

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: BAE Systems Ordnance Systems, Inc. (“BAE”), the prime contractor for a project to replace an Army munitions facility in Radford, Virginia, decided to engage Fluor Federal Solutions, LLC (“Fluor”) to perform the turnkey work of a terminated subcontractor on an estimated three-year project. BAE awarded Fluor an Undefined Contract Action (“UCA”) in October 2015, which permitted Fluor to proceed with a limited scope of work while the parties negotiated a formal subcontract. The UCA allocated \$32M for Fluor’s initial work, and two months later, the parties executed a subcontract totaling \$245M, but which expressly limited to \$30M the amount of damages either party could seek in litigation.

By early 2018, Fluor was clearly far behind schedule. BAE negotiated a schedule extension to November 2020 with the Army and removed work from Fluor’s scope to allow Fluor to focus on critical path activities. In September 2020, BAE sued Fluor seeking delay damages of \$30M, the maximum allowed under the subcontract.

Fluor filed a counterclaim against BAE, asserting that BAE caused the delays and cost overruns by providing defective design information and by demanding work beyond Fluor’s contractual scope. Fluor claimed damages of \$183M for unapproved change orders. BAE moved to limit Fluor’s damages claim to no more than \$30M, citing to the subcontract provision. Fluor argued that a Virginia statute (Va. Code § 11-4.1:1) voids any provision in a subcontract that waives or limits a subcontractor’s right to assert claims for additional costs, and that it would be inequitable for a GC to be able to cause additional work to be done without having to pay for it.

ISSUE: Does the subcontract limit Fluor’s claim to no more than \$30M even if its actual damages are \$183M, or does Virginia law void that provision of the subcontract?

(Ruling and Lesson continued on next page.)

Update on “Pay-if-Paid” Ban

Virginia’s new law invalidating common “pay-if-paid” provisions in construction subcontracts will apply to subcontracts executed on or after January 1, 2023. “Pay-if-paid” provisions state that the general contractor does not have to pay the subcontractor unless and until the owner pays the general contractor. The statute permits withholding of payment for defective work if certain conditions are met. A Department of General Services workgroup has proposed amendments to the law, as several provisions were controversial with various industry groups. We will be monitoring any amendments that are proposed in the General Assembly when lawmakers convene in January.

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

You Be the Judge

RULING: Absent statutory prohibition, parties are free to limit contractual damages, so the subcontract's damage limit will be enforced, whether or not it's inequitable. Va. Code § 11-4.1:1 states that a "provision that waives or diminishes a subcontractor's . . . right to assert claims for demonstrated additional costs in a contract executed *prior to providing any labor, services, or materials* is null and void." (Emphasis added.) Since Fluor executed the formal subcontract with BAE, which included the \$30M limit on damages, after it performed work on the project, the statute did not bar the damage limitation.

BAE Sys. Ordnance Sys. v. Fluor Fed. Sols., LLC, 2022 WL 969773 (W.D. Va. March 30, 2022).

LESSON: If a subcontractor begins work on a project before executing its subcontract, it gives up the protection of § 11-4.1:1 against waiving future claims and damages. General contractors can circumvent the statutory protection by having subcontractors start work before signing their subcontract. Subcontractors should keep this in mind and refuse to perform work without a signed subcontract, and should then refuse to sign another subcontract thereafter for the same project that contains a severely restrictive limitation on damages.

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.

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