

Important contractual rights and remedies can be lost, hard-won statutory protections waived, and serious liabilities incurred—all through ignorance of the law. This newsletter is designed to give you, in 60 seconds, some more insight into legal problems faced by contractors, subcontractors, and suppliers in the construction industry, so that you do not repeat their mistakes and, instead, successfully complete the job.

You Be the Judge

FACTS: A subcontractor agreed to provide labor and materials for HVAC, plumbing, and digital controls for a barracks renovation project at Fort Benning, Georgia in return for payment of \$10.1 million. At the conclusion of the subcontractor's work, the GC had paid \$9.9 million, but the subcontractor claimed that it was due an additional \$562,000 arising from delays on the project and additional out-of-scope work. When the GC denied the subcontractor's claims, the subcontractor filed suit under the Miller Act against the GC and the surety who issued the payment bond on the project. As part of its delay claim, the subcontractor asserted damages for the additional labor and materials required to complete its work, as well as for additional overhead, lost profits, and the cost of salaried employees. The surety challenged these additional damages as either not allowed by the Miller Act or as required by the original scope of the subcontract.

ISSUE: Can the subcontractor recover for additional overhead, lost profits, and the cost of salaried employees as part of its Miller Act delay claim?

RULING: Lost profits, with respect to missed opportunities on other projects, are clearly outside of what the subcontractor can recover under the Miller Act. However, the additional overhead and cost of salaried employees may be recovered under the Miller Act, if the subcontractor can show at trial that they are actual costs incurred and attributable to the delay or extra work. This is because subcontractors may recover from a surety for damages related to project delays not caused by the subcontractor, but only for additional or increased costs actually expended in furnishing labor or material in prosecution of the work and attributable to the delay. The surety's delay-related liability to the subcontractor is limited to the subcontractor's out-of-pocket costs of delay.

*United States ex rel. McKenney's, Inc. v. Leebcor Servs., LLC,
No. 4:20-CV-179, 2022 WL 122367 (E.D. Va. Jan. 12, 2022)*

Va. Legislation on "Pay if Paid" Clauses

New legislation awaiting Governor Youngkin's signature would prohibit the inclusion of "pay if paid" or "pay when paid" clauses in construction contracts. These clauses function to protect a general contractor from payment demands from subcontractors or suppliers when the project owner has not yet paid the general contractor for related aspects of the project. They also can present a frustrating obstacle for subcontractors or suppliers who have provided labor or materials on a project but have yet to receive payment. The governor is expected to make a decision on the legislation by mid-April, and it would take effect on July 1, 2022. We recommend reviewing your contracts for compliance if the legislation is enacted.

Have a lawyer review your construction contracts before you sign them. Know that you are protected before starting the work.

Construction Industry Team

Miles & Stockbridge's Construction Industry Team represents general contractors, subcontractors, suppliers and sureties in all aspects of construction law, including contract drafting and negotiation, mechanics liens, bid protests, and the preparation, litigation, arbitration and mediation of construction claims.

TOM WOLF is a co-leader of the Construction Industry Team at Miles & Stockbridge and is recognized by Best Lawyers in America® for pre-eminence in Construction Law, Construction Litigation and Commercial Litigation and by The Virginia Lawyers Hall of Fame. He has been Adjunct Professor, Construction Law at the University of Richmond School of Law since 1986 and lectures frequently on construction law issues for the Virginia State Bar, the Associated General Contractors of Virginia and various construction industry groups. 804.905.6910 | twolf@milesstockbridge.com

JACK ROBB is a Principal and former in-house general counsel with a focus on construction law. He also regularly advises owners, general contractors, subcontractors, and suppliers. 804 905-6916 | jrobb@milesstockbridge.com

KEN STOUT is an Associate and former federal fellowship law clerk, with a focus on complex litigation. 804 905-6912 | ktstout@milesstockbridge.com

JASON GOLDSMITH is an Associate on the Miles & Stockbridge Construction Industry Team. 804 905-6914 | jgoldsmith@milesstockbridge.com

LESSON: If your company has claims on a project, an accurate assessment of what damages may be recoverable is essential to developing an effective strategy for resolution of those claims. Be sure to consult with an experienced construction lawyer as part of your claim analysis.

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919 East Main Street
Suite 1302
Richmond, VA 23219
804 905-6900



60 SECOND CONSTRUCTION JOURNAL

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