Case NOTES

Pay-if-Paid Clause Is Not a Defense to a Miller Act Payment Bond Claim

By Aaron P. Silberman

In *United States for the Use and Benefit of Walton Technology, Inc. v. Weststar Engineering, Inc.*,[1] the U.S. Court of Appeals for the Ninth Circuit held that a "pay when and if paid" clause in a construction subcontract is not a defense to a Miller Act [2] payment bond action. This holding is consistent with previous holdings in the Fourth and Fifth Circuits[3] and other courts' decisions concerning non-Miller Act payment bonds.[4]

Walton Technology was a subcontractor that furnished equipment for a federal project to repaint a Navy crane in the State of Washington. After the prime contractor, Weststar Engineering, became delinquent in making rental payments, Walton sued Weststar. The parties settled the lawsuit and executed a settlement agreement providing that Weststar would pay Walton a specified sum and that Walton would continue to provide equipment for the duration of the project. In addition, the settlement agreement modified the original subcontract by providing that Weststar would only have to make future rental payments to Walton when and if Weststar was paid by the Navy.[5]

Weststar failed to make rental payments for the last twelve months of the project, so Walton sued Weststar and its payment bond surety, Reliance Insurance Company, for recovery under the Miller Act. Weststar and Reliance moved for summary judgment on the ground that since Weststar had not been paid by the Navy, the pay-if-paid clause had not been satisfied and there were no "sums justly due" to Walton.[6] A district court agreed and granted summary judgment in favor of the defendants. Walton appealed.

The Ninth Circuit reversed the judgment. The court noted that the Miller Act was "highly remedial in nature" and, as such, "entitled to a liberal construction and application."[7] The Miller Act requires prime contractors on federal construction projects to obtain performance and payment bonds. Under the act, a subcontractor who is not paid in full within ninety days after it last furnishes labor or materials on a project may recover from the payment bond surety all "sums justly due." Thus, the act conditions a subcontractor's right to recover on a payment bond on the passage of time.[8] The Ninth Circuit noted that while the terms of a subcontract would typically govern the measure of a subcontractor's recovery in a Miller Act case, the Miller Act expressly governed when a subcontractor's right to recovery accrued. As such, any terms of the subcontract, such as a pay-if-paid clause dictating the timing or right to recovery under the Miller Act, contradicted the express terms of the act.[9] The court held that absent a "clear and explicit" waiver of the subcontractor's rights under the Miller Act, such a clause would not be enforced to preclude recovery under the act.[10]

Walton Technology is consistent with courts' general refusal to limit subcontractors, Miller Act rights even if provisions in the subcontract expressly purport to do so. In the absence of an express waiver that specifically mentions the Miller Act and unambiguously states that the subcontractor intends to waive its rights under the act, a pay-if-paid clause is no defense to a subcontractor payment bond claim. Thus, there will be circumstances in which a payment bond surety must pay a subcontractors sums that are not yet due under the contract between the prime and subcontractor, and under those circumstances, the prime will ultimately have to pay those sums as well because of the surety's subrogation rights. PL

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Endnotes

1. 290 F.3d 1199 (9th Cir. 2002).
2. 40 U.S.C. §§ 270a et seq.
3. Moore Bros. Co. v. Brown & Root, Inc., 207 F.3d 717, 723 (2000); United States for the Use of T.M.S. Mechanical Contractors v. Miller's Mut. Fire Ins. Co. of Texas, 942 F.2d 946, 949 n.6 (5th Cir. 1991).
4. *See, e.g.*, M&T Elec. Contractors, Inc., v. Capital Lighting & Supply, Inc., 267 B.R. 434, 449 (Bankr. D.C. 2001) (applying Virginia Law); Brown & Kerr, Inc. v. St. Paul Fire & Marine Ins. Co., 940 F.Supp. 1245 (N.D. Ill. 1996); Shearman & Assoc., Inc. v. Cont'l Cas. Co., 901 F. Supp. 199 (D. V.I. 1995); United States for the Use of DDC Interiors, Inc. v. Dawson Constr. Co., Inc., 895 F. Supp. 270 (D. Colo. 1995); OBS Co. v. Pace Constr. Corp., 558 So. 2d 404 (Fla. 1990); R&L Acoustics v. Liberty Mut. Ins. Co., 2001 Conn. Super. LEXIS 2854 at * 26–27 (Sept. 27, 2001).
5. The subcontract provided, "[I]t is expressly agreed that any further payment to Walton for the framing and fabric rental shall only be made when and if paid by the Navy and only to the extent paid by the Navy." 290 F.3d at 1203.
6. *Id.* at 1205.
7. *Id.* (citations omitted).
8. *Id.*; *cf. T.M.S. Mechanical*, 942 F.2d at 949 n.6.
9. *Id.* at 1207–08.
10. *Id.* at 1208–09; *cf. DDC Interiors*, 895 F. Supp. at 272.