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**DELAY CLAIMS AMONG CO-PRIME CONTRACTORS:
OPPORTUNITIES AND RISKS FOR THE SURETY**

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INTRODUCTION

It is not unusual for an owner to structure the work on a construction project by negotiating prime contracts with a number of contractors. Typically, there is no direct contractual relationship among the co-prime contractors.¹ The owner may contract away the responsibility for coordinating the work among the co-primes, sometimes to one of the co-primes, or may retain the supervisory responsibility and either exercise it directly or through an agent such as a construction manager, an architect, or an engineer.

Where a surety bonds a co-prime and incurs a loss on the project, the possibility of delay claims among co-primes presents both risks and opportunities. By virtue of having incurred a loss and thereby being subrogated to the claims of its principal, the surety may be able to assert delay claims against other co-prime contractors as one element of salvage. On the other hand, the surety may face exposure as a consequence of co-primes asserting delay claims against the bonded principal.

These risks and opportunities are colored by the unique element inherent in claims among co-primes; namely, the absence of a direct contractual relationship among the parties in dispute. Delay claims are usually predicated on either explicit or implied provisions of a construction contract under which each party agrees not to burden or obstruct the other's performance.² These express or implied contract provisions may allow one party to sue the other party for delay damages for which the other party bears responsibility.³ A co-prime seeking delay damages against another co-prime typically seeks to overcome the absence of privity to such express or implied contract provisions by claiming third party beneficiary status in regard to the contract between the co-prime and the project owner and/or the performance bond between the surety and the owner. The success of such third party beneficiary claims varies widely from case to case and jurisdiction to jurisdiction; depending heavily on the text of the bonded contract and the bond and the courts' attitude in the particular jurisdiction to third party beneficiary status.

This paper is in three parts. The first section reviews the case law relating to the ability of a co-prime to assert delay claims against another co-prime. The analysis is pertinent to the surety's right to subrogate to the delay claims that could be asserted by its bonded principal and provides the first step of an analysis of a surety's exposure to delay claims asserted against its principal by co-prime contractors.⁴ The second section addresses whether a co-prime can successfully claim delay damages against the surety of another co-prime. The final section considers the risk of exposure to delay claims from a co-prime contractor which confronts a surety where it contemplates taking over and completing the contract of its "co-prime" principal.

¹ For the purposes of this article, co-prime contractors will be referred to as "co-primes."

² See, e.g., *Wolff & Munier v. Whiting-Turner Contracting*, 946 F.2d 1003 (2nd Cir. 1991).

³ See, e.g., *Triangle Sheet Metal v. Merritt & Co.*, 79 N.Y.2d 801, 580 N.Y.S.2d 171 (1991).

⁴ For purposes of the analysis set out herein, it is assumed that delay damages are available under the contracts between the co-primes and the owner. As such, this paper does not address issues relating to liquidated damages or "no damages for delay" clauses.

ANALYSIS

I. A Co-Prime's Exposure to Delay Claims Asserted by Another Co-Prime.

The case law addressing whether a co-prime can assert delay claims against another co-prime is in conflict.⁵

There are at least three possible explanations for the split in the case law. One court has suggested that the “emerging trend” and the majority rule is to recognize a cause of action for delay damages among co-prime contractors unless construction contracts explicitly provide to the contrary.⁶ In fact, the case law taken as a whole does not support this conclusion.

More likely, the split in the case law is explained by either differences among jurisdictions in the legal criteria applied to evaluate third party beneficiary claims and/or interpretations of differing contract language, some of which more strongly support the recognition of third party beneficiary status for co-prime contractors than others.

A. Differing Criteria for Evaluating Claims of Third Party Beneficiary Status

It is possible to identify three approaches currently used by the courts for evaluating claims for third party beneficiary status.

Many jurisdictions employ a “common law” approach to “third party beneficiary status” under which the key or exclusive issue is whether the contracting parties intended to confer a benefit on a third party. The application of this approach is particularly complicated in the context of a construction project and numerous related contracts and subcontracts:

Difficulty may be encountered, however, in applying the intent to benefit test in construction contracts because of the multiple contractual relationships involved and because performance ultimately, if indirectly, runs to each party of the several contracts. Hence, interpretational difficulties prevalent in third party beneficiary contracts are compounded as a result of the peculiar problems presented by construction contracts.⁷

⁵ Compare M.T. Reed Construction Co. v. Virginia Metal Products Corp., 213 F.2d 337 (5th Cir. 1954) (“M.T.Reed”) (authorizing one co-prime to sue another co-prime for delay damages); Moore Construction Co., Inc. v. Clarksville Department of Electricity, 707 S.W.2d 1 (Tenn. App. 1985) (“Moore”) (same); Barth Electric Co. v. Traylor Brothers, Inc., 553 N.E.2d 504 (Ind.App. 1990) (“Barth”) (same); Broadway Maintenance Corp. v. Rutgers, 90 N.J. 253, 447 A.2d 906 (1982) (“Rutgers”) (same); Hanberry Corp. v. State Building Commission, 390 So.2d 277 (Miss. 1980) (“Hanberry”) (same); J. Louis Crum Corp. v. Alfred Lindgren, Inc., 564 S.W.2d 544 (Mo. App. 1978) (“J. Louis Crum”) (same); KEC Corp. v. New York State Environmental Facilities Corp., 76 Misc.2d 170, 350 N.Y.S.2d 331 (Sup.Ct. 1973) (“KEC”) (same); Thomas G. Snavelly Co. v. Brown Construction Co., 16 Ohio Misc. 50, 239 N.E.2d 759 (CmPl. 1968) (“Snavelly”) (same); Visintine & Co. v. New York Chicago & St. Louis Railway, 169 Ohio St. 505, 160 N.E.2d 311 (1959) (“Visintine”) (same); Church of Jesus Christ of Latter Day Saints v. Hartford Accident and Indemnity Co., 95 P.2d 736 (Utah Sup.Ct. 1939) (“Church”) (same) with J.F. Inc. v. S.M. Wilson & Co., 152 Ill.App.3d 873, 504 N.E.2d 1266 (1987) (“J.F.”) (co-prime has no valid cause of action against another co-prime for delay damages); Buchman Plumbing Co., Inc. v. Regents of the University of Minnesota, 298 Minn. 328, 215 N.W.2d 479 (1974) (“Buchman”) (same); Van Cor, Inc. v. American Casualty Co., 417 Pa. 408, 208 A.2d 267 (1965) (“Van Cor”) (same); Snyder Plumbing & Heating Corp. v. Purcell, 7 A.D.2d 505, 195 N.Y.S.2d 780 (1960) (“Snyder”) (same); Reed v. Adams Steel & Wire Works, 106 N.E. 882 (Ind. App. 1914) (“Reed”) (same).

⁶ Moore Construction, *supra*, 707 S.W.2d at 10.

⁷ See Port Chester Electrical Construction Corp. v. Atlas, 40 N.Y.2d 652, 655-56, 389 N.Y.S.2d 327, 330 (1976).

The “intent to benefit” test is the test that is commonly applied by the courts to evaluate co-prime delay claims. The courts which have applied this test in the context of co-prime delay claims appear to be equally split as to whether such claims are viable.⁸ As such, it does not appear that the application of the “intent to benefit” test inherently favors either party to a co-prime delay claim.

In contrast to the "intent to benefit" test, the First Restatement of Contracts evaluates third party beneficiary claims by creating three categories of possible third party beneficiaries.⁹ A claimant is a “donee beneficiary” if the promisee, in our case the project owner, intended in the course of negotiating a contract with one co-prime, to make a gift or confer a benefit on another co-prime.¹⁰ A donee beneficiary is entitled to third party beneficiary status. Alternatively, a claimant is a “creditor beneficiary” where the purpose of the promisee in contracting with the promisor was to satisfy a debt owed to the third party.¹¹ A creditor beneficiary is entitled to third party beneficiary status. All other claimants are “incidental beneficiaries” and, by process of elimination, are not entitled to enforce the terms of the contract between the promisor and promisee.¹²

The “First Restatement” test may be more favorable to a co-prime asserting a delay claim than the “intent to benefit” test since only one party to the third party contract need intend to benefit the third party as opposed to the two required by the common law test.¹³ On the other hand, the First Restatement test has been criticized as too narrowly compartmentalizing the claims to be protected and therefore excluding claims which may well warrant protection.¹⁴ In fact, one court that sanctioned a co-prime delay claim rejected resort to the First Restatement test precisely because, in the court’s view, the test’s rigidity did not allow for consideration of the applicable equities.¹⁵ Despite the rigidity of the First Restatement test, at least one court has sustained a co-prime delay claim in express reliance on its terms.¹⁶

Yet a third set of criteria is embodied in the Second Restatement of Contracts. Under the Second Restatement, third party beneficiary status is warranted where such recognition is appropriate to effectuate the intention of the parties and if either there is an expression in the contract that the contracting parties intended to benefit the third party or proof that the promisor’s performance will discharge a duty owed to the third party.¹⁷ This test appears to represent a synthesis of the “intent to benefit” test and the “First Restatement” criteria.¹⁸ Though at least one court has relied on this test in approving a co-prime delay claim, it does not appear to afford any greater likelihood of success for either the proponent or opponent of

⁸ Compare J. Louis Crum Corp., supra, 564 S.W.2d at 547 (allowing co-prime delay claims); KEC Corp., supra, 350 N.Y.S.2d at 335 (same); Barth, supra, 553 N.E.2d at 506 (same); Rutgers, supra, 447 A.2d at 909 (same) with J.F., supra, 504 N.E.2d at 1208 (co-prime may not assert claim for delay damages against another co-prime); Van Cor, supra, 208 A.2d at 269 (same); Snyder, supra, 195 N.Y.S.2d at 780 (same); Reed, supra, 106 N.E. at 884 (same).

⁹ First Restatement of Contracts, §133.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Murray on Contracts at §130 (1990).

¹⁴ Id.

¹⁵ Moore, supra, 707 S.W.2d at 8-10.

¹⁶ Snively, supra, 239 N.E.2d 759.

¹⁷ Restatement, Second § 302.

¹⁸ Murray on Contracts at §130 (1990).

a co-prime delay claim.¹⁹

In sum, it does not appear that any of the legal criteria applied by the courts in evaluating third party beneficiary claims necessarily provide an advantage to either the proponent or opponent of a co-prime delay claim.

B. Differing contract language

A court evaluating a co-prime delay claim generally confronts a series of identical contracts entered into between the owner on the one hand and each co-prime contractor on the other hand. The proponent of the co-prime delay claim asserts that it is a third party beneficiary of the contract between the owner and the co-prime which is the responding party to the claim. The court must evaluate that contract to determine, inter alia, whether the contracting parties intended a benefit owing to a third party co-prime such that the proponent, co-prime can sue the other co-prime under the express or implied provisions of the other co-prime's contract with the owner.

For purposes of this evaluation, it is possible to divide construction contracts into three categories.

1. A 201-Type Contracts (1987)

The A 201 General Conditions (1987) has a number of terms that bear on the question of allowing a third party co-prime to sue for delay days under the contract between the owner, and another co-prime:

- The general conditions recognize that the co-prime's work may only be a part of a larger project.²⁰
- The general conditions recognize that other prime contractors may be performing work on the same project.²¹
- The general conditions state that time is of the essence²², each contractor's work must be promptly performed and completed²³, and all contractors on the project have the right to perform their work free of interference.²⁴
- Most importantly, the general conditions obligate a contractor to pay for the damages it may cause to the work of other contractors working on the same project.²⁵

Every court that has addressed the issue has held that the parties to an "A 201" contract intend by the terms of that contract to benefit third party co-primes such that a third party co-

¹⁹ Moore, supra, 707 S.W.2d at 9-11.

²⁰ A 201, Articles 1.1.3 and 1.1.4.

²¹ A 201, Article 6.1.1.

²² A 201, Article 8.2.1

²³ A 201, Articles 3.2.4, 4.10.1, & 8.2.2.

²⁴ A 201, Articles 6.2.1, 6.2.2, 4.13.1 and 4.14.2.

²⁵ A 201, Articles 6.2.3, 6.2.4, and 10.2.5.

prime can sue the contracting co-prime under that contract for delay damages.²⁶ Arguably, the key provision militating in favor of that result is Article 6 under which a co-prime has the explicit right to sue another co-prime for damages caused by that co-prime.

2. "Mutual Cooperation Only Contracts"

A second category of contracts is characterized by language which acknowledges the work of other co-prime contractors and requires each co-prime, as part of its obligation to the owner, to cooperate with all of the other co-primers so that the project can be completed on schedule. In cases interpreting this kind of language, the courts are divided as to whether or not co-primers are the intended beneficiaries of another co-prime's contract, with a majority of courts seemingly rejecting the cause of action.²⁷ The diversity among these cases reflects, to some degree, the relative strength of the particular language in each such contract. Most tellingly, however, the absence of the "A 201" language holding one co-prime liable for damages caused to its work by the other co-prime, makes the argument for co-prime delay damages problematic and heavily dependent on the predilections of the particular court.

3. "Indemnity" Contracts

An interesting contrast to the "A201" type and "Mutual Cooperation Only" Contracts was presented by the contract language assessed in Snyder Plumbing & Heating Corp. v. Purcell.²⁸ A co-prime contractor sought delay damages against another co-prime based on the following clause in the other co-prime's contract:

If, through acts of neglect on the part of the Contractor any other contractor or any other subcontractor shall suffer loss or damages on the work, the Contractor agrees to settle with such other Contractor or subcontractor by agreement or arbitration, if such other Contractor or subcontractor will so settle. If such other Contractor or subcontractor shall assert any claim against the Owner on account of any damage alleged to have been so sustained, the Owner shall notify the Contractor who shall defend at his own expense any suit based upon such claim and, if any judgment or claims against the Owner shall be allowed, the Contractor shall pay or satisfy such judgment or claim and pay all costs and expenses in connection therewith.

The court in Snyder determined that this language was intended solely to create rights in favor of the owner and not to benefit a co-prime.²⁹ In the absence of an intent to benefit a co-prime, the court held that the co-prime could not recover delay damages in reliance on the terms of another co-prime's contract.³⁰ On the other hand, other courts reached exactly the opposite conclusion in evaluating a co-prime delay claim based on closely analogous contract terms.³¹

²⁶ See Barth, *supra*, 553 N.E.2d 504; Moore Construction, *supra*, 707 S.W.2d 1; Rutgers, *supra*, 447 A.2d 906; J. Louis Crum, *supra*, 564 S.W.2d 544; M.T. Reed, *supra*, 213 F.2d 337; KEC, *supra*, 350 N.Y.S.2d 331.

²⁷ Compare J.F., *supra*, 504 N.E.2d 1266 (denying a cause of action for co-prime delay damages); Buchman Plumbing, *supra*, 215 N.W.2d 479 (same); Van Cor, *supra*, 208 A.2d 267 (same); and Reed, *supra*, 106 N.E. 882 (same) with Snavely, *supra*, 239 N.E.2d 759 (acknowledging a cause of action for co-prime delay damages) and Visintine, *supra*, 160 N.E. 311 (same).

²⁸ 195 N.Y.S.2d 780. (1960)

²⁹ Id.

³⁰ Id.

³¹ See Hanberry, *supra*, 390 So.2d 277; Church, *supra*, 95 F.2d at 748

These divergent decisions suggest that a contractor's right to recover delay damages against another co-prime is problematic unless the other co-prime's contract with the owner specifically provides for a "co-prime versus co-prime" remedy such as that referenced in "A-type" contract provisions.

II. A Surety's Exposure to Delay Damages Claimed by a Co-Prime Contractor.

A. Payment Bond Claims³²

The universe of parties that have standing to allege claims under a payment bond is determined by the text of the bond and pertinent statutes where payment bonds are statutory mandates. Claimants are generally limited to those parties having a direct contractual relation with the principal by virtue of having provided labor, services or materials to the principal or parties having a direct contractual relationship with first tier subcontractors.³³

Co-prime contractors do not have direct contractual relationships with other co-prime contractors or with first tier subcontractors of co-prime contractors. For this reason, the courts have consistently rejected claims for delay damages initiated by one co-prime against another co-prime's payment bond.³⁴

B. Performance Bond Claims³⁵

a. Initiated by the Co-Prime Contractor

As noted above, a co-prime contractor seeking damages from another co-prime must establish that it is a third party beneficiary of an implied or express term of the contract between the other co-prime and the owner which makes the other co-prime liable for delays which it caused. Assuming that a co-prime surmounts this burden and seeks to extend exposure to the other co-prime's surety, it would typically argue that the surety's performance bond incorporated all terms of the bonded contract, including that relating to delay damages in regard to which the co-prime was a third party beneficiary.

The courts have almost universally denied performance bond claims from co-primers seeking co-prime delay damages. The reasoning is substantially two-fold.

First, the A A311 and A312 bonds and numerous other performance bonds incorporate language identical or analogous to the following:

³² The analysis in this paper assumes that the payment bonds under discussion allow for a recovery for delay damages in favor of the principal's subcontractors and vendors. Depending on the language of the bond, there may be an argument that the bond does not contemplate the recovery of delay damages irrespective the identity of the claimant. See Lite-Air Products, Inc. v. Fidelity & Deposit Co., 437 F. Supp. 801 (E.D.Pa. 1979).

³³ See Lybeck & Shreves, The Law of Payment Bonds at pp. 25-40 (ABA 1998).

³⁴ See Moore, supra, 707 S.W.2d at 12; M.G.M. Construction Corp. v. New Jersey Educational Facilities Authority, 230 N.J. Super. 483, 532 A.2d 764 (1987) ("MGM Construction"); The CECO Corp. v. Plaza Point, Inc., 573 S.W.2d 92 (Mo.App. 1978); J. Louis Crum, supra, 564 S.W.2d at 550; Novak & Co. v. Travelers Indemnity Co., 56 A.D.2d 418, 392 N.Y.S.2d 901 (1977) ("Novak"); Church, supra, 95 P.2d at 748-49.

³⁵ The analysis in this paper assumes that the performance bonds under discussion contemplate a recovery for delay damages in favor of the obligee. In fact, depending on the language of the bond, there may be an argument that the bond does not contemplate the recovery of delay damages irrespective the identity of the claimant. See L & A Contracting Co. v. Southern Concrete Services, Inc., 17 F.3d 106, 112 (5th Cir. 1994). American Home Assurance Co. v. Larkin General Hospital, 593 So.2d 195 (Fla. 1992).

No right of action shall accrue on this Bond to any person or entity other than the Owner, or its heirs, executors, administrators, or successors.³⁶

A co-prime contractor alleging a co-prime delay claim would clearly lack standing to assert a performance bond claim in the face of such language.³⁷

Many performance bonds do not incorporate a specific clause indicating which parties are eligible to allege claims under the Bond. In the absence of such a clause, the co-prime contractor alleging a delay claim against the surety's co-prime principal must establish that it is entitled to recovery as a third party beneficiary of the bond.

In applying a third party beneficiary status to a performance bond claim, the courts have virtually unanimously determined that the parties to a performance bond, the owner and the surety, do not intend to benefit co-prime contractors. The reasoning of these cases is at least threefold:

- The text of a performance bond typically acknowledges the owner as the beneficiary of the bond to the exclusion of references to any other party.³⁸
- The primary if not sole concern of an owner in requiring a performance bond is to assure the completion of the contract at no additional cost to the owner beyond that provided for in the bonded contract. For this reason, the penal sum of the performance bond typically is equal to the price of the bonded contract. If third parties such as co-primes could claim on the bond and thereby draw down on the penal sum available to the owner, such claims could result in diminishing the protections available to the owner. As such, it is unlikely that, in executing the performance bond, the owner intended to benefit a party which could be adverse to the owner in terms of competing for the penal sum.³⁹
- The fact that payment bonds specifically incorporate causes of action for third party beneficiaries—i.e., subcontractors, laborers, and vendors—of the bonded principal evidence that sureties know how to acknowledge third party beneficiary status when such status is intended. The absence of such acknowledgement in performance bonds as it relates to co-prime contractors evidences that no such status is intended.⁴⁰

The only reported decision known to the author in which a court has acknowledged a co-prime's third party beneficiary status to assert claims under a performance bond is the decision of the Mississippi Supreme Court in Hanberry Corp. v. State Building Commission.

⁴¹ The Hanberry Court determined that the bonded contract required the principal to indemnify another co-prime contractor for delays caused by the principal. The court indicated that as this

³⁶ A Performance Bonds, A311 and A312.

³⁷ Moore, supra, 707 S.W.2d at 11-12.

³⁸ M.G.M. Construction, supra, 532 A.2d at 766.

³⁹ M.G.M. Construction, supra, 532 A.2d at 773; Novak, supra, 392 N.Y.S.2d at 906-7.

⁴⁰ M.G.M. Construction, supra, 532 A.2d at 771; Novak, supra, 392 N.Y.S.2d at 906-7; Van Cor, supra, 208 A.2d at 270.

⁴¹ 390 So.2d 277.

contract term was incorporated into the bond, the Surety was obligated to compensate the co-prime contractor. While the court recognized that a “third party” claim under the performance bond required a showing that the parties to the bond intended to benefit the third party, the court never addressed how such intent on the part of both the owner and the surety was manifest, choosing instead to rely on the notion that unidentified ambiguities in the bond language should be resolved against the surety.⁴²

The decision in Hanberry should be treated as an aberration and has been treated as such in the subsequent case law. The only fair conclusion to be drawn from the case law is that co-prime delay claims initiated by the co-prime contractor should not be compensable under the typically worded performance bond.

b. Initiated by the Owner

There does not appear to be reported case law in which an owner paid a co-prime contractor for delay damages caused by another co-prime contractor and then sought to recover its payment by alleging a claim under the surety’s performance bond.

Under most construction contracts, an owner would be liable to a co-prime contractor for delay damages, if at all, only where the owner bore responsibility for those damages; for instance, if the owner had breached a contractual duty to the co-prime contractor to coordinate the work.⁴³

Under circumstances where the owner was responsible for delay, it could not claim such payment against the surety of another co-prime since the payment would not have arisen under the bonded contract and the bonded co-prime would not be responsible for such damages.

Hypothetically, it is possible to imagine the following scenario: an owner concludes that one co-prime had sustained delay damages as a consequence of the conduct of a bonded co-prime; the owner compensates the injured co-prime for the delays in order to keep the injured party solvent and functional on the project; and the owner claims its payment against the bonded co-prime and its surety. The owner might predicate its bond claim on broad indemnity language in the bonded contract under which the bonded co-prime was obligated to indemnify and hold the owner harmless from all costs and expenses incurred by the owner in excess of the contract price for which the bonded co-prime was responsible. The owner would presumably argue that such an indemnity clause was incorporated into and made a part of the bond.

The resolution of such a bond claim would depend on a careful analysis of the relevant language in the bonded contract and the bond. In some ways, such a claim alleged by the obligee is of greater concern than a claim alleged by a co-prime contractor since there would be no question as to the obligee’s standing to assert the claim, irrespective whether the claim was ultimately meritorious.

⁴² Id.

⁴³ See Rutgers, supra, 447 A.2d 906.

The risk of "owner-initiated" "co-prime" delay claims on performance bonds has been rendered less hypothetical by the 1997 edition of the A 201 General Conditions. Paragraph 6.2.3 of the 1997 version states:

The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

A 201-1997 appears to require an owner to reimburse a co-prime for delay damages caused by another co-prime and allows the owner to assess the delay damages against the responsible co-prime. The failure of the responsible co-prime to reimburse the owner could generate a performance bond claim against the responsible co-prime's surety. Depending on the language of the performance bond, such an owner-initiated claim might succeed, thereby indirectly holding the surety liable for delay damages inflicted by its principal on other co-prime contractors.⁴⁴

⁴⁴ The impact of AIA 201 Paragraph 6.2.3(1997) may be blunted in part, by Paragraph 4.3.10 of the 1997 version under which the contractor and the owner waive all claims for consequential damages. It appears likely, but is not entirely certain, that Paragraph 4.3.10 limits the scope of the remedy available under Paragraph 6.2.3.

III. **A Surety's Exposure to Co-Prime Delay Claims as a Consequence of Executing a Takeover Agreement.**

Assume that a surety enters into a takeover agreement regarding a co-prime contract which incorporates the terms of the bonded contract and makes the surety a party to the bonded contract. Assume also that the original bonded contract states that each co-prime is responsible for the delay damages it causes to all other co-primes. The surety may not have been liable for co-prime delay claims prior to executing the takeover agreement since its bonds likely did not accord third party beneficiary status to co-primes. However, by virtue of the surety executing the takeover agreement and becoming a party to the bonded contract, it may become possible for co-prime contractors to circumvent the bonds and sue the surety for prior or future delay claims directly as breaches of the bonded contract.

The possibility of exposure to co-prime delay claims should be considered by a surety whenever it contemplates a takeover of a co-prime contract. Such exposure may counsel in favor of tendering a substitute contractor in lieu of taking over the contract. Where there are strong reasons favoring a takeover, it may be possible to insert language into the takeover agreement that minimizes the risk. For instance, a takeover agreement may state as follows:

Nothing contained in this Agreement is intended to create any rights in favor of, or otherwise in any manner to inure to the benefit of any person or legal entity not a signatory hereto. Nothing contained in this Agreement is intended nor may be construed to create, modify, or expand any liability on the part of either the Government or the Surety to co-prime contractors on the Project. The parties specifically acknowledge that this Agreement does not incorporate Article of the Bonded Contract (which addresses the question of the contractor's exposure to co-prime delay claims). The parties acknowledge that the Surety's exposure to claims from co-prime contractors, if any, shall be no greater than that which preexisted the execution of this Agreement pursuant to its payment and performance bonds. All preexisting defenses available to the Surety in regard to claims from co-prime contractors are specifically reserved

Though such qualifying language in a takeover agreement should be sufficient, there is no case law which provides confirmation. Therefore, whether a surety should execute a takeover agreement and thereby assume the risk of a greater exposure to co-prime delay claims should be a function of a host of considerations including the relative advantages of entering into a takeover agreement, the likelihood of co-prime delay claims and their anticipated magnitude, the likelihood that the language of the bonded contract exposes the principal to co-prime delay claims, and the extent to which the Surety can secure exculpatory language in the takeover agreement.

CONCLUSION

The prime factor in determining a co-prime contractor's exposure to delay claims from other co-prime contractors is the text of its contract with the owner. Assuming that delay claims

among co-prime contractors are viable in a particular context, these claims present an opportunity for a salvage-seeking surety. To the extent that co-prime delay claims are alleged against the surety, such claims can likely be denied due to the co-prime claimant's lack of standing. One caveat is exposure to a claim for such damages from an owner proceeding under 1997 version of A 201. Another caveat is the risk that a takeover agreement could expand a surety's exposure beyond that called for under its bonds. It is therefore incumbent on the surety to carefully consider the risk of co-prime claims before executing a takeover agreement in regard to a co-prime contract.

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