

## Prime Contractor Cannot Pass on Liquidated Damages to Subcontractor

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The prime contractor for a highway construction project subcontracted the excavation, grading, and paving work, and retained the rock crushing and placement work for itself. Because the prime contract allowed only two miles of highway to be excavated and ungravelled at a time, the excavation and grading subcontractor's progress depended on a steady supply of crushed rock being placed.

While two detours were still under construction, the excavation contractor began work on the shoulders of the highway. The prime contractor promised that a large rock crusher would soon be on-site, and because of this promise, the subcontractor began excavation and grading on the highway itself. However the large crusher did not arrive and the state, displeased with the lack of gravel cover on the excavated portion of the highway, stopped the excavation and grading progress.

The subcontractor left the job and returned a month later when the prime contractor began producing crushed rock in sufficient quantities to continue the work. There was some additional excavation done late in the job, but even with these delays, the subcontractor completed excavation and grading ahead of schedule. The prime contractor completed its work well ahead of schedule as well; however, the paving subcontractor (not a party to this lawsuit) began work seven days after it could have and completed seven days after the project deadline.

The state withheld liquidated damages from the prime contractor, and the prime contractor withheld the same amount from the excavation subcontractor, blaming it for the delay because it had left the job, and because of the extra excavation done later in the project. The subcontractor appealed the withholding and eventually the Idaho Supreme Court ruled. The Court found that a general contractor cannot recover from a subcontractor for delay under a liquidated damages clause when the general contractor contributed to the delay by failing to perform a contractual duty, such as failing to provide adequate equipment. The Court held that although the failure to provide the large rock crusher was not a breach of the contract, it was a failure to provide adequate equipment and contributed to the overall delay of the job. The prime contractor was not allowed to assess liquidated damages. [Seubert Excavators, Inc. v. Eucon Corp](#) [1], 871 P.2d 826 (Ida. 1994)

*NOTE: There was no explanation why the paving contractor was not charged with the delay, especially since both the prime contractor and the excavation subcontractor were ahead of schedule.*

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