

Toll Contractor Rests Miami Case With \$58M Push

By Nathan Hale

Law360, Miami (September 21, 2015, 9:01 PM ET) -- Electronic Transaction Consultants Corp. won entry of a potentially key piece of evidence and outlined upward of \$58 million the Miami-Dade County Expressway Authority allegedly owes ETC for work on the county's cashless toll system, before resting its case Monday in Florida court.

Texas-based ETC convinced Miami-Dade Circuit Judge John W. Thornton Jr. to admit a 2006 MDX report that purportedly shows the quasi-agency provided misleading information when it awarded the [disputed \\$80 million contract](#) in 2008. But ETC also faces a defense motion for involuntary dismissal of portions of its claims, which the court took under advisement for review overnight.

"They have not established anywhere close to what they have to prove," said the MDX's attorney Joseph H. Serota of [Weiss Serota Helfman Cole & Bierman PL](#), arguing for a complete dismissal of ETC's count for breach of implied covenant of good faith and fair dealing and for portions of its breach of contract claims, including those regarding project delays and an option that involved the Tampa Hillsborough Expressway Authority.

ETC has brought a two-pronged attack in the nonjury trial in the Miami court's complex business litigation division, arguing alternatively that the MDX breached and interfered with its contract to design, implement and operate the Account Management and Toll Enforcement System, which covered the electronic tolls' back-office billing system; and that the MDX wrongfully terminated the deal in December 2012.

ETC claims the MDX terminated the agreement after ETC requested fee adjustments to account for its having to process a greater than expected volume of customers using the pay-by-plate system, in which cameras snap images of license plates for vehicles lacking SunPass transponders and the company bills the owners by mail.

Before the plaintiff rested its case, Judge Thornton revisited and ultimately rejected the defense's objection to ETC's evidence request.

ETC successfully argued for admission of a master tolling approved by the MDX board in 2006. The plaintiff argued that the MDX provided project bidders only historical data on the system that included a cash toll option and failed to disclose the master plan, which included MDX engineering consultants' projections that the number of non-SunPass customers in a cashless system would exceed the 6.4 percent figure it told them to use.

That figure was actually 24.5 percent after three months of operations, prompting ETC to call for the fee adjustment, as provided for in the contract if that figure varied by more than 25 percent, ETC said.

MDX Deputy Executive Director and Director of Toll Operations Stephan Andriuk refuted those claims in testimony Monday, saying he had presented the master plan to the tolling industry, including ETC, and that the MDX just did not think to use the projections in the bidding process.

"It's not like anyone was kept in the dark and we tried to hide anything," Andriuk said. "I was expecting the experts, who have done these projects elsewhere, to [look at the historical data and] say, 'Look, this is what we expect this to be.'"

Regarding the MDX's motion to dismiss, Serota said ETC's contract claims rely on alleged honest mistakes, bad judgments and negligence, which would not rise to the level of conscious and capricious acts needed under state law and [Florida Bar](#) rules to meet the implied covenant claims.

ETC's counsel Mike Piscitelli of [Vezina Lawrence & Piscitelli PA](#) argued that fair dealing comes into play because of a contract clause that gives the MDX the sole discretion to grant "provisional acceptance" of the phases of work that it deemed had been substantially complete.

He pointed to the MDX's alleged refusal to approve design documents that ETC submitted on time and its orders for the system to go live before testing was completed.

"The first breach, and what threw this off track, was MDX's failure to follow the schedule," Piscitelli said. "Those breaches by MDX are the reasons why we incurred the damages that we incurred."

Damages were the subject of Monday morning's testimony, as ETC called its expert witness, Louis M. Wenick, to explain his calculations for the company's request.

Under the breach of contract/interference argument, which ETC claims total \$58 million in damages, Wenick found the wrongful termination argument bears \$45.9 million in claims.

In the contract breach argument, a claim of \$16.9 million in cost overrun attributed to the MDX's interference and delays was figured in a system portion, while an operations portion was bloated by the \$18.3 million in excessive "apparent violations" the company had to compare to what the contract indicated, Wenick said.

Wenick said that ETC spent about \$55 million on the project, and the company's counsel pointed out that the company did not charge the MDX for a 29 percent overrun on labor estimates and certain work that was not project-specific.

Questioned on cross-examination about his assumptions and depth of investigation into whether the MDX actually owed all the claims levied by ETC, Wenick explained that he had been hired to validate the calculations based solely on ETC's liability arguments and that his report did take a position on those legal questions.

Asked by defense counsel if Wenick agreed that the liability issues could have a big effect on the value of the damages, Wenick replied, "Sure, that's what you're here for."

The MDX opened presentation of its case Monday afternoon with testimony from Susan Carlson of engineering firm [HNTB Corp.](#), whose testimony on her extensive background with toll projects contradicted the plaintiff's earlier portrayal of her as being in over her head on the project.