

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA FOR
THE USE AND BENEFIT OF
INLAND ELECTRIC CORP.

v.

C.A. No. 94-681-T

TURNER BROTHERS CONSTRUCTION,
INC., and HARTFORD CASUALTY
INSURANCE COMPANY

MEMORANDUM AND ORDER

ERNEST C. TORRES, United States District Judge.

Introduction

This action was brought, pursuant to the Miller Act, 40 U.S.C. §§ 270a-270d, to recover amounts allegedly due to Inland Electric Corp. ("Inland") for work performed pursuant to its subcontract with Turner Bros. Construction, Inc. ("Turner") and for "delay damages" allegedly incurred by Inland. It is presently before the Court for consideration of Inland's motions to amend and confirm an arbitrator's award and Inland's motion to proceed against Hartford Casualty Insurance Company ("Hartford"), the surety on Turner's payment bond.

Background

Like many other construction dispute cases, this one has turned into a procedural nightmare. The facts from which the

dispute arises are set forth in the Magistrate Judge's Report recommending partial summary judgment in favor of Inland; in a subsequent Report vacating that recommendation; and in the Award made by an arbitrator. Briefly stated, the pertinent facts are as follows.

Turner was the general contractor for construction work to be performed at a Rhode Island Air National Guard base in North Smithfield, Rhode Island. Electrical work was to be performed by Inland, pursuant to a subcontract between it and Turner. As required by the Miller Act, Turner furnished a payment bond, with Hartford as its surety.

Through no fault of either Inland or Turner, work was delayed when contaminated soil was discovered at the site. As a result, Turner, on behalf of itself and Inland, submitted to the government a claim for delay damages entitled MODIFICATION OF CONTRACT NO. P00018 ("MOD-18"). The government agreed to pay a portion of that claim, and Turner filed an administrative appeal seeking the remainder.

Inland brought this action to recover its share of the rejected portion of the MOD-18 request from Turner and Hartford. Inland also seeks "additional delay damages" attributable to what it describes as ineffective project management by Turner plus what Inland claims is the balance owed it for work performed pursuant to the subcontract.

With the agreement of the parties, Judge Pettine, to whom this case originally was assigned, referred the matter to arbitration. His order provided that the arbitrator's determinations as to factual issues would be final and binding but that the arbitrator's decisions regarding questions of law would be subject to review by the Court.

After ten days of hearings and the presentation of numerous exhibits, the arbitrator issued a 34-page Award. The Award sets forth the arbitrator's findings and awards Inland \$86,064 plus interest on its MOD-18 delay damages claim against Hartford and \$14,412.90 plus interest on its claim against Turner for the balance due under the subcontract. The arbitrator rejected Inland's claim for "additional delay damages" on the ground that, unlike the MOD-18 delay damages, the additional delay damages represented "soft costs alone, unconnected to a claim for labor and materials." (Award at 22.)

The Award established May 6, 1993, the mid-point of the 252-day delay that was the subject of the MOD-18 delay claim, as the date on which prejudgment interest began to run on that claim. The Award further established November 3, 1994, as the date on which prejudgment interest began to run on the claim for the balance due under the subcontract. Later, in response to a motion by the defendants, the arbitrator revised the Award and specified December 20, 1994, the date on which Hartford received notice of Inland's

claim, as the date on which interest began to accrue on the MOD-18 claim.

Inland now moves to amend the Award to reinstate May 6, 1993, as the date on which interest began accruing on the MOD-18 claim; to confirm the Award, as amended; and, because Turner is bankrupt, to proceed against Hartford with respect to the claim for the balance due under the subcontract.

Those motions were heard on October 30, 1998; but, since counsel were under the impression that the case was scheduled only for the rendition of a bench decision, they were not fully prepared to argue. Despite that fact, and, because counsel had submitted lengthy memoranda, the Court, in an effort to bring the matter to a close, indicated from the bench that it would confirm the revised Award.

However, before a final order was entered, the Court had second thoughts about the correctness of its ruling. Specifically, the Court was concerned about whether the subcontract made Turner's receipt of payment from the government a condition precedent to its obligation to pay delay damages to Inland. The Court advised counsel of that concern and afforded them an opportunity to file supplemental memoranda addressing the issue. Those memoranda have been received and the Court now is prepared to enter its order.

Discussion

I. The Amounts Awarded

As a preliminary matter, Hartford argues that delay damages are not recoverable under the Miller Act; and, therefore, the arbitrator erred, as a matter of law, in awarding MOD-18 delay damages.

The Miller Act requires that, when a contract to construct or repair a public building or public work of the United States is awarded, the contractor must furnish a payment bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract." 40 U.S.C. § 270a(a). The Act also permits subcontractors to sue on the bond for amounts due for "labor or material [furnished] in the prosecution of the work provided for in [the] contract." 40 U.S.C. § 270b(a).

Courts are divided on the question of whether delay damages constitute amounts due for "labor or material." The disagreement appears to stem, in part, from differences regarding the manner in which "labor and materials" should be construed. Some courts have strictly interpreted that term to exclude delay damages on the theory that the Miller Act was intended to afford only "protection comparable to that furnished by mechanics' and materialmen's liens where private construction is involved." See, e.g., United States ex rel. Pittsburgh-Des Moines Steel Co. v. MacDonald Constr. Co., 281 F. Supp. 1010, 1013 (E.D. Mo. 1968). Other courts have

interpreted "labor and materials" to include delay damages on the theory that the Miller Act should be liberally construed to achieve its remedial purpose of protecting subcontractors. See, e.g., United States ex rel. Pertun Constr. Co. v. Harvesters Group, Inc., 918 F.2d 915, 918-19 (11th Cir. 1990).

However, much of the apparent disagreement seems attributable to the fact that the cases deal with different kinds of "delay damages" and many of the opinions fail to explain the basis for concluding that the particular "delay damages" at issue are or are not recoverable.

Both logic and the language of the Miller Act suggest that when delays increase the costs directly incurred in furnishing "labor or material in the prosecution of the work" the increased costs should be recoverable. Conversely, recovery for delay-related losses and expenses that are not directly reflected in the cost of the "labor or material" furnished is more appropriately the subject of an action for breach of contract.

In general, the case law appears to be consistent with these principles. Thus, "delay damages" have been awarded under the Miller Act for increased out-of-pocket expenses for labor costs and equipment rental, see United States ex rel. Kirchdorfer v. Aegis/Zublin Joint Venture, 869 F. Supp. 387, 395 (E.D. Va. 1994), and increased overhead expenses associated with the furnishing of labor or materials. See United States ex rel. TMS Mech.

Contractors v. Millers Mut. Fire Ins. Co., 942 F.2d 946, 951-52 (5th Cir. 1992); See also Mai Steel Serv., Inc. v. Blake Constr. Co., 981 F.2d 414, 418 (9th Cir. 1992) (allowing recovery for increased out-of-pocket costs caused by construction delays that directly contribute to completion of the contract); Pertun, 918 F.2d at 918-19 (allowing recovery for out-of-pocket costs for labor and materials actually furnished in performing the contract); United States ex rel. Mariana v. Piracci Constr. Co., 405 F. Supp. 904, 905-07 (D.D.C. 1975) (allowing delay damage recovery for out-of-pocket overhead expenses). On the other hand, the First Circuit has held that lost profits resulting from delay are not recoverable under the Miller Act. See Arthur N. Olive Co. v. United States ex rel. Marino, 297 F.2d 70, 72 (1st Cir. 1962); See also Mai Steel Serv., 981 F.2d at 418; Kirchdorfer, 869 F. Supp. at 394; United States ex rel. Moran Towing Corp. v. Hartford Accident & Indem. Co., 204 F. Supp. 353 (D.R.I. 1962).

Hartford argues that, even if "delay damages" are recoverable under the Miller Act, the MOD-18 delay damages awarded by the arbitrator were erroneously calculated because they include general overhead expenses that are not directly related to or reflected in the cost of the labor and material furnished by Inland. In support of that argument, Hartford cites some of the exhibits that were presented to the arbitrator.

However, those exhibits represent only a portion of the

evidence upon which the Award was based, and there is no record of the testimony or other evidence presented during the course of the arbitration proceedings. Moreover, in making an award to Inland for only a portion of the MOD-18 delay damages claimed and entirely denying Inland's claim for additional delay damages, the arbitrator specifically distinguished between delay claims relating to "a discernible underlying claim for labor or materials" and what he termed "soft costs alone, unconnected to a claim for labor and materials." (Award at 21-22.)

Because the arbitrator clearly recognized that overhead expenses must be related directly to the cost of furnishing labor and material and because the order of reference makes the arbitrator's factual findings final and binding, the determination that Inland has sustained delay damages in the amount of \$86,064.00 is affirmed.

II. Hartford's Liability for the Balance Due under the Subcontract —

It is not clear why the award for the balance that the arbitrator determined was due to Inland under the subcontract was made against Turner and not Hartford. However, since the Award clearly represents payment for work actually performed by Inland, and since Turner now is in bankruptcy, there is no question that Inland is entitled to seek that amount from Hartford as surety on the payment bond.

III. The Condition Precedent

The subcontract provides for monthly progress payments to Inland and permits Turner to retain 10% of the amount due Inland pending final acceptance and approval of Inland's work. Subparagraph 4B states that:

Payment from the Owner for the work for which payment is sought by the Subcontractor is a condition precedent to payment of the Subcontractor. Receipt by the Contractor of final payment from the Owner is a condition precedent to payment of retainage to the Subcontractor.

In initially recommending that Inland's motion for partial summary judgment on the MOD-18 claim be granted, the Magistrate Judge determined that Subparagraph 4B refers only to "work done" by Inland and does not apply to delay damages incurred by Inland. However, I find that the Magistrate Judge's determination and the arbitrator's reliance upon it were erroneous, as a matter of law.

The arbitrator's award of MOD-18 delay damages was based, in part, on the arbitrator's finding that the costs and expenses comprising those damages were related to Inland's underlying claim for labor and materials. (Award at 21-22.)¹ Indeed, the arbitrator could not have awarded MOD-18 damages without such a finding because, under the Miller Act, a subcontractor can recover only the amount owed for "labor or material [furnished] in the prosecution of the work provided for in [the] contract." 40 U.S.C. § 270b.

¹The arbitrator rejected Inland's "additional delay" damages claim as "soft costs" unrelated to the furnishing of labor and materials. (Award at 21-22.)

See Arthur N. Olive Co., 297 F.2d at 72 (The Miller Act is not a substitute for an action for breach of contract. Rather, it was designed merely to insure that a subcontractor would be paid for the "labor and material" furnished in performing its work.).

Since the MOD-18 delay damages related to and were part of the costs associated with the labor and materials furnished by Inland, they are subject to the provisions of Subparagraph 4B to the same extent as the payment of amounts owed for the labor and materials, themselves. There is no logical reason for treating Inland's claim for delay damages associated with the furnishing of labor and material more favorably than its claim for the value of the labor and material actually furnished.

Indeed, Inland, itself, apparently viewed its right to payment for MOD-18 damages as subject to paragraph 4B. Thus, Inland's September 29, 1993, letter to Turner conceded that Inland was not entitled to payment on its MOD-18 claim until Turner received payment from the government.² Although the arbitrator found that the letter, itself, did not constitute a sponsorship agreement, the letter confirms that the parties contemplated that Turner's obligation to pay Inland was contingent upon Turner's receipt of payment from the government.

² The letter stated in relevant part: "Inland recognizes the fact that the Government has not approved this amount or issued a change order. Payment made against our requisitions should only be for the amounts approved and paid by the Government to you."

In short, Inland is entitled to recover from Hartford, as surety, only those amounts owed to Inland by Turner. Since subparagraph 4B of the subcontract conditions Turner's obligation to pay delay damages for which it is not responsible upon the receipt of payment from the government, Inland is not entitled to receive payment on its MOD-18 claim unless and until Turner is paid by the government.

Inland argues that applying the "pay-when-paid clause" of Paragraph 4B would be inequitable. That might be true in cases where the general contractor causes the delay. However, in this case, the delay was not attributable to Turner.

IV. Prejudgment Interest

Under Rhode Island law, prejudgment interest begins to run at the time a cause of action accrues. R.I. Gen. Laws § 9-21-10. Here, Inland's cause of action for MOD-18 delay damages accrues at the time it is entitled to payment and a demand for payment is refused. As already noted, that time has not yet arrived because the subcontract makes Turner's receipt of payment from the government a condition precedent to Turner's obligation to pay Inland. Therefore, it was error for the arbitrator to award prejudgment interest with respect to that claim. On the other hand, Inland alleged, and the arbitrator apparently found, that Turner has received payment referable to the balance of the work performed by Inland. Therefore, Inland is entitled to prejudgment

interest with respect to that claim, commencing on November 3, 1994.

Conclusion

For all of the foregoing reasons, Inland's motion to confirm the Award is granted to the extent that the Award determines that Inland sustained \$86,064 in MOD-18 delay damages and that Inland is entitled to \$14,412.90 for the balance due for work performed pursuant to the subcontract plus interest. The Award also is confirmed to the extent that it denies Inland's claim for further delay damages.

Inland's motion to confirm is denied to the extent that the Award provides for prejudgment interest with respect to the MOD-18 delay damages claim and to the extent that it entitles Inland to collect the amount awarded with respect to that claim before Turner receives payment from the government.

Finally, Inland's motion to proceed against Hartford with respect to the Award for the balance due under the subcontract,

plus interest, is granted.

IT IS SO ORDERED,

Ernest C. Torres
United States District Judge

Date: , 1999