

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2021 CA 0334

OMEGA GENERAL CONSTRUCTION, L.L.C.

VERSUS

RECREATION AND PARKS COMMISSION FOR THE
PARISH OF EAST BATON ROUGE

MAT.

PMC by JEW

JEW

Judgment Rendered: DEC 22 2021

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C699083

The Honorable Janice Clark, Judge Presiding

Charles K. Chauvin
Destrehan, Louisiana

Counsel for Plaintiff/Appellant
Omega General Construction,
L.L.C.

Murphy J. Foster, III
Jacob E. Roussel
David C. Fleshman
Baton Rouge, Louisiana

Counsel for Defendant/Appellee
Recreation and Parks Commission
for the Parish of East Baton Rouge

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

THERIOT, J.

Omega General Construction, L.L.C. (“Omega”) appeals a judgment by the Nineteenth Judicial District Court, which sustained the peremptory exception of *res judicata* in favor of Recreation and Parks Commission for the Parish of East Baton Rouge (“BREC”), and dismissed Omega’s claims with prejudice. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On January 14, 2013, BREC and Omega entered into a public works contract (“the contract”) wherein Omega agreed to serve as the general contractor for the construction of the Magnolia Mound Visitor Center (“the project”) located on Nicholson Drive in Baton Rouge, Louisiana.¹ BREC agreed to pay Omega \$1,996,000.00 under the contract, and the work was to be completed within 285 calendar days. Omega agreed that if it failed to achieve substantial completion within that time, including any authorized extensions, liquidated damages in the amount of \$700.00 per day would be assessed to Omega until substantial completion was achieved. On August 21, 2015, the project reached substantial completion. A formal certificate of acceptance of the project by BREC was signed on November 30, 2015 and recorded on December 1, 2015.

Thereafter, several disputes arose between BREC and Omega concerning the project’s design, construction, workmanship, and materials and Omega’s failure to perform its work in compliance with the contract and other applicable standards. In February 2016, BREC, Omega and Trahan Architects signed a change order titled Change Order 013-R2 (“Change Order 13”).² Change Order 13 (1) added 158 calendar days with no general conditions to the contract time; (2) deducted

¹ Carolyn McKnight signed the contract on behalf of BREC, and Adam B. Stevens signed the contract on behalf of Omega.

² Victor F. Trahan, III signed Change Order 13 on behalf of Trahan Architects on February 15, 2016; Adam B. Stevens signed Change Order 13 on behalf of Omega on February 3, 2016; and Carolyn McKnight signed Change Order 13 on behalf of BREC on February 22, 2016.

\$63,500.00 from the contract sum for 127 days of liquidated damages at \$500.00 per day pursuant to the contract; (3) deducted \$66,930.00 from the contract sum for the punch-list items that were removed from the contract; (4) and added \$7,500.00 to the contract sum for the work described in Construction Change Directive 001. Pursuant to Change Order 13, the new contract sum including Change Order 13 was \$1,677,512.60.

About a year and a half after Change Order 13 was agreed upon, BREC and Omega (and several other parties) entered into a Settlement Agreement, and all parties performed their obligations under the agreement.³ Upon the parties' performance of their obligations under the Settlement Agreement, Omega compromised "all claims, actions, causes of action, rights, liabilities, obligations, requests and demands of every kind and nature whatsoever" against BREC "which in any manner arise out of or relate or are in any way connected to the Project including but not limited to amounts claimed pursuant to any contracts entered into with BREC in connection with the Project."

On September 2, 2020, Omega filed a petition for writ of mandamus against BREC claiming that BREC withheld the final payment of \$63,500.00 for alleged liquidated damages. Omega argued it was entitled to a summary mandamus proceeding against BREC for its failure to comply with Louisiana Revised Statutes 38:2191 and Louisiana Revised Statutes 38:2248. Thereafter, on November 4, 2020, BREC filed a peremptory exception of *res judicata*, which was set for a hearing before the district court on November 20, 2020. BREC argued that it and Omega entered into an agreement via Change Order 13, wherein \$63,500.00 in liquidated damages was deducted from the contract sum, and then subsequently entered into the Settlement Agreement that compromised all issues and disputes relative to the project. In opposition, Omega argued BREC did not have the

³ The Settlement Agreement was signed by Adam Stevens on behalf of Omega on August 10, 2017 and by Carolyn McKnight on behalf of BREC on September 20, 2017.

discretion to withhold payments under the Louisiana Public Works Act (“LPWA”) and a contractor’s right to payment may not be waived.

At the hearing on the exception of *res judicata*, BREC and Omega introduced twelve joint exhibits including (1) the Contract Agreement dated January 14, 2013; (2) the Notice to Proceed dated January 18, 2013; (3) the Certificate of Substantial Completion dated August 21, 2015; (4) Change Orders 1-12; (5) Change Order 13; (6) the Settlement Agreement dated September 20, 2017; (7) proof of the parties’ contributions pursuant to the Settlement Agreement; (8) the Sworn Statement by Glassman of Louisiana, L.L.C. Regarding Magnolia Mound Visitor Center Project; (9) the Application and Certification for Payment; (10) Breazeale, Sachse & Wilson, L.L.P.’s letter and final payment check to Glassman of Louisiana, L.L.C.; (11) Omega’s letter to Breazeale, Sachse & Wilson, L.L.P.; and (12) Breazeale, Sachse & Wilson, L.L.P.’s letter to Omega.

At the conclusion of the hearing, the district court sustained BREC’s exception of *res judicata* and dismissed all claims asserted by Omega against BREC in the petition for writ of mandamus. A judgment to that effect was signed by the district court on December 14, 2020. It is from this judgment that Omega appeals.

ASSIGNMENT OF ERROR

Omega contends the district court committed legal error in sustaining the exception of *res judicata* wherein it held that Omega contractually waived its right to recover the balance of the contract price illegally withheld from final payment even though such a contractual waiver is expressly prohibited by the LPWA.

STANDARD OF REVIEW

When an objection of *res judicata* is raised before the case is submitted and evidence is received on the objection, the standard of review on appeal is traditionally manifest error. *Leray v. Nissan Motor Corp. in U.S.A.*, 2005-2051, p.

5 (La. App. 1st Cir. 11/3/06), 950 So. 2d 707, 710. However, the *res judicata* effect of a prior judgment is a question of law that is reviewed *de novo*. *Pierrotti v. Johnson*, 2011-1317 (La. App. 1st Cir. 3/19/12), 91 So. 3d 1056, 1063. The issue here is the district court's legal conclusion that the Settlement Agreement between the parties constituted a valid compromise. Therefore, we will conduct a *de novo* review to determine if the district court was legally correct in sustaining BREC's *res judicata* exception.

APPLICABLE LAW

Res judicata bars re-litigation of a subject matter arising from the same transaction or occurrence as a previous suit. *Avenue Plaza, L.L.C. v. Falgoust*, 1996-0173, p. 4 (La. 7/2/96), 676 So. 2d 1077, 1079; see also La. R.S. 13:4231. It promotes judicial efficiency and final resolution of disputes. *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 1995-0654, 1995-0671, p. 12 (La. 1/16/96), 666 So. 2d 624, 631. Louisiana Revised Statutes 13:4231, which sets forth the general principles regarding *res judicata*, provides as follows:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

- (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
- (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
- (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

The Louisiana Supreme Court has emphasized that all of the following elements must be satisfied in order for *res judicata* to preclude a second action: (1)

the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause(s) of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause(s) of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. *Burguieres v. Pollingue*, 2002-1385, p. 8 (La. 2/25/03), 843 So. 2d 1049, 1053. The parties are the same for purposes of *res judicata* only when they appear in the same capacities in both suits. *Burguieres*, 2002-1385 at p. 10, 843 So. 2d at 1054.

Although the exception of *res judicata* typically contemplates the existence of a final judgment on the merits, it also applies if there is a settlement of a dispute that has been entered into by the parties. *Davis v. J.R. Logging, Inc.*, 2013-0568 (La. App. 1st Cir. 11/8/13), 136 So. 3d 828, 830, writ denied, 2014-0860 (La. 6/20/14), 141 So. 3d 812. The burden of proving the facts essential to support the objection of *res judicata* is on the party pleading the objection. If any doubt exists as to the application of *res judicata*, the objection must be overruled and the lawsuit maintained. *Landry v. Town of Livingston Police Dept.*, 2010-0673, p. 5 (La. App. 1st Cir. 12/22/10), 54 So. 3d 772, 776.

DISCUSSION

1. Valid Judgment

For *res judicata* to preclude the mandamus action filed by Omega, the Settlement Agreement must be a valid judgment. See *Burguieres*, 2002-1385 at p. 8, 843 So. 2d at 1053. The doctrine of *res judicata* applies where there is a settlement of a disputed or compromised matter that has been entered into by the parties. *Labiche v. Louisiana Patients' Comp. Fund Oversight Bd.*, 1998-2880 (La. App. 1st Cir. 2/18/00), 753 So. 2d 376, 380, (citing *Matthew v. Melton Truck Lines, Inc.*, (La. App. 1st Cir. 3/10/75), 310 So. 2d 691, 693). A compromise is a contract whereby the parties, through concessions made by more than one of them,

settle a dispute or an uncertainty concerning an obligation or other legal relationship. La. C.C. art. 3071. A compromise is the law between the parties and must be interpreted according to the parties' intent. *Chauvin v. Exxon Mobil Corp.*, 2014-0808 (La. 12/9/14), 158 So. 3d 761, 766. When the words of a compromise are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. The settlement agreement entered into by Omega and BREC regarding the project states, in pertinent part:

The following Settlement Agreement is hereby made and entered into by and among: RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE (hereinafter "BREC"); OMEGA GENERAL CONSTRUCTION, L.L.C (hereinafter "Omega"); THE GRAY INSURANCE COMPANY (hereinafter "Gray"); TRAHAN ARCHITECTS, APAC [(]hereinafter "Trahan"); BENDHEIM WALL SYSTEMS, INC. (hereinafter "Bendheim"); and GLASSMAN OF LOUISIANA, L.L.C. (hereinafter "Glassman").

WHEREAS, BREC and Omega entered into a "Contract Agreement" dated January 14, 2013 (hereinafter "Contract") for the construction of a project referred to as "Magnolia Mound Visitor Center[,] 2161 Nicholson Dr., Baton Rouge, LA (hereinafter "Project"); and

WHEREAS[,] certain disputes have arisen in the context of claims by BREC that the Project's design and/or construction and/or workmanship and/or materials are defective or otherwise non-compliant with the Contract requirements and/or other applicable standards;

THEREFORE, for and in consideration of the obligations undertaken and the releases and other considerations stated herein, the above-named and undersigned parties hereby agree as follows:

1. Within 90 days of execution of this Settlement Agreement by all parties, (hereafter the "Effective Date"), Omega, at its own expense, will: (a) repair and paint damaged sheetrock as previously identified by BREC; (b) clean all HVAC ducts; (c) clean or replace ceiling tiles that have been stained/damaged nearby the HVAC ducts located at the front and rear of the facility; (d) install to required grade the dirt on the roof in preparation for installation of a new green roof (Omega shall be obligated to supply no more than 6 medium sacks of dirt fully complying with the original Project specifications and only after the weeding is performed by BREC); (e) install swale on west side of

building and replace sod at swale, which notwithstanding the 90 day deadline, shall be performed only after all Channel Glass work subject to this Agreement has been completed on the west side of the building by Glassman; (f) re-route drain in mechanical room to the mop sink drain[;] (g) sand, prime and paint rusted areas of trellis; and (h) Omega will attempt to provide a copy of all close out documents, previously submitted at the close of the construction project, including warranty materials, O & M manuals and as-built drawings. With regard to item (c), Omega will attempt to clean the ceiling tiles; if cleaning is not successful, they will be replaced after BREC has installed deflectors/louvers to prevent damages to the new (or cleaned) ceiling tiles; however, Omega shall not be obligated to replace more than forty-five (45) ceiling tiles. Additionally, BREC agrees to be responsible for the removal of the existing grass roof and grass replacement and maintenance thereof. Except as otherwise indicated, all of the work items listed in this paragraph shall be completed by Omega within 90 days of the Effective Date of this Settlement Agreement . . .

6. The following parties shall contribute the following amounts for Glassman's performance of the work specified herein:

Bendheim:	\$76,000
Omega:	\$11,500
Trahan:	\$11,500
BREC:	\$51,500

7. The above amounts shall be paid to Breazeale, Sachse & Wilson, LLP (BREC's counsel) within 30 days of the Effective Date and shall be held by that firm in trust. The funds shall be released and disbursed to Glassman following monthly pay applications approved by the BREC Representative.

8. Gray hereby consents to the terms of this Settlement Agreement and agrees that Gray's obligations under the Bond extend to the additional obligations undertaken by Omega pursuant to this Settlement Agreement.

9. In consideration of the parties' performance of the obligations set forth above, and upon completion and Acceptance of the work specified herein, BREC releases and fully discharges Omega, Gray, Trahan, Bendheim and Glassman, and their respective insurers, sureties, officers, representatives, attorneys, successors and assigns, from any and all claims and causes of action arising from or related to the Project, Contract and Subcontract, including (but not limited to) alleged defects in the design, construction, workmanship, and materials used in the glass wall system, concrete walls, concrete wall flashing, floor pavers, storefront windows, roof and trellis. Notwithstanding the foregoing, the following items (only) are excluded from the effects of the release and discharge:

(a) The express warranty obligations set forth in this Settlement Agreement; and/or

(b) Any written warranty, unrelated to the alleged defects listed above, which has not expired as of the date hereof (which said warranty will not be deemed expanded, diminished or modified as a result of this Agreement).

10. Nothing herein shall be construed as an admission of fault or liability by any party; all parties expressly deny fault and liability. Any of the payments, performance and releases set forth herein are given and received for the purpose of settling, compromising and putting an end to disputed claims.

11. The terms of this Settlement Agreement shall be binding on the parties on the Effective Date.

13. Upon fulfillment of the payment obligations set forth above and written approval and acceptance by BREC of all work described in this Settlement Agreement, Omega, Gray, Glassman, Bendheim and Trahan release, waive, hold harmless, acquit and forever discharge BREC, its insurers, and each of their respective past, present and future parent, subsidiary and affiliated companies, joint venturers, partnerships, employees, board members, officers and directors, agents, representatives, predecessors, successors and assigns from any and all liability whatsoever for any and all claims, actions, causes of action, rights, liabilities, obligations, requests and demands of every kind and nature whatsoever, known and unknown, accrued or unaccrued, existing or potential, suspected or unsuspected, including, without limitation, for consequential and punitive damages, loss of profit, compensation, emotional distress, breach of legal or contractual duties, property damage, losses, costs, expenses, attorney's fees, rescission, reformation and declaratory relief, whether under the common law, statutorily based, or of an equitable predicate, which in any manner arise out of or relate or are in any way connected to the Project including but not limited to amounts claimed pursuant to any contracts entered into with BREC in connection with the Project.

15. This Agreement may be executed in multiple counterparts and by facsimile, which, when taken together, shall form the entire agreement between the parties with regard to the subject hereof, and supersedes any prior representations, promises, or warranties (oral or otherwise), made by any party. No party shall be liable or bound to any other party for any prior representation, promise or warranty (oral or otherwise) except for those expressly set forth in this Settlement Agreement. All prior discussions, negotiations, and representations are hereby merged into and are superseded by this agreement. This Agreement may be amended only by a written document executed by all parties.

16. This Settlement Agreement shall be interpreted in accordance with the substantive laws of the State of Louisiana, regardless of whether applicable conflicts of laws principles require the application of another state's laws.

In the Settlement Agreement, Omega agreed to release BREC "from any and all liability whatsoever for any and all claims, actions, causes of action, rights, liabilities, obligations, requests and demands of every kind and nature whatsoever." Omega and BREC further agreed that all prior "discussions, negotiations, and representations" were merged into and superseded by the Settlement Agreement. Thus, through the Settlement Agreement, Omega and BREC compromised all disputes that arose from the project. However, Omega contends that the Settlement Agreement is not valid under the LPWA.

Omega first argues that, under Louisiana Revised Statutes 38:2191, upon the expiration of the forty-five day lien period, Omega was entitled to full payment under the contract, so BREC's effort to force Omega to waive its right to payment through Change Order 13 and subsequently the Settlement Agreement was without effect. Louisiana Revised Statutes 38:2191 provides:

A. All public entities shall promptly pay all obligations arising under public contracts when the obligations become due and payable under the contract. All progressive stage payments and final payments shall be paid when they respectively become due and payable under the contract.

B. (1) Any public entity failing to make any progressive stage payment within forty-five days following receipt of a certified request for payment by the public entity without reasonable cause shall be liable for reasonable attorney fees and interest charged at one-half percent accumulated daily, not to exceed fifteen percent. Any public entity failing to make any final payments after formal final acceptance and within forty-five days following receipt of a clear lien certificate by the public entity shall be liable for reasonable attorney fees and interest charged at one-half percent accumulated daily, not to exceed fifteen percent.

(2) Any interest received by the contractor pursuant to Paragraph (1) of this Subsection, shall be disbursed on a prorated basis among the contractor and subcontractors, each receiving a prorated portion based on the principal amount due within ten business days of receipt of the interest.

C. The provisions of this Section shall not be subject to waiver by contract.

D. Any public entity failing to make any progressive stage payments arbitrarily or without reasonable cause, or any final payment when due as provided in this Section, shall be subject to mandamus to compel the payment of the sums due under the contract up to the amount of the appropriation made for the award and execution of the contract, including any authorized change orders.

Substantial completion was reached on August 21, 2015, and the project was formally accepted on November 30, 2015. Omega contends that BREC failed to make the final payment that was due after formal final acceptance, with the forty-five day lien period expiring on January 15, 2016. However, instead of filing a mandamus action at that time, Omega chose to enter into Change Order 13. In Change Order 13, Omega agreed to the deduction of \$63,500.00 from the contract sum for 127 days of liquidated damages. After agreeing to Change Order 13, Omega entered into the Settlement Agreement, which compromised any remaining claims between the parties.

Although Louisiana Revised Statutes 38:2191C indicates that the provisions of the statute are not subject to waiver, it does not prohibit parties from entering into a compromise to resolve their differences. Generally, “[w]aiver occurs when there is an existing right, a knowledge of its existence and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished.” *B.F. Carvin Const. Co. v. Hosp. Serv. Dist. No. 1 of Par. of Terrebonne*, 2009-0211 (La. App. 1st Cir. 9/11/09); 2009 WL 3161630, at *2 (citing *Steptore v. Masco Const. Co., Inc.*, 1993-2064 (La. 8/18/94), 643 So. 2d 1213, 1216). In contrast, a compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute concerning an obligation or other legal relationship. La. C.C. art. 3071. It is well-settled that a compromise between parties to avoid litigation is

avored by law, and courts will not declare them void without a clear showing that they violate good morals or public interest. *B.F. Carvin Const. Co.*, WL 3161630, at *2 (citing *Barker v. Dept. of Transp. and Development for State*, 2008-1084 (La. App. 1st Cir. 12/23/08), 4 So. 3d 869, 871). Omega compromised any claims it had against BREC in regards to the project when it signed the Settlement Agreement. Although a waiver is not permissible under Louisiana Revised Statutes 38:2191, a compromise is. Therefore, the Settlement Agreement is valid and enforceable under Louisiana Revised Statutes 38:2191.

Next, Omega contends that under Louisiana Revised Statutes 38:2248 liquidated damages may only be withheld from retainage on flood or coastal restoration projects and may not be waived. Louisiana Revised Statutes 38:2248 provides:

A. No contracts for the construction, alteration, or repair of any public works executed in conformity with this Part shall provide that the state or any of its agencies, boards, or subdivisions or any other public entity letting such a contract may withhold payment of more than ten percent of the contract price on projects of less than five hundred thousand dollars, and five percent of the contract price on projects of five hundred thousand dollars or more until the expiration of forty-five days after the recordation of formal acceptance of such work, or notice of default by the contractor or subcontractor. Such provision for withholding of payment shall in no way change or affect the liability of the letting agency or of the contractor, subcontractor, or their sureties.

B. All public works contracts shall contain a clause stating that any punch list generated during a construction project shall include the cost estimates for the particular items of work the design professional has developed based on the mobilization, labor, material, and equipment costs of correcting each punch list item. The design professional shall retain his working papers used to determine the punch list items cost estimates should the matter be disputed later. The contracting agency shall not withhold from payment more than the value of the punch list. Punch list items completed shall be paid upon the expiration of the forty-five day lien period. The provisions of this Section shall not be subject to waiver, nor shall these provisions apply to the Department of Transportation and Development.

C. Notwithstanding any provision of law to the contrary, a public entity letting a public works construction contract for a flood protection project or for an integrated coastal protection project as

defined in R.S. 49:214.2, as per the terms of the contract, may withhold liquidated damages from any payments or monies otherwise due to the contractor, taking into consideration all granted time extensions, after the expiration of the forty-five day period set forth in R.S. 38:2242(B).

Omega argues that the Settlement Agreement was an illegal and unenforceable waiver under Louisiana Revised Statutes 38:2248 since the project was not a retainage on flood or coastal restoration project. Louisiana Revised Statutes 38:2248B's restriction on waiver does not limit the parties' rights to compromise their differences. The Settlement Agreement between Omega and BREC is clearly stated as a compromise. Omega was not asked to expressly waive or relinquish a known right. As the pleadings and evidence show, disputes existed between the parties regarding the work done pursuant to the contract, and the parties entered into the Settlement Agreement to resolve those existing disputes.

Omega and BREC released their claims against each other in exchange for consideration. A release of claims, when given in exchange for consideration, is a compromise. *Labiche*, 753 So. 2d at 380. In the Settlement Agreement, Omega agreed to repair and paint damaged sheetrock; clean all HVC ducts; clean or replace ceiling tiles; install to required grade the dirt on the roof; install swale; re-route the drain in the mechanical room; sand, prime and paint the rusted areas of the trellis; and attempt to provide a copy of all close out documents. Omega further agreed to contribute \$11,500.00 for Glassman's performance of the work specified in the Settlement Agreement. In consideration for Omega's performance of the obligations set forth in the Settlement Agreement, BREC released and fully discharged Omega from any and all claims and causes of action arising from the project, contract and subcontract. Likewise, BREC agreed to contribute \$51,500.00 for Glassman's performance of the work specified in the Settlement Agreement. Upon fulfillment of the payment obligations set forth in the Settlement Agreement and acceptance by BREC of all work described in the Settlement

Agreement, Omega released BREC from any and all liability whatsoever for any and all claims. Thus, Omega's claims against BREC were released in exchange for consideration, which constitutes a compromise. Further, the compromise in this instance does not violate good morals or public interest. Accordingly, we conclude that Omega's arguments that the Settlement Agreement is precluded by law are without merit.

In Omega's final argument, it contends that the Settlement Agreement is actually a new public works contract due to the substantial construction repairs performed by Omega pursuant to the Settlement Agreement, so the waiver and release of all claims by Omega violates Louisiana Revised Statutes 38:2216H.

Louisiana Revised Statutes 38:2216H provides:

Any provision contained in a public contract which purports to waive, release, or extinguish the rights of a contractor to recover cost of damages, or obtain equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable. When a contract contains a provision which is void and unenforceable under this Subsection, that provision shall be severed from the other provisions of the contract and the fact that the provision is void and unenforceable shall not affect the other provisions of the contract.

A "public contract" or "contract" is "any contract awarded by any public entity for the making of any public works or for the purchase of any materials or supplies." La. R.S. 38:2211A(11). Here, a public works contract was entered into by BREC and Omega on January 14, 2013. To resolve issues that arose from the contract, BREC and Omega entered into Change Order 13. A "change order" is "any contract modification that includes an alteration, deviation, addition, or omission as to a preexisting public work contract, which authorizes an adjustment in the contract price, contract time, or an addition, deletion, or revision of work." La. R.S. 38:2211A(3)(a). When Change Order 13 was agreed upon, it modified the existing public works contract between BREC and Omega. Change Order 13 is not

a subsequent public works contract. BREC and Omega then entered into the Settlement Agreement. Like Change Order 13, the Settlement Agreement does not constitute a new public works contract. As determined above, the Settlement Agreement is a compromise between the parties. Thus, Omega's argument that the Settlement Agreement is a new public works contract is without merit, and the Settlement Agreement is valid and enforceable under the LPWA.

2. Final Judgment

For *res judicata* to preclude the mandamus action filed by Omega, there must be a final judgment. See *Burguières*, 2002-1385 at p. 8, 843 So. 2d at 1053. "A judgment that determines the merits in whole or in part is a final judgment." La. C.C.P. art. 1841. While the doctrine of *res judicata* is generally premised on a final judgment on the merits, it also applies where there is a settlement of a disputed or compromised matter that has been entered into by the parties. *Ortego v. State, Dep't of Transp. & Dev.*, 1996-1322 (La. 2/25/97), 689 So. 2d 1358, 1363. In the Settlement Agreement, Omega agreed to "release, waive, hold harmless, acquit and forever discharge BREC... from any and all liability whatsoever for any and all claims, actions, causes of action, rights, liabilities, obligations, requests and demands of every kind and nature whatsoever, known and unknown, accrued or unaccrued, existing or potential, suspected or unsuspected." The Settlement Agreement further states that all prior "discussions, negotiations, and representations" were merged into and superseded by the Settlement Agreement. Since the doctrine of *res judicata* applies when there is a settlement of a disputed or compromised matter, and Omega and BREC voluntarily entered into the Settlement Agreement regarding the project, this element of the *res judicata* analysis is met.

3. Same Parties

For *res judicata* to preclude the mandamus action filed by Omega, the parties must be the same. See *Burguieres*, 2002-1385 at p. 8, 843 So. 2d at 1053. In this case, Omega is the plaintiff and BREC is the defendant. Both Omega and BREC were also parties to the Settlement Agreement. Therefore, the parties are the same, and this element of the *res judicata* analysis is met.

4. Existence of the Cause of Action

For *res judicata* to preclude the mandamus action filed by Omega, the cause of action asserted in the current suit must have existed at the time the Settlement Agreement was entered into. See *Burguieres*, 2002-1385 at p. 8, 843 So. 2d at 1053. Omega contends that BREC failed to pay \$63,500.00 in liquidated damages when it was due on January 15, 2016. However, Omega agreed to Change Order 13, which deducted the \$63,500.00 from the contract sum, after January 15, 2016. Omega further compromised all outstanding claims against BREC when it signed the Settlement Agreement. Omega knew that it previously agreed to the deduction of \$63,500.00 in liquidated damages from the contract sum at the time the Settlement Agreement was entered into. Therefore, the cause of action asserted by Omega in this lawsuit existed at the time the Settlement Agreement was entered into.

5. Same Transaction or Occurrence

For *res judicata* to preclude the mandamus action filed by Omega, the cause of action must have arisen out of the transaction that was the subject matter of the Settlement Agreement. See *Burguieres*, 2002-1385 at p. 8, 843 So. 2d at 1053. Here, Omega settled a dispute with BREC by agreeing to Change Order 13. Change Order 13 deducted \$63,500.00 from the contract sum for 127 days of liquidated damages at \$500.00 per day pursuant to the contract. Thereafter, Omega compromised any remaining claims it may have had against BREC in the

Settlement Agreement. Omega then filed the current lawsuit seeking to recover the \$63,500.00 in liquidated damages from BREC that it previously agreed to deduct, alleging that amount was owed pursuant to the contract. Thus, the cause of action asserted in the present lawsuit arose out of the transaction that was the subject matter of the Settlement Agreement.

All of the elements of the *res judicata* analysis are met in this case, and the district court did not err in sustaining the exception of *res judicata* finding that the Settlement Agreement was valid for the purpose of *res judicata* to preclude the mandamus action.

DECREE

The judgment by the Nineteenth Judicial District Court, which sustained the peremptory exception of *res judicata* in favor of the appellee, Recreation and Parks Commission for the Parish of East Baton Rouge, and against the appellant, Omega General Construction, L.L.C., is affirmed. All costs of this appeal are assessed to Omega General Construction, L.L.C.

AFFIRMED.