Saiber Wins Appeal on Behalf of Surety Company in NYC Subway Telecom Construction Dispute

July 11, 2022

In a lawsuit spanning more than seven years, Saiber recently achieved a key victory on behalf of a surety client by convincing a federal appeals court to vacate a judgment in excess of $1 million. The judgment had ordered the surety to make payment on a performance bond issued on behalf of a supplier of customized telecommunications equipment and in favor of a contractor that was licensed to bring internet and phone service to New York City's underground subway system.

The performance bond contained a two-year limitations period, requiring that "[a]ny suit under this bond…be instituted [by contractor] before the expiration of two (2) years from the date on which final payment under the [Purchase Agreement] falls due." The underlying Purchase Agreement provided that final milestone payment from the contractor was due upon the earlier of three months after the supplier's delivery of the equipment or successful commissioning of the equipment for commercial service. The contractor maintained that because the supplier's equipment was non-conforming, the final payment under the Purchase Agreement never became due and, as a result, the two-year limitations period under the bond had not been triggered.

The issue arrived before the Third Circuit from the surety's appeal of the New Jersey District Court's decision which held that the contractor's lawsuit under the bond was not time-barred – and the surety was liable – because the contractor had rejected the equipment. The District Court's judgment reversed the earlier decision issued by the Bankruptcy Court following a three-day bench trial, which held that the contractor had accepted the equipment through its continued use of it, which triggered the two-year limitations period under the bond. Because the contractor did not file suit against the surety within that two-year time period, the Bankruptcy Court concluded that the surety was not liable under the bond.

In a precedential opinion issued on July 5, 2022, the U.S. Court of Appeals for the Third Circuit unanimously agreed that the surety is not liable on the bond because the contractor's lawsuit against the surety is time-barred. In reaching this conclusion, the Third Circuit did not look to the date of rejection or acceptance as the District and Bankruptcy Courts had done. Instead, the Third Circuit agreed with the argument advanced by Saiber that the unambiguous limitations period in the bond – which was not conditioned on anything other than the supplier's delivery of the equipment or the successful commissioning of the equipment – must be read according to its ordinary meaning.

This result is particularly significant because it vacated the judgment the District Court entered in favor of the contractor and against the surety in an amount in excess of $1 million.

The Saiber team representing the surety in the successful appeal was led by Michael J. Grohs, who argued the appeal before the Third Circuit, and Saiber member Robert L. Ritter.