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Eric A. Moore, CIC, LIC
Moore Insurance Services
emoore@mooreinsuranceservices.com

O (517) 439-9345
M (517) 416-0940

SUBCONTRACT DELAY COST CLAIM AGAINST GENERAL CONTRACTOR IS COVERED BY PROFESSIONAL LIABILITY POLICY

by Kent Holland

An HVAC subcontractor sued the prime general contractor for $2 million for delays, acceleration, and related impacts that it asserted were caused by the actions of the contractor. It's claim asserted it had experienced "an increase in the cost of performance" as a result of various "delays, acceleration, and related impacts" allegedly caused by the general contractor's failure to adequately address initial delays in construction, "lack of timely responses to … requests for information," and "crowding" on the work site caused by the general contractor's direction to all subcontractors to add more manpower.

The contractor tendered the claim to its professional liability insurance carrier to defend and indemnify. The insurer refused to do so. The insurer argued that the policy could not reasonably be understood to cover demands for costs arising out of accelerated work from subcontractors and to compensate for delay claims. Finding that the entire complaint was directed toward the contractor's mismanagement in the rendering of the functions as a "construction manager," the court concluded as a matter of law, the claims were covered by the professional liability policy. KICC-Alcan General, JV v. Crum & Foster Specialty Insurance, 242 F. Suppl. 3d 869, (U.S. District Court, Alaska 2017).t.)

As explained by the court,

> "The subcontractor had a claim-if at all-only because of the general contractor's actions or omissions. KICC's liability arose from the settlement of that claim; thus the liability was "caused" by KICC's act or omissions, satisfying the third element.
>
> And these damages did "arise out of" KICC's professional services.... Here, the policy does not use the words "arise out of," but instead provides that the "act, error or omission" that causes the damages must be "in the rendering" of professional services or in the "failure to render" professional services….

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PRONET PRACTICE NOTES

The Keys to Keeping a Project On Track I understood, as the traditional casebooks teach in law school, that appellate decisions in commercial cases tend to focus on determining where something went wrong and deciding who should be blamed.
Liability was the proverbial 'hot potato', something to be avoided at all cost. As a result, lawyers teach and are trained to concentrate on anticipating potential liability and finding ways to avoid or transfer it so their clients are not caught in its web.

GUEST ESSAYS

Benefits of a Succession Plan for Your Business You've worked hard to establish your business and plan to stay actively involved in its future success. So, why would you plan your exit from it now? Because, as the saying goes, if you fail to plan, plan to fail. You won't lead your company forever, and statistics show most businesses don't make it past the second generation of ownership due to the lack of a proper and thorough succession plan.

a/e ProNet
Dave Johnston, Executive Director
info@aepronet.org
www.aepronet.org

> Finally, the Court considers Crum & Forster's policy arguments. First, Crum & Forster contends that "[a]llowing liability coverage for amounts due under a contract for an insured's pre-existing obligations would 'create a moral hazard problem....' " But the Court does not hold that this professional liability policy extends coverage to any breach of contract claim, or requires indemnification for contractual obligations that exist solely by virtue of the contract. Rather, consistent with the policy language, the Court holds that this particular professional liability policy provides coverage for damages that are caused by the KICC's acts, errors, or omissions in the provision of professional services. Like all insurance, this policy does create some moral hazard. But that hazard can be mitigated by changing the policy language, and the Court will not distort the plain language of this contract to achieve a policy result."

Comment: This is a trial court decision. It is based on Alaska law. The reader should not assume that courts in other states would reach a similar outcome on the facts presented here. Nevertheless, the decision should cause contractors and their attorneys to take a closer look at whether there could be coverage for what might otherwise appear to be losses arising out of simple contract disputes where the general contractor was acting as a general contractor or construction manager at risk (CMAR) and the allegations concern acts and errors concerning how it managed its own work and that of its subcontractors.

A point that I believe the court didn't address clearly is why it found that the claim arose out of construction management services rather than normal general contractor work and routine decisions impacting its own work and that of its subcontractors.

It is understandable why an insurer would argue that the type of construction management services intended to be insured under a contractor's professional liability policy are for agency type construction management where the contractor is providing a professional construction management services for a third party, such as a project owner. It is easy to understand what an insurer would argue that the policy was never intended to cover run of the mill subcontractor claims for cost increases resulting from a general contractor making errors, omissions or mistakes in managing its own work and that of its subcontractors.

If nothing else, this decision could certainly incentivize general contractors to purchase professional liability insurance with the hope that it will defend them against subcontractor claims.

Moore Insurance Services - is a member of **a/e ProNet** - a national association of insurance agents/brokers that specialize in providing risk management and insurance services to design professionals. These services included risk management publications, contract language review tools, seminar materials and other useful information to help design professionals manage their risks.

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Eric A. Moore, CIC, LIC **(517) 439-9345**
emoore@mooreinsuranceservices.com