



Reminder: Pay if Paid not All Encompassing (but Could it be?)



On numerous occasions, I have discussed the need to be careful with so called "pay if paid" clauses in construction contracts. While such clauses [are enforceable in Virginia](#) (when phrased correctly), there are exceptions and limitations (for instance in [the Miller Act context](#)).

One such exception (that I frankly would have thought to be obvious) is that such clauses do not protect a general contractor from paying all subcontractors. They only protect a general contractor only from payment to those subs for whose work the general contractor has not been paid. In other words, if a general contractor has been paid by an owner for a particular subcontractors work, it cannot use the pay if paid clause to deny payment *even in the event that other subcontractors were deficient in their work or the owner has failed to pay the general contractor in full*.

In [Precision Contractors Inc. v. Masterbuilt Companies Inc.](#) (PDF) the Fairfax, VA Circuit Court reiterated this principal stating that nothing in the contract suggests that either party to the lawsuit had any intention to shift the risk of non-payment by the owner or non-performance of *other subcontractors* to the plaintiff (Precision).

While this may seem obvious, the more interesting question in my mind is whether the Court would have enforced a provision in the contract that in fact shifted all of the risk downhill in the manner described above. We are in Virginia where [the contract is king](#) so I'm not sure that such a clause, correctly drafted, would not be enforced. Fairness would dictate that a performing subcontractor should not bear the weight of poor or untimely performance by its fellow subcontractors, but subcontractors must [be wary of contractual language](#) that may make them do just that.

The Fairfax court restated what we all would think is the law, however, it left the door open to enforcing some strongly pro-general contractor language in contracts. For this reason, whether you're a subcontractor, supplier, or general contractor, you should consult with an experienced [Virginia construction lawyer](#) in order to protect your interests.

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