SLDF CASE UPDATE: AAROW/IET, LLC

December 22, 2020

The U.S. Court of Appeals for the Fourth Circuit has rendered an appellate decision involving a payment bond claim under the Federal Miller Act. The Subcontractor Legal Defense Fund filed an *amicus* brief in the appeal. In *Aarow/IET, LLC v Hartford Fire Insurance Company*, ASA was concerned about whether a subcontract no-damage-for-delay provision could contravene the statutory protections of the Federal Miller Act.  The trial court had dismissed the bond and contract claims in the Complaint at the preliminary stage after concluding that the damages sought were delay damages barred by the Subcontract.  The Subcontractor had, in presenting its Request for Equitable Adjustment (“REA”) during the Project, submitted a delay and disruption claim and the trial court held that the REA, attached ads an exhibit to the Complaint, undermined any attempt to plead that the damages sought to be recovered were something other than delay damages.  The trial court, relying on the no-damage-for-delay clause in the subcontract and accompanying REA, dismissed the Complaint, including both the contract and bond claims.

While the appeals court reversed, it did not reach the underlying payment bond issue upon which the SLDF filed its *amicus* brief.  Instead, the 4th Circuit in an unpublished opinion found that summary dismissal was inappropriate because the Amended Complaint was sufficient to place the defendants on notice and to set the stage for prosecution of the REA claims.

Although the issue of the Federal Miller Act versus language in a contravening subcontract was not a basis of the decision, , the ruling still represents a win for subcontractors. The specific issue ASA was most concerned with was not addressed, however the case comes with a fair deal of lessons learned for ASA members and counsel. Takeaways include the need to be cautious:

1. when signing subcontracts to understand the impact of the clauses on their rights (and potential impact on statutory rights like payment bond recovery);
2. in their wording and presenting of claims in the first instance (the improvident use of ‘delay’ in some instances and ‘disruption’ in other instances in an REA can have downstream effects; and
3. while there are arguments to be made for the statutory language prevailing over pure subcontract terms, counsel should be aware of these pitfalls and be prepared to very carefully think these arguments through and plead judiciously and carefully.