

Pay If Paid- Pay Attention Subs



Recently, we all had yet another reminder that the Virginia Courts will strictly construe even the strictest of payment conditions. In the [W. O. Grubb Steel Erection Co. v. 515 Granby, LLC](#) case (full text of opinion in .pdf [here](#)), Suburban Grading and Utilities found this out in spades, much to their chagrin. Suburban Grading sued for payment, and [Turner Construction Company](#), the general contractor pointed to its "pay if paid" clause of the contract. Conceding

the unequivocal nature of the pay if paid clause, Suburban Grading argued that the Owner/Turner contract rendered the clause ambiguous because the prime contract between the Owner and Turner stated that Turner could only bill for those charges that it incurred and payments made to subcontractors.

While this argument seems persuasive, the [Norfolk](#), VA Circuit Court disagreed. It stated that the clause cited by suburban grading did nothing to change the nature of the unambiguous contract between Turner and its subcontractor. Instead, the Court cited both the fact that the prime contract clause only discussed *timing* of payments and specifically stated that payments from Turner to subcontractors were to be in accordance with the subcontract documents. Additionally, the subcontract contained a priority clause making terms in the subcontract control in the event of a conflict. In short, Turner saved itself from a judgment because it made sure to include an unambiguous pay if paid clause.

Yet again, the Virginia Courts teach us that, in the Commonwealth of Virginia, the contract is king. The general contractor, Turner, saved itself with careful drafting that avoided any potential issues created by its contract with the Owner. Suburban Grader, the subcontractor, could do nothing about the language even in the face of some at least arguable ambiguity because of it.

A second point to be made here is that a subcontractor should *always* request and review a copy of the prime contract before entering into a construction subcontract. The prime contract is almost always incorporated into the subcontract and can contain provisions that affect the risk assumed by a subcontractor on a project. This can include anything from notice time frames to dispute resolution.

Also, I recommend the use of an experience [construction attorney](#) to assist you in drafting and reviewing contracts before a contractor or subcontractor enters into such a contract.

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.