

SURETY ON THE HOOK FOR OWNER-CAUSED DELAYS UNDER MILLER ACT

By Jonathan J. Straw



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Sureties are not banks. But, more courts are treating them as such by finding subcontractors are entitled to payment before finding the party actually responsible for the damages and/or delays.

The general rule is that a surety assumes only the liability of its principal (the prime contractor). Several courts, however, are gradually eroding that general rule. The Federal Court for the Eastern District of Virginia has taken another chunk from that general rule in its wake.¹

The Court ruled for a Sub under the Miller Act in granting the Sub's Motion for Summary Judgment.² The Project was for building improvements at the FBI Academy in Quantico, Virginia. The Sub provided temporary kitchen facilities so the Project would not interfere with FBI training activities. Delays extended the Project duration by four months. The Prime argued the Owner caused the delays. The Sub only argued it didn't cause the delays and sought payment anyway.³

The Surety argued Sub's Motion and action were premature under two express clauses of the Subcontract: The No-Damage-for-Delay (ND4D) and Disputes clauses. Under the ND4D clause, the Sub agreed to payment for damages and time extensions from Owner-caused delays upon recovery from the Owner. Under the Disputes clause, the Sub agreed to follow the procedures in the Prime Contract to recover time and/or money for Owner-caused delays and damages.

The Court found these two Subcontract clauses were improper conditions to recovery under the Miller Act and held that the only conditions to recovery under the Miller Act are: (1) expiration of the 90-day nuisance period (i.e., more than 90 days have passed since the Sub last performed work on the Project), (2) the Sub has not been paid, (3) the Sub performed the work for which it seeks payment, and (4) notice, if necessary, was timely provided.⁴

There is hope for other prime contractors and sureties. The Court's findings of impermissible conditions were premised upon both the ND4D and Disputes clauses having been agreed to by the Sub before the work was performed. Had the Prime included the important parts of these two clauses in its interim payment lien/claim waivers or some other after-the-fact agreement (e.g., liquidating agreement), the results may have been different.

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¹[U.S. f/u/b/o Kitchens To Gov. John C. Grimberg Co., Inc., Case No. 1:16-cv-991 \(U.S. Dist. Ct., E.D. of Va., Oct. 19, 2017\).](#)

²A pre-trial (potentially cost- and time-saving) mechanism to resolve part of or all of a dispute.

³The results may have been different had the Prime been able to assert a counterclaim; but, the Sub's scope of work was very narrow and uniquely discrete (it performed no work on site), which probably made a counterclaim for delays difficult to legitimately assert.

⁴For more information on notice and the 90-day waiting period, see this [Presentation for the American Road and Transportation Builders Association](#).

About the Author | Jonathan J. Straw

Jonathan focuses on construction law and government contracts with experience in claim preparation, litigation, arbitration, mediation, discovery disputes, and mechanic's liens. Jon has successfully represented and assisted prime contractors, subcontractors and public and private owners in both state and federal courts and before arbitration panels. Coming from a family of design professionals and problem solvers, Jon has a unique enthusiasm for construction. Click to [download Jon's full biography](#).

