court of Common Pleas against Respondent and the other above-captioned defendants.

11/18/2019 – All parties submit a joint motion to stay the case and arbitrate. (*See* Agreement to Arbitrate, attached hereto as **Exhibit A**.) The parties agreed that the Federal Arbitration Act governed and that the American Arbitration Association ("AAA") Construction Rules would apply.

11/19/2019 – The Court of Common Pleas grants the joint motion.

1/11/2021 – Without making a prior written application and obtaining approval from the arbitration panel to file a dispositive motion as required by AAA Construction Rule 34[2], Stantec moved for summary judgment.

2/9/2021 – The arbitration panel finds that Stantec's motion for summary judgment was premature and could be brought again at the close of discovery.

[1] The parties agreed in their joint motion to stay that the Federal Arbitration Act would govern the arbitration proceedings.

[2] Available at: https://www.adr.org/sites/default/files/ConstructionRules_Web_0.pdf.

9/13/2021 – Stantec moves for summary judgment a second time, again without requesting leave to submit a dispositive motion and obtaining approval from the arbitration panel to do so as required by Construction Rule 34.

11/5/2021 – The arbitration panel issues an order granting Stantec's motion for summary judgment (despite the procedural deficiencies and that discovery was ongoing), on 5 of 6 grounds while denying summary judgment on the sixth. (*See* Summary Judgment Order, attached as **Exhibit B**.)[3]

11/24/2021 – FZJV submits a motion to clarify or reconsider to the arbitration panel.

12/8/2021 – The arbitration panel issues an order affirming its grant of summary judgment. (*See* Order on Motion to Clarify, attached as **Exhibit C**.)[4]

12/10/2021 – Stantec files another summary judgment motion on the remaining claim.

1/19/2022 – The Arbitration panel again denies Stantec's motion on the sole remaining claim. (*See* Order on Second Motion for Summary Judgment, attached as **Exhibit D**.)[5]

2/9/2022 – FZJV timely files a motion to vacate under 9 U.S.C. § 12 of the FAA with the Court of Common Pleas.

3/15/2022 – The Court of Common Pleas issues an order denying the motion to vacate.

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[3] Relevant to this appeal, the arbitration panel stated that summary judgment on the two "MSE Wall claims" was proper because there was no dispute of material fact as to Stantec's contractual obligations; however, the panel stated both that "for item 4 [MSE Wall claims], it is undisputed that Stantec did not provide pre-award services" and that "[r]egarding item 4, the MSE walls, while Stantec performed some pre-award services relating to the MSE wall." Further, this order failed to specify whether it related to both MSE Wall claims against Appellee.

[4] The panel summarily denied, without explanation, Appellant's request for clarification and reconsideration of this fundamental inconsistency.

[5] In this order, the panel denied summary judgment to Stantec finding that there was a disputed material fact because contractual obligations are not, in and of themselves, determinative of what constitutes professional negligence or compliance with the applicable standard of care. The panel reasoned that the arguments in support of summary judgment related to contractual obligations between two parties "do[] not address the factual issues of whether that work was performed or whether that work was performed with the proper standard of care" and, thus "these issues involve questions of material fact that are in dispute." Thus, while the initial order found summary judgment to be appropriate based on contractual obligations, the order on the second motion held the opposite. This prompted FZJV's first motion to vacate filed with the Court of Common Pleas.

3/18/2022 – FZJV submits a second motion to clarify or reconsider to the arbitration panel due to its inconsistent and ambiguous application of summary judgment law.

3/24/2022 – The Arbitration panel issues an order ostensibly denying FZJV's second motion to clarify or reconsider, but making substantive changes to its order, including granting summary judgment to Stantec on an additional basis. (*See* Order on Second Motion to Clarify or Reconsider, attached as **Exhibit E**.)[6]

6/22/2022 – FZJV timely files a motion to vacate the amended order with the Court of Common Pleas.

10/6/2022 – The Court of Common Pleas issues an order denying the motion to vacate the amended order.

10/17/2022 – FZJV timely files a motion to reconsider the court's Oct. 6, 2022 order denying the motion to vacate pursuant to Rule 59(e), SCRCP.

10/27/2022 – FZJV dismisses its remaining claims against the other Defendants pursuant to a settlement. This brought the arbitration portion of the case to a conclusion. FZJV previously confirmed to the Defendants and arbitration panel that it would forgo its remaining claim against Stantec upon settlement with Defendant TY Lin International. However, FZJV did not agree to dismiss Stantec from the court case in light of the issues presently on appeal to this Court.

6/21/2023 – The Court of Common Pleas denies FZJV's motion to reconsider.

7/20/2023 – FZJV timely files its notice of appeal.

I. FZJV's appeal is not untimely.

As the timeline above reflects, the only orders in the arbitration at the time of FZJV's second motion to vacate were preliminary orders of the arbitration panel: (1) granting summary judgment on 5 of 6 claims brought by FZJV against Stantec while ***denying*** summary judgment on

[6] Specifically, the panel held that it's November order should have omitted the MSE Wall claims from those issues which it stated were undisputed, yet it still affirmed summary judgment in FZJV's favor on the MSE Wall claims (and, for the first time, confirmed that both of FZJV's MSE Wall claims against Stantec were contemplated by the initial order) despite acknowledging those were in dispute.

the sixth and (2) denying FZJV's motions to clarify or reconsider while ***nevertheless amending*** that order. FZJV's final claim against Stantec remained outstanding and awaiting final disposition. In fact, that claim still has not reached a final disposition. FZJV simply agreed not to pursue it further in the arbitration following its resolution of other claims against other Defendants, with these developments post-dating the motion to vacate presently on appeal to this Court.

The Federal Arbitration Act provides that any motion to vacate, modify, or correct an arbitration award "must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. Courts apply the "complete arbitration rule" to determine whether an arbitration award is final for purposes of judicial review so as to trigger the three-month limitations period under the FAA. *McKinney Restoration Co. v. Ill. Dist. Council No. 1 of the Int'l Union of Bricklayers & Allied Craftworkers*, 392 F.3d 867, 872 (7th Cir. 2004).[7] This embodies the principal that "where an arbitrator believes the assignment is completed, the award is final and appealable . . . [and when] the arbitrator does not believe the assignment is completed, the award is not final and appealable." *Id.* An award is final when it is "intended by the arbitrator to be his complete determination of every issue submitted to [the arbitrator]." *Id.* at 871. If any "substantive task remain[s] for the arbitrator to perform," the award is not final. *McKinney Restoration*, 392 F.3d at 871. When a court is asked to review an arbitrator's decision, it should "refrain from doing so until the arbitrator has decided all facets of the dispute." *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union, Unincorporated Ass'n*, 815 F.3d 154, 160 (4th Cir. 2016).

[7] *See also Local 36, Sheet Metal Workers Int'l Ass'n v. Pevely Sheet Metal Co.*, 951 F.2d 947, 949–50 (8th Cir. 1992); *Union Switch & Signal Div. Am. Standard, Inc. v. United Elec., Radio & Mach. Workers, Local 610*, 900 F.2d 608, 610–12 (3d Cir. 1990).

Here, the arbitration panel's denial of summary judgment on one of the claims of FZJV against Stantec demonstrates that there was not a "complete arbitration" at the time of the original order of the arbitration panel. Therefore, although FZJV chose to go ahead and pursue a motion to vacate, *see* 9 U.S. Code § 10, this order did not trigger the three-month limitations period for moving to vacate under the FAA because it was not a final order on all claims and issues in the arbitration.

Further, the arbitration panel's amendment of the summary judgment order also demonstrates that there was not a "complete arbitration" as to the disposed claims of FZJV until, at the very earliest, the time of the order purporting to deny FZJV's motion to clarify. As noted, although that order stated it was denying the motion, it substantively modified the summary judgment order in two respects. First, it amended the summary judgment order to state that the panel intended to grant summary judgment in Stantec's favor on the "Wall 32 issues . . . to include the shoring issues along with the strap length issues." Second, it modified the order to state that "The sentence 'On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items' in the original award should have read 'On items 1 and 2, it is undisputed that Stantec did not provide pre-award services for these items.'" The end result of the arbitration panel's actions were: (1) an initial order granting summary judgment because of allegedly undisputed contractual obligations on the MSE wall claims; (2) a second order denying summary judgment because contractual obligations are not determinative, and (3) a third order affirming summary judgment on the "MSE Wall claims" but stating that they are not undisputed issues.

At the earliest, the clarification order became the "final" order as to the disposed claims at the time of its issuance. As noted, however, the fact that FZJV had a pending claim remaining against Stantec as well as pending claims against other Defendants supports that even at the time

of FZJV's present motion to vacate there had yet to be a complete arbitration. To this day, there has not been a final arbitration ***award*** as the panel's only actions have been to issue a series of orders disposing of certain claims against certain defendants. Therefore, under any standard, FZJV's appeal is timely.

Among the grounds identified by the FAA for seeking vacatur of an arbitration award is where the arbitrators exceeded their powers or "so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). The series of conflicting orders from the arbitration panel is precisely why this ground exists and an issue that FZJV should be permitted to raise in its merits briefing.

Furthermore, Stantec did not challenge the amendments made by the order on FZJV's second motion to clarify, thereby waiving any argument that the original award was the "final" order as it now contends in its motion. Rule 43 of the AAA Construction Arbitration rules provides that "[t]he parties may modify any period of time by mutual agreement" and "[t]he AAA or the arbitrator may for good cause extend any period of time established by these rules." R-43, AAA Construction Arbitration Rules. The effect of the arbitration panel's action was to extend the deadline for modifying its summary judgment order to the date of the clarification order, thereby making the date of the clarification order, at the earliest, the date of the "final" order.

II. Even if the appeal were not timely, equitable tolling should apply.

Two federal circuit courts of appeal have recognized in recent years that equitable tolling applies to the FAA. *See Move, Inc. v. Citigroup Glob. Markets, Inc.*, 840 F.3d 1152, 1157–58 (9th Cir. 2016); *NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861, 874 (11th Cir. 2023). As the Ninth Circuit explained in *Move, Inc.*, while the FAA reflects a "'national policy favoring arbitration with just the limited review' of the courts necessary to maintain finality in arbitral

proceedings, '[t]he general pro-arbitration policy relies on the assumption that the forum is fair, and therefore cannot justify special deference to arbitration outcomes in the face of a colorable claim that the forum was unfair in a particular case.'" 840 F.3d at 1157–58 (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 F. App'x 243, 246 (6th Cir. 2004)). As the court explained, § 10 of the FAA's limited grounds for review were "designed to preserve due process," and thus: (1) "[b]alancing the needs for both finality and due process, the arbitral process will not be disrupted if parties are permitted to satisfy the high bar of equitable tolling in limited circumstances" and (2) "[m]ore importantly, permitting equitable tolling will enhance both the accuracy and fairness of arbitral outcomes." *Id.* (quoting *Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

The Eleventh Circuit in *NuVasive* expressly relied on *Move, Inc.*, and reached the same holding. *See* 71 F.4th 861, 874 (11th Cir. 2023) (finding that the three-month deadline was merely a statute of limitations eligible for tolling and not a jurisdictional precondition, noting that "equitable tolling does not contravene the FAA's text, structure, or purpose" and concluding that the District Court appropriately found it was warranted under the facts of the case).

Under South Carolina law, courts have broad power to apply equitable tolling. As the Supreme Court explained, "[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009) (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. Ct. App. 2006)). Therefore, "[e]quitable tolling may be applied where it is justified under all the

circumstances," although "used sparingly and only when the interests of justice compel its use." *Id.* "[E]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116, 687 S.E.2d at 32. Moreover, it may be applied "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Id.* at 115, 687 S.E.2d at 32 (quoting 54 C. J. S. *Limitations of Actions* § 115 (2005)).

Even assuming that the Court believes that the arbitration panel reached a final award (which it did not) and that Appellant's motion to vacate the modified award was not timely (which it was), the confusion generated by the arbitration panel's handling of this matter and the conflicting nature of the series of orders warrants applying equitable tolling in this circumstance.

III. *Elam* is inapposite to this situation.

Respondent asserts that *Elam v. South Carolina Dept. of Trans.*, 361 S.C. 9, 602 S.E.2d 772 (1994) is "perfectly aligned" with case law developed under the FAA regarding successive motions. Respondent, however, cites no authority analyzing the FAA. Moreover, the situation in *Elam* was not analogous to the issues raised in FZJV's motion to vacate and this related appeal.

Elam involved a scenario where there was an underlying judgment following a jury trial, the appellant made oral post-trial motions, the court denied those motions, and then the appellant submitted a written Rule 59(e) motion to reconsider restating the same grounds as the oral post-trial motions. The Court of Appeals found that the Rule 59(e) motion did not stay the time for appeal because it merely repeated the same arguments. The Supreme Court, however, held that a party is usually allowed "to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Id.* at 21, 602 S.E.2d at 778-79. The Supreme Court reversed the Court of Appeals' dismissal of the appeal as untimely on this basis.

Elam acknowledged two narrow exceptions to the general rule that a Rule 50 or 59 motion stays the time to appeal: (1) "when a party—instead of serving a notice of appeal—files a ***successive Rule 59(e) motion***, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment"; and (2) "when a party—instead of serving a notice of appeal—recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a ***virtually identical***, written Rule 59(e) motion." *Id.* at 20, 602 S.E.2d at 778 (emphases added).

This case is distinguishable from *Elam*. Here, there was not a final decision that FZJV moved the ***court*** to reconsider on the merits pursuant to Rule 59(e), a denial by the ***court***, and a successive Rule 59(e) restating the ***same*** arguments. As noted, what happened here was an order of the arbitration panel, denial of a motion to vacate that order by the court, a substantive amendment of the arbitration order by the arbitration panel (prior to the expiration of the time to move to reconsider or appeal the denial of the motion to vacate), denial of a motion to vacate the as-amended order by the court, a timely motion to reconsider that court order, and then a timely appeal. *Elam* is not applicable here and does not support dismissal of this appeal as untimely.

IV. The FAA and South Carolina standards of review also demonstrates why this appeal is timely and appropriate.

In addition to their timeliness argument, Stantec's response to FZJV's motion to vacate incorrectly contended that FZJV failed to state any proper grounds for vacatur. The FAA and South Carolina common law standards for assessing whether an arbitration award should be vacated, however, demonstrate the merit of FZJV's arguments. Although the Court is not tasked with evaluating the merits at this time, the standards are important to consider as they provide a window into the propriety of FZJV's appeal.

Under the FAA, courts have the authority to vacate awards on several grounds, including:

> (3) where arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(3)-(4). On appeal from an order denying a motion to vacate, the appellate courts review the lower court's "legal conclusions de novo and its factual findings for clear error." *Constellium Rolled Prod. Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC*, 18 F.4th 736, 739 (4th Cir. 2021). Courts play a limited role when reviewing the decision of an arbitrator, and because the parties have contracted to have their disputes settled by an arbitrator rather than a judge, courts "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation." *Id.* (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987)).

In assessing whether an arbitrator's misbehavior or misconduct prejudiced the rights of the parties under § 10(a)(3), courts "ask whether the parties received a fundamentally fair hearing." *Move, Inc.*, 840 F.3d at 1158; *see also Oldcastle Precast, Inc. v. Liberty Mut. Ins. Co.*, 838 F. App'x 649, 651 (2d Cir. 2021) ("Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review.").

Under § 10(a)(4), Arbitrators exceed their "authority by failing to provide an award in the form required by an arbitration agreement." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836,

843 (11th Cir. 2011). Moreover, arbitrators exceed their authority "when the award is completely irrational or exhibits a manifest disregard of the law." *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003) (en banc). Thus, a court may vacate an arbitration decision pursuant to § 10(a)(4) where the arbitrator "strays from interpretation and application of the agreement and effectively dispense[s] h[er] own brand of industrial justice." *Id.* (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)).

In addition to the statutory grounds established by the FAA, South Carolina case law provides for an additional, non-statutory ground for vacatur of an arbitration decision where it reflects "manifest disregard or perverse misconstruction of the law." *See Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). This "basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

The issues raised by FZJV's motion to vacate, which FZJV incorporates by reference herein in full, fit neatly within these standards. As FZJV's motion to vacate contended, the entire arbitration proceedings were fundamentally unfair, the arbitration panel's orders exceeded the scope of their authority in violation of the parties' agreement, and the arbitration panel manifestly disregarded and misconstrued applicable law. To fully assess the propriety of the arbitration panel's orders, the entire constellation of its flawed series of actions must be reviewed and assessed by this Court. The arbitration panel:

- Permitted Stantec to submit procedurally defective motions in violation of the agreed-upon AAA Construction Arbitration Rules;
- Refused to hear evidence material to the controversy;

- Granted Stantec's defective motion (in violation of the parties' agreement to arbitrate since discovery was still ongoing);
- Manifestly disregarded the law in granting Stantec's motion;
- Issued conflicting orders regarding FZJV's claims against Stantec;
- Issued orders denying summary judgment motions submitted by other Defendants that conflicted with its order in Stantec's favor; and
- Issued an improper order purporting to deny FZJV's motion to clarify or reconsider in full while at the same time substantively amending its summary judgment order.

All of FZJV's arguments were appropriately raised in its motion to vacate and are proper considerations for this Court in reviewing FZJV's appeal under the applicable FAA and South Carolina common law standards. Stantec's motion should be denied for this additional reason.

Conclusion

For the reasons stated above, the Court should deny Respondent's motion to dismiss and permit the parties to proceed with briefing the merits.

Signature on Following Page

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August 17, 2023

Exhibit A

(Agreement to Arbitrate)

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GREENVILLE	)	**C.A. NO. 2018-CP-23-04740**
	)	
Flatiron-Zachry, a Joint Venture,	)	**AGREEMENT TO ARBITRATE**
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	
	)	

This Agreement made this 18th day of November 2019, by and among Flatiron-Zachry, a Joint Venture ("FZJV"), Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc. ("CECS"), ECS Southeast, LLP f/k/a ECS Carolinas, LLP ("ECS"), Stantec Consulting Services, Inc. ("Stantec") and T.Y. Lin International ("T.Y. Lin") (collectively the "Parties".)

WHEREAS, a dispute has arisen between FZJV and CECS, ECS, Stantec, and T.Y. Lin;

WHEREAS, FZJV filed a lawsuit captioned *Flatiron-Zachry, a Joint Venture, v. Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International,* Civil Action No. 2018-CP-23-0470 (the "Lawsuit") against CECS, ECS, Stantec, and T.Y. Lin;

WHEREAS, the Lawsuit involves the improvements to the Interstate 85/385 Interchange, such construction being located in the County of Greenville, South Carolina (the "Project");

WHEREAS, by consent of the Parties, they have agreed to arbitrate all disputes now pending in the Lawsuit and other disputes as specifically set forth below;

NOW, THEREFORE, the Parties agree as follows:

1. The Parties' Agreement with regards to the disputes, claims, and issues to be submitted to final and binding arbitration is as follows:

FZJV, CECS, ECS, TY Lin and Stantec agree to refer all issues by and among them relating to the Project to final and binding arbitration, provided that such issues/claims are asserted at least one hundred eighty (180) days prior to the start of the final Arbitration Hearing. The Parties reserve the right to mutually agree to refer to final and binding arbitration any issue/claim asserted less than one hundred eighty (180) days prior to the start of the planned final Arbitration Hearing; should the parties agree to refer to final and binding arbitration of any issue/claim asserted less than one hundred eighty (180) days prior to the start of the planned final Arbitration Hearing, upon request of any party, there shall be a continuance of the planned final Arbitration Hearing to allow no less than one hundred eighty (180) days between the assertion of such issue/claim and the final Arbitration Hearing.

Nothing contained herein shall be construed to shorten or extend any applicable statute of limitations or statue of repose; nor shall it be construed to bar any claims which may arise less than 180 days prior to the commencement of the final Arbitration Hearing.

2. The American Arbitration Association Construction Industry Arbitration ("AAA") Rules and Mediation Procedures for Large, Complex Construction Disputes shall apply to and govern the arbitration proceeding, including any issue of arbitrability as provided in Rule 9, except as otherwise modified by this agreement.

3. The Federal Arbitration Act 9 U.S.C.A § 1, et. seq. shall apply to the arbitration proceedings.

4. The arbitrator selection process *shall not* be administered by the AAA but shall be administered by N. Ward Lambert, Esquire of Harper, Lambert & Brown, P.A., Greenville, South Carolina (the "Administrator"). The parties shall equally be responsible for payment of the Administrator's fees and expenses on a pro rata basis.

5. This agreement to arbitrate between FZJV and CECS shall supersede the provisions of Article 10.2 of the Standard Terms and Conditions of Exhibit 5 to the Design Subcontract.

6. The arbitration proceedings shall be held in Greenville, South Carolina.

7. Three (3) arbitrators shall be selected to hear the dispute and, except as otherwise modified by this agreement, the American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures for Large, Complex Construction Disputes shall apply and govern. The parties shall make reasonable efforts to choose arbitrators who are willing and able to provide cost-effective services, including to limit the number of AAA arbitrators and higher costs associated therewith.

   A. The arbitrators shall be selected from the following: the mid-Atlantic and Southeastern states - Maryland, Virginia, West Virginia, North Carolina, South Carolina, Florida, Georgia, Tennessee, Kentucky, Alabama, Mississippi, Louisiana and the District of Columbia.

B. Arbitrators conduct shall be governed by the AAA's *Code of Ethics for Arbitrators in Commercial Disputes* and the American Bar Association's *Code of Ethics for Arbitrators in Commercial Disputes*.

C. Method of Arbitrator Selection:

(1) Within 30 days of this Agreement, (A) FZJV, as Claimant, shall propose an initial list of 10 potential arbitrators from the geographical area in 7(A) above, and (B) CECS, ECS, TY Lin and Stantec, as Respondents, shall collectively propose an initial list of 10 potential arbitrators from the geographical area in 7(A) above. Biographical information or a CV shall be provided along with disclosures from each proposed arbitrator.

(2) Should Claimant or Respondents believe that a potential arbitrator(s) should be disqualified, the party shall so advise the other party and the Administrator within 10 days of receipt of the other party's list of potential arbitrators.

(3) The Administrator shall determine the disqualification of any potential arbitrator. A party, Claimant or Respondents, as applicable, proposing a potential arbitrator who is disqualified shall submit another proposed potential arbitrator, and the other party shall have 10 days to advise the proposing party of any reason that such proposed arbitrator should be disqualified.

(4) The steps outlined in 7(C)(2) and 7(C)(3) shall continue until the parties have final a list of 20 potential arbitrators. Once the list is final, Claimant shall strike five (5) of the arbitrators from the list of potential arbitrators and rank those remaining in numerical order 1 – 15, and Respondents shall collectively strike five (5) of the arbitrators from the list of potential arbitrators and rank those remaining in numerical order 1 - 15. "1" being the highest ranking and "15" being the lowest ranking. The parties shall submit their strikes and rankings to the Administrator within 10 days of the list becoming final.

(5) The Administrator shall tally the rankings and determine the three (3) highest ranked arbitrators which shall constitute the arbitration panel. The arbitration panel shall select a chairperson to serve as the chair of the arbitration panel.

8. FZJV, CECS, ECS, Stantec and TY Lin shall bear the cost and expenses of the arbitrators equally.

9. Discovery. The parties agree that discovery will be conducted in the arbitration, with the scope and process subject to further agreement or by direction of the arbitration panel. It is contemplated and agreed that (a) the parties shall disclose all experts and their opinions,

produce any expert reports, any all experts designated shall be made available to be deposed; (b) the parties shall disclose all reports, test results and other facts relied upon by an expert in their opinions and reports; (c) the parties will exchange and produce documents based on an agreed-upon ESI Protocol; (d) the extent and number of fact witness depositions will be subject to further agreement or by direction of the arbitration-panel; (e) the parties agree to disclose names of fact witnesses and the substance of the witnesses' testimony by further agreement or by direction of the arbitration panel; (f) any party seeking affirmative relief shall provide a computation of each category of damages claimed.

Additional discovery shall be by further agreement or by direction of the arbitration panel, and nothing contained within this paragraph is intended to, or shall, be read as a limitation on the parties' ability to agree to, or the panel's authority to allow, such other discovery as may be reasonable and appropriate.

Any disputes concerning the scope or process of discovery shall be decided by the arbitration panel pursuant to the American Arbitration Association Construction Industry Rules and Procedures for Large, Complex Construction Disputes (including Rules L1 – L4).

10. CECS, ECS, TY Lin and Stantec shall have 30 days from the date of this Agreement to serve a response, if any, to FZJV's claims that were previously asserted in the Amended Complaint filed with the Greenville County Clerk of Court in the Lawsuit and to assert any Counter-Claims against FZJV. If no Reply is served, the allegations in FZJV's Complaint shall be deemed denied.

11. The pending Lawsuit shall be stayed.

12. Any Party may seek judicial confirmation of a final award 30 days after issuance of a final award, or 30 days after any modification to a final award by the panel.

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Exhibit B

(Summary Judgment Order)

IN THE MATTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents.

ORDER ON STANTEC'S MOTIONS FOR SUMMARY JUDGMENT

The Panel having read and considered Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motions for Summary Judgment and the documentation provided in support thereof, Claimant's Flatiron-Zachry JV ("FZJV") Response thereto and the documentation in support thereof and Stantec's Reply, finds as follows: Stantec's Motions for Summary Judgment on items 1-4 and 6 are GRANTED and item 5 is DENIED.

STANTEC'S MOTIONS

Stantec filed its first motion for summary judgment on January 11, 2021, shortly after the Claimant's submission of its expert's report on December 15, 2020. On February 9, 2021, the Panel denied the motion without prejudice based on the status of discovery. Stantec served its expert's report on May 28, 2021 and FZJV served its expert's sur-rebuttal report on July 27, 2021.

Stantec renewed its motion for summary judgment on September 13, 2021. The motion was divided into six parts, covering all claim items that FZJV contends were related in some part to services provided by Stantec. The six parts are:

1. Pre-award storm drainage design
2. Pre-award temporary storm drainage design
3. Pre-award roadway design including guardrails and impact attenuators
4. Pre-award MSE wall design
5. Design details relating to bridge barrier conduit and geomembrane at bridge abutments.
6. Post-award temporary drainage design

DISCUSSION

FZJV objects to Stantec's motion on the grounds that it is premature because discovery has not been completed. While the Panel is mindful that completing discovery is often necessary to determine whether there are genuine issues of material fact that would prevent issuing summary judgment, we find that based on the claims asserted against Stantec, the evidence presented Stantec, FZJV's responses to the summary judgment and progress of discovery to date there is sufficient evidence to conclude that there are no genuine issues of material fact relating to claims against Stantec on items 1-4 and 6.

Items 1-4 relate to pre-award services provided by Stantec. FZJV has withdrawn its claim for item 3. On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items. For items 1 and 2 relating to final and temporary storm water drainage design, FZJV's claim is based on deficiencies in the pre-award plans. Stantec's motion is based on the fact that Stantec did not perform any pre-award design services on these items. After receiving Stantec's expert's report which confirmed that Stantec did not perform pre-award drainage design of any kind, FZJV's expert issued a rebuttal report opining that Stantec was under an obligation to follow the pre-award design and its failure to do so was a breach of the standard of care. This position is illogical in that it suggests that Stantec was bound by the preliminary design and could not deviate from it. As FZJV's expert noted, the preliminary drainage design was inadequate and Stantec's post-award drainage design corrected some of these inadequacies. Further, FZJV's expert's interpretation that the contract required Stantec to follow the pre-award design is not

accurate. The provision requires the Designer "to the extent reasonably possible" to avoid deviation from the preliminary design. This does not require the Designer to follow the preliminary design when it is deficient or inaccurate. Therefore, FZJV has not shown that there is a genuine issue of material fact relating to Stantec's breach of the standard of care relating to the drainage design.

Regarding item 4, the MSE walls, while Stantec performed some pre-award services relating to the MSE walls, it is undisputed by the evidence provided that Stantec was not retained by CECS to provide input on the strap lengths needed for the MSE walls. Testimony from Stantec and CECS personnel confirmed that CECS was not relying on Stantec to provide input on the strap lengths. While FZJV's expert contends that the "design team" should have provided input on this issue, that does not create an issue of material fact relating to Stantec's services since there is no evidence to suggest that Stantec was required to provide this input for the "design team".

Stantec's motion for summary judgment on items 1, 2 and 4 is granted and item 3 was withdrawn by FZJV.

Regarding item 5, design details relating to the bridge barrier conduit and geomembrane at the bridge abutments, Stantec asserts that it is entitled to summary judgment on these items based on the statute of limitations. FZJV withdrew its claim on the bridge barrier conduit, so the only issue relates to the geomembrane at the bridge abutments.

South Carolina law requires a party to commence an action within three years of the discovery of its cause of action. S.C. Code Ann. § 15-3-530. The complaint in this action was filed on September 14, 2018. Therefore, claims that arose prior to September 14, 2015 are barred. It is undisputed that Stantec's pre-award Bridge 11 drawings did not include bridge barrier conduit or geomembrane at the abutments. Stantec delivered post-award final Bridge 11 plans depicting bridge barrier conduit and geomembrane at least by May 2015 and at least 4 revised sets of plans showing the geomembrane before September 8, 2015. Stantec contends that FZJV had adequate opportunity to note that the pre-award plans did not contain a geomembrane at the abutments and the post-award plans did contain a geomembrane. FZJV submitted an affidavit stating that FZJV did not discover that the geomembrane was not included in the final plans until September 2016 during the RFI process. Based on the affidavit, there is a genuine issue of material fact on when a reasonable design builder should have discovered the claim relating to the geomembrane in the bridge abutment.

Stantec's motion for summary judgment on item 5 is denied.

Regarding item 6, while Stantec was retained to provide some post-award temporary drainage services and there may be some dispute over the impact of the timing of providing these services, there is no dispute that FZJV did not sustain any damages due to the flooding that may or may not have been caused by the temporary drainage. It is undisputed that FZJV's damages expert concluded that this flooding event did not cause any damages. FZJV's contention that the flooding event could have caused "inefficiencies" that are "interwoven" among various cost codes is mere speculation and does not raise a genuine issue of material fact as to Stantec's liability for damages relating to the flooding event.

Stantec's motion for summary judgment on item 6 is granted.

Accordingly, Stantec's Motions for Summary Judgment are GRANTED for items 1-4 and 6. Stantec's Motion for Summary Judgment on item 5 is DENIED.

AND IT IS SO ORDERED, this 5th day of November, 2021.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

Exhibit C

(Order on Motion to Clarify)

IN THE MATTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents.

ORDER ON FZJV's MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR RECONSIDERATION

The Panel having read and considered Claimant Flatiron-Zachary, A Joint Venture's ("FZJV") Motion for Clarification or in the Alternative for Reconsideration, Respondent Stantec Consulting Services, Inc.'s ("Stantec") Opposition thereto, FJIV's reply and Stantec's Sur-reply, as well as all briefs, materials and documentation provided in support thereof, the Panel denies FJIV's Motion. The Panel's Order dated November 5, 2021 is hereby confirmed.

Accordingly, Stantec's Motions for Summary Judgment on items 1-4 and 6 are GRANTED and item 5 is DENIED.

AND IT IS SO ORDERED, this 8th day of December, 2021.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

Exhibit D

(Order on Second Motion for Summary Judgment)

IN THE MATTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents.

REVISED ORDER ON STANTEC'S, CECS's AND ECS'S MOTIONS FOR SUMMARY JUDGMENT

The Panel having read and considered Respondent Stantec Consulting Services, Inc.'s ("Stantec"), Civil Engineering Consultant Services, Inc.'s ("CECS") and ECS Southeast, Inc.'s ("ECS") Motions for Summary Judgment and the documentation provided in support thereof, and Claimant's Flatiron-Zachry JV ("FZJV") Responses thereto and the documentation in support thereof, hereby denies all three Motions.

STANTEC'S MOTION

The Stantec Motion is predicated upon two arguments. First, Stantec argues that its motion should be granted because it performed work that CECS requested and nothing more. This does not address the factual issues of whether that work was performed or whether that work was performed with the proper standard of care. The Tribunal therefore finds that these issues involve questions of material fact that are in dispute and holds that the Motion for Summary Judgment on this argument should be and hereby is denied.

Second, Stantec again asks the Tribunal to dismiss the FZJV claims on the basis that they are barred by the applicable South Carolina statute of limitations. This argument has been earlier rejected by the Panel, and nothing new or different has been raised by Stantec.

As previously held by the Panel:

> South Carolina law requires a party to commence an action within three years of the discovery of its cause of action. S.C. Code Ann. § 15-3-530. The complaint in this action was filed on September 14, 2018. Therefore, claims that arose prior to September 14, 2015 are barred.
>
> It is undisputed that Stantec's pre-award Bridge 11 drawings did not include bridge barrier conduit or geomembrane at the abutments. Stantec delivered post-award final Bridge 11 plans depicting bridge barrier conduit and geomembrane at least by May 2015 and at least 4 revised sets of plans showing the geomembrane before September 8, 2015. Stantec contends that FZJV had adequate opportunity to note that the pre-award plans did not contain a geomembrane at the abutments and the post-award plans did contain a geomembrane. FZJV submitted an affidavit stating that FZJV did not discover that the geomembrane was not included in the final plans until September 2016 during the RFI process. Based on the affidavit, there is a genuine issue of material fact on when a reasonable design/builder should have discovered the claim relating to the geomembrane in the bridge abutment.

The facts behind that finding remain unchanged, therefore Stantec's Motion for Summary Judgment is therefore denied.

CECS'S MOTION AND ECS'S MOTION

CECS's and ECS's Motions for Summary Judgment are predicated upon their arguments that FZJV's claims are barred by the statute of limitations.

In summary, CECS argues that the statute of limitations on the claims raised against it commenced not later than March 5, 2015, during the pursuit phase services portion of the design of the Project. At that point in time, the design of the Project was not complete, and therefore FZJV could not have reasonably discovered whether CECS's design was negligently performed and did not meet the proper standard of care. Accordingly, the Panel finds that there remains a genuine issue of material fact as to when FZJV should have discovered the claims against relating

to the alleged negligence of CECS and CECS's Motion for Summary Judgment is hereby denied.

ECS's Motion is similarly based. ECS argues that all claims of FZJV and in particular the claims related to the MSE and SMSE walls should be dismissed. With regard to the latter claims, ECS argues that FZJV had actual knowledge that reinforcement ratios in excess of .7H would be required for the MSE walls before September 14, 2015, that FZJV's claims were filed more than three years from that date and are therefore time-barred. For the reasons set forth above, the Panel finds that there is a genuine issue of material fact relating to the statute of limitations and the motions for summary judgment are denied. Respondents may assert their statute of limitations defenses at the hearing.

Accordingly, the Panel denies Stantec's Motion for Summary Judgment, CECS's Motion for Summary Judgment and ECS's Motion for Summary Judgment.

AND IT IS SO ORDERED, this 19th day of January, 2022.

*/s/ Herbert H. Gray, III*_____
Herbert H. Gray, III, Arbitrator
For The Panel

Exhibit E

(Order on Second Motion to Clarify or Reconsider)

IN THE MATTTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents

ORDER ON FZJV's 2nd MOTION FOR CLARIFICATION or in the alternative MOTION FOR RECONSIDERATION

The Panel having read and considered Claimant Flatiron-Zachry JV's (FZJV) 2nd Motion for Clarification or in the alternative Motion for Reconsideration of Panel's Order on Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motion for Summary Judgment and Stantec's Response thereto finds as follows:

The sentence *"On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items"* in the original order should have read *"On items 1 and 2, it is undisputed that Stantec did not provide pre-award services for these items."* Additionally, the original order granting summary judgment for Stantec on Wall 32 issues was intended to include the shoring issues along with the strap length issues. The original order is amended accordingly.

Respondent FZJV's motion for reconsideration of the Stantec summary judgment order is DENIED.

AND IT IS SO ORDERED, this 24th day of March, 2022.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

RECEIVED
Aug 17 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-001178
Case No. 2018-CP-23-04740

Flatiron-Zachry, a Joint Venture, Appellant,

v.

Civil Engineering Consulting Services, Inc. c/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International, Defendants,

Of which Stantec Consulting Services, Inc. is the Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Flatiron-Zachry, a Joint Venture, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04, and a copy of that electronic mail is attached to this certificate.

Pleading(s): Return to Respondent's Motion to Dismiss

Served: **Via E-Mail**

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Eileen Hindman
Administrative Assistant

08/17, 2023

Eileen Hindman

From: Eileen Hindman
Sent: Thursday, August 17, 2023 3:42 PM
To: Will.hoffman@law.ua.edu; barnold@wwhgd.com; rginsberg@wwhdg.com; mecox@smithcurrie.com; Blake Williams; Mitch Brown
Subject: Flatiron-Zachry v. Stantec Consulting Services, Inc. - Appellate Case No. 2023-001178
Attachments: 2023.08.17 Flatiron - Return to Motion to Dismiss with Exhibits A-E.pdf; 2023.08.17 Flatiron - Proof of Service.pdf

Good afternoon,

Attached for service upon you in the above matter, please find a Return to Respondent's Motion to Dismiss with exhibits A-E, and Proof of Service.

Thank you,

NELSON MULLINS

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