

SLDF ABBEVIATED ANALYSIS MEMORANDUM

TO: SLDF Task Force

FROM: Eric Travers, Esq.

DATE: September 19, 2019

RE: *Aarow/IET, LLC v. Hartford Fire Insurance Company, et al.* In the United States Court of Appeals for the Fourth Circuit, Record No.: 19-1710

I. DISPUTE BACKGROUND.

This case involves whether a Miller Act surety may rely on a subcontract no-damages-for-delay clause as a defense of its Miller Act obligations. In the underlying dispute, the District Court dismissed a subcontractor's breach of contract and payment bond claims after finding that the damages being sought were delay damages that were unrecoverable under the Subcontract.

The subcontractor has appealed to the United States Court of Appeals for the Fourth Circuit and has asked for ASA's involvement in appealing the dismissal.

A. Facts.

1. *The Project and Parties*

The dispute arose out of a project to build a Basic School Student Officer Quarters at the Marine Corps base in Quantico., Virginia (the "Project"). The Naval Facilities Engineering Command (the "Owner") hired Harper Construction Company ("Harper" or "Contractor") as its general contractor. In turn, Harper and Aarow/IET, LLC ("Subcontractor") entered into a subcontract agreement (the "Subcontract") under which Subcontractor was retained as Harper's electrical subcontractor. Because this was a federal project, Harper was required by the Miller Act to post performance and payment bonds for the Project, which it did through its surety the Hartford Fire Insurance Company ("Surety").

The Subcontract provided that California law applied to any disputes.

2. *The Subcontract and Dispute*

Subcontract Section 7 provided that if the Subcontractor was, through no fault of its own, obstructed or delayed by the Contractor then its time for performance would be equitably extended, provided it preserved its claim with written notice within 30 days of the occurrence of the delay. Subcontract Section 8 contained a "no damages for delay" clause providing that a time extension, and not additional money or other damages, was the Subcontractor's only remedy for delays. The Claims section of the Subcontract added a notice requirement that (a) gave the Subcontractor 90 days from the

occurrence of the event giving rise to the claim to give written notice of claims, and (b) waived any claims not given within that time.

As the Project proceeded, the Subcontractor encountered difficulties in performing the work for various reasons and progress stalled. In April 2018, the Subcontractor submitted a request for equitable adjustment seeking a 298-day time extension and just over \$2.9 Million in additional labor, supervisory and other costs due to what it positioned as its inability to perform its work in a timely, efficient, and sequential manner (due, it alleged, to the Contractor's mismanagement).

The Contractor denied the Subcontractor's request for compensation, so the Subcontractor filed a suit against the Surety in the United States District Court for the Eastern District of Virginia at Alexandria (the "Rocket Docket"). The Contractor intervened in the case. Shortly thereafter, the Surety filed a Motion to Dismiss seeking its dismissal from the case. The Surety argued that its liability, as bond surety, was derivative of its principal's liability under the Subcontract and the bond claims were barred by (1) the Subcontractor's failure to give written notice of its claims in the time and manner required by the Contract, and (2) the Subcontract's no-damages-for-delay clause.

The Subcontractor responded by arguing that the Contractor had actual notice of the delays and attempted to avoid the no-damages for delay provision by arguing that its claims were for recovery of damages (labor inefficiencies and lost productivity due to out of sequence work, idle labor crews, and trade stacking) that the Subcontractor alleged were "disruption" and not delay damages. After full briefing, the motion was argued before the Judge.

3. *The District Court Decision*

After oral argument, the District Court ruled from the bench. The Court dismissed the Subcontractor's claims in their entirety. The Court rejected the Subcontractor's characterization of its damages as 'disruption', not delay, damages stating that "the change notice makes clear that on its face the plaintiffs claim is a delay claim and that the increased costs plaintiff sought reimbursement for were due to that delay..." The Court dismissed the Complaint, holding that (1) the no damages for delay clause barred the Subcontractor's

contract claims, and (2) the Subcontractor had, in any event, waived its claims by failing to timely comply with the Subcontract notice requirements. The District Court then dismissed the bond claims, stating that the Miller Act claim “depends on [the Contractor] being liable [to the Subcontractor] on the other [breach of contract] counts and so for those reasons, Count 1 (the bond claim) is dismissed as well.” Transcript p. 33, lines 15-18.

The Subcontractor is seeking review from the 4th Circuit Court of Appeals and has asked ASA to enter an amicus appearance on its behalf, specifically on the issue of the Court’s conclusion that the Surety was entitled to rely on the Subcontract no-damages-for-delay clause as a defense to its Miller Act obligations.

B. The Issue/Policy Interests.

The issue in this case is whether payment bond sureties may rely on a subcontract exculpatory clauses, like the no-damages-for-delay clause here, as a defense to their Miller Act obligations. The issue is not settled, with courts in different jurisdictions coming to different results and there being a split in the circuits. Compare In *United States f/u/b/o Aarow Electrical Solutions, LLC v. Continental Casualty Company*, Civil No. ELH-16-3047, 2017 WL 3642957 (D. Md. Aug. 24, 2017)(holding that 40 U.S.C. § 3133(c) prohibits waivers of Miller Act claim rights which are made while the subcontract is still executory, and precludes a surety from relying on a subcontract no-damages-for-delay clause) and *U.S. f/u/b/o Kogok Corporation v. Travelers Casualty and Surety Co. of America*, 55 F.Supp.3d 852 (N.D. W.Va. 2014)(dismissed subcontractor’s Miller Act claim and holding, inter alia, that the no-damages-for-delay clause in the subcontract barred the subcontractor’s right to recover delay damages under the bond)

C. Is the issue presented preserved for appeal? What is the certainty that the issues will be decided on appeal?

The issues are preserved for appeal and there is certainty they will be decided on appeal.

II. Amicus Brief Deadline and Procedure.

Under Fed. R. App. P. 29(a)(6) “[a]n amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed.” In this matter there is currently no briefing order pending in this appeal so the date by which an amicus brief must be filed is unknown.

After a briefing order is entered, any amicus supporting the subcontract will have 47 days from the date that the briefing order is entered to file a motion for leave and proposed brief. ASA approves filing a brief, it will ask amicus counsel to provide ASA’s General Counsel with a draft of the brief for review, comment and approval at least three (3) business days before the brief is due.