The Availability of Contractual Defenses to Sureties in Miller Act Payment Bond Claims

By Scott D. Cessar | Thursday, October 4, 2018

A federal court ruled in favor of a subcontractor's delay claim, despite no damage for delay language in the subcontract. The holding presents a potentially potent weapon for unpaid subcontractors and prime contractors, and sureties should be cognizant of its ramifications when handling subcontractor claims on federal projects.

Consider this not uncommon scenario: On a federal project, a subcontractor, after its work is complete, submits a delay claim to a prime contractor. The prime contractor submits the delay claim to the government, which denies the claim. The prime contractor advises the subcontractor that the government has denied the subcontractor's claim, but that the prime contractor will include the claim in its other claims against the government as per the prime contract's dispute resolution procedures. The prime contractor also tells the subcontractor that, in any event, the claim is denied based on the no damage for delay clause contained in the subcontract.

The subcontractor files suit in federal court against the prime contractor and its surety to recover damages on its delay claim. The subcontractor moves the court to grant summary judgement against only the surety in the subcontractor's favor—meaning judgment for it without a trial—on its delay claim damages. The surety opposes and interposes two defenses: the no damage for delay clause in the subcontract and the fact that the dispute resolution process between the government and the prime contractor has not been completed.

This was the fact pattern in a recent case in a federal court in Virginia: United States v. Grimberg. The subcontractor was Kitchens to Go; the prime contractor was John C. Grimberg Co., Inc.; and the surety that issued the payment bond under the Miller Act to Grimberg was Hartford Accident and Indemnity.

The dispute arose out of Grimberg's work designing and completing improvements on a building at the FBI Academy in Quantico, VA. Kitchens' delay claim was for $686,818 for extended rental and use of Kitchens' temporary kitchen facilities for an additional five months. Grimberg submitted the claim to the government, which denied the claim. While stating that it would submit the claim with its final claim to the government, Grimberg also cited to the no damage for delay clause in its subcontract with Kitchens as a basis for denying the claim. Kitchens filed suit against Grimberg and Hartford.

Kitchens moved the court to rule in its favor as a matter of law against Grimberg's surety, Hartford, arguing that, while the no damage for delay clause may be a contractual impediment to judgment in its favor against Grimberg, under the Miller Act, Hartford was not entitled to rely on that clause to avoid payment on an otherwise valid Miller Act, payment bond claim.

Hartford argued that it was entitled to the contractual protections of the Grimberg-Kitchens's subcontract, namely the no damages for delay clause, and, further, that judgment could not be entered in favor of Kitchens until the ongoing dispute resolution process between Grimberg and the government was complete. In essence, Hartford argued that Congress, when it enacted the Miller Act, "did not intend to extend the liability of the surety beyond that of the contractor."

The court extensively reviewed prior decisions considering the issue and the language of the Miller Act. The court found those past decisions to be unpersuasive because the holdings of those cases were not supported "in the text of the Miller Act, its statutory scheme, purpose or legislative history."

Focusing on the text of the Miller Act and its intended purpose, the court held that the only provision that was a precondition to payment by a surety to an unpaid subcontractor under the Miller Act was the 90-day period from when the subcontractor last worked on the project. As such, the surety could not rely on the no damage for delay clause in the subcontract because, to so find, would be to add "a condition to the action on the payment bond that a subcontractor can only bring a Miller Act claim if the owner has paid the prime contractor for the delays." Such a result, according to the court, "not only contradicts the Miller Act's language but is also inconsistent with the purposes of the Act."

The court made short shrift of Hartford's second argument, namely that payment to Kitchens by Hartford must await completion of the disputes procedure set forth in Grimberg's prime contract with the government incorporated into the subcontract. In rejecting this argument, the court held that "the dispute resolution clause contravenes the purpose of the Miller Act by needlessly delaying the Subcontractor's recovery while denying the Subcontractor a forum in which to adjudicate its rights."

The court, thus, entered judgment on liability for Kitchens and against Hartford, holding that it only remained for Kitchens to prove up its entitlement at trial to the $686,818 in delay costs that it claimed.

Since the Miller Act covers all federal projects, Grimberg, thus, is a must read for prime contractors, subcontractors and sureties working on such projects. The holding presents a potentially potent weapon for unpaid subcontractors and prime contractors, and sureties should be cognizant of its ramifications when handling subcontractor claims on federal projects.