

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UPON A CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA (CLARKSBURG)

Civil Action No. 1:04cv233 (Judge Keeley)

Appeal No. 33286

PREUSSAG INTERNATIONAL STEEL CORPORATION, et al.
INFRA-METALS CO., a Georgia Corporation,

Plaintiff,

v.

MARCH-WESTIN CO., INC., a West Virginia Corporation; TITAN
FABRICATION & CONSTRUCTION, INC., an Ohio Corporation; ZURICH
AMERICAN INSURANCE CO., a New York Corporation; and FIDELITY
AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,

Defendants.

**BRIEF OF AMICUS CURIAE THE SURETY & FIDELITY ASSOCIATION
OF AMERICA IN SUPPORT OF DEFENDANTS MARCH-WESTIN CO.,
INC., ET AL. ON THE CERTIFIED QUESTION FROM THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA PURSUANT TO W.V.A.R.A.P. 19**

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I. STATEMENT OF INTEREST

The Surety & Fidelity Association of America (“SFAA”) is a national trade association of approximately 500 member companies licensed to write fidelity and surety bonds. SFAA collects data on premiums and losses on fidelity and surety insurance and files statistics with the state insurance departments. SFAA is licensed by the West Virginia Office of the Insurance Commissioner as a Rating Organization.

The members of SFAA are sureties on the overwhelming majority of contract performance and payment bonds furnished in the United States and in West Virginia. SFAA and its members have a substantial interest in the question certified to this Court by the United States District Court for the Northern District of West Virginia. The position urged by Plaintiff, Preussag International Steel Corporation d/b/a Infra-Metals Co. (“Infra-Metals”), would substantially expand the obligations of prime contractors and their sureties.

II. CERTIFIED QUESTION

The Question before this Court comes by Order of Certification to the Supreme Court of Appeals of West Virginia from the United States District Court for the Northern District of West Virginia pursuant to W.Va. Code Section 51-1A-3. The Question certified is as follows:

Under W.Va. Code Section 38-2-39 (2003) is a steel fabricator deemed to be a “subcontractor: where:

- A. The Steel fabricator enters a fixed-price contract with the general contractor of a public works construction project, pursuant to which the fabricator
 - i. Agrees to fabricate and deliver structural steel components conforming to the construction project’s unique design specifications;

- ii. Produces shop drawings for the fabricated steel components based on the project's engineering calculations and design specifications';
 - iii. Submits its shop drawings for approval by the project's architect and general contractor before fabricating the structural steel components; and
 - iv. Delivers the fabricated steel components on a delivery schedule based on construction progress;
- B. The steel fabricator performs all physical fabrication processes at its own facility, away from the project site; AND
- C. The fabricated steel components are not fungible and not readily marketable without further modification?

The factual background of this case has been set forth by the District Court and will not be restated here. In summary, however, at issue is a determination of the coverage of a payment bond issued on a public project and whether a supplier of fabricated material to the project, who never performed any labor at the project site, will be deemed a "subcontractor" so that its material supplier can recover on a payment bond issued on that Project. This Court's answer to the Certified Question will have a significant impact on general contractors, their sureties and the construction industry in West Virginia.

III. LEGAL ARGUMENT

There are two aspects to the determination of who is a subcontractor. One is the issue of a subcontractor versus a material supplier. The other is a subcontractor versus a sub-subcontractor or remote subcontractor. The facts in this case implicate the first issue. The Certified Question from the United States District Court is whether under the facts of this case a

steel fabricator in privity with the prime contractor is a subcontractor or a material supplier for purposes of the payment bond required by W.Va. Code § 38-2-39.

The parties agree that if the fabricator, Titan Fabrication & Construction Co. (“Titan”), was a subcontractor, then Infra-Metals was within the coverage of the prime contractor’s statutory payment bond. If Titan was a material supplier, then Infra-Metals was not within the coverage of the bond. The parties disagree on which term correctly characterizes Titan’s role.

This precise issue has been decided in numerous cases from other jurisdictions. Most recently, in *United States for the use of E & H Steel Corp. v. C. Pyramid Enterprises, Inc.*, 2006 WL 2570849 (D.N.J. September 1, 2006) the court began its opinion by stating, “How much does a steel fabricator have to do to qualify as a ‘subcontractor’ under the Miller Act, 40 U.S.C. § 3133(b)? On that seemingly simple question rides plaintiff’s claims for \$565,125.40. The Act does not define the terms. The parties vigorously contest the issue.” *Id.* at *1.

SFAA respectfully suggests that logic, the West Virginia statutes, case law from other jurisdictions, and the public interest all require a negative answer to the Certified Question. Titan was not a subcontractor and, therefore, Infra-Metals cannot recover on March-Westin’s statutory payment bond.

A. Logic and West Virginia Statutes

A surety contracts to answer for the debt or default of another.¹ Syllabus Point 2, *State ex rel. Mayle v. Aetna Casualty & Surety Co.*, 152 W.Va. 683, 166 S.E.2d 133 (1969): “A surety does not insure his principal against loss but agrees to be answerable for any debt, default or miscarriage of such principle (sic.)” *Id.* at 134. Unlike an insurance policy, a surety bond does

¹ Gallagher, *The Law of Suretyship, Second Ed.* (American Bar Association 2000) at p. 1.

not shift the primary risk of loss to the surety. The surety guarantees the principal's performance, but the principal remains primarily liable and must indemnify the surety for any loss.

Any risk placed on the bond, therefore, falls primarily on the principal. The surety must pay only if the principal is unable or unwilling to do so, and the surety then is entitled to indemnity from the principal. Under normal circumstances, this does not increase the principal's obligations because the principal already was liable to the claimant pursuant to the underlying contract. The bond guarantees an obligation that the principal already had separate from the bond.

The instant case, however, is an exception because March-Westin had no privity of contract with Infra-Metals and no obligation to pay Infra-Metals outside of the bond. March-Westin's contract was with Titan, and if March-Westin paid Titan it met its contractual obligation even though Titan failed to pay Infra-Metals. The attempt here is to force March-Westin to pay twice (once to Titan and once to Infra-Metals) for the same material.

W.Va. Code § 38-2-39 requires the prime contractor on a public construction project to furnish a bond,

conditioned that in the event such contractor shall fail to pay in full for all such materials, machinery, equipment and labor delivered to him for use in the erection, construction, improvement, alteration or repair of such public building or other structure, or building or other structure used or to be used for public purposes, then such bond and the sureties thereon shall be responsible to such materialman, furnisher of machinery or equipment, and furnisher or performer of such labor, or their assigns, for the full payment of the full value thereof.

W.Va. Code § 38-2-39.

On the face of the statute, the condition of the bond is that the principal shall pay for all material, etc. delivered to him. In this case, Infra-Metals delivered nothing to March-Westin. Its

material was sold to Titan who then provided it to March-Westin. Therefore, there was no breach of the bond as long as March-Westin paid Titan for the material.

This is a very significant point to a prime contractor because if it has already paid the first tier party (whether subcontractor or materialman) for the material, it will be paying twice for the same items if it also has to pay the first tier party's supplier. Legislatures and the courts have traditionally been very aware of this potential unfairness and sought to protect the prime contractor from double liability. In *Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163 (1944) the Court stated:

Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors.

Id., 322 U.S. at 110.

The federal Miller Act explicitly provides that a supplier to a subcontractor comes within the protection of the payment bond, but it also requires such a claimant not in privity of contract with the bond principal give notice that it is unpaid within 90 days following the last date on which it provided labor or material for which claim is made. This notice helps the prime contractor know if its subcontractor is not paying for labor or material. The prime contractor can then withhold funds, issue joint checks, or otherwise take steps to avoid double liability.

W.Va. Code § 39-2-39 contains no such notice requirement. If it were an open issue, SFAA would argue that the condition of the bond set forth in § 38-2-39, and the lack of a notice provision, indicate that the Legislature intended the bond to cover only the prime contractor's own debts and not to obligate the principal and surety to pay the debts of subcontractors.

Section 38-2-39, however, is part of the mechanics lien section of the Code, and § 38-2-2 provides that on private jobs mechanics liens are available to persons contracting with the prime contractor or with a subcontractor. This Court has equated the bond on public works with the lien remedy on private works, and interpreted the bond to cover material supplied directly to the contractor or to a subcontractor. See, *Rosenbaum v. Price Construction Co.*, 117 W.Va. 160, 184 S.E. 261 (1936); *Hibner v. Ebersbach*, 110 W.Va. 177, 157 S.E. 178 (1931); and *Appalachian Marble Co. v. Boone, Eason & Wood*, 114 W.Va. 307, 171 S.E. 751 (1933). The Certified Question and the parties to this case assume that coverage extends to a supplier to a “subcontractor.”

In determining who qualifies as a subcontractor, however, it is important to remember that no notice is required from a supplier to such a subcontractor and that the prime contractor is exposed to an unreasonable risk of double liability if “subcontractor” is extended beyond parties whom the prime contractor can monitor and against whose debts the prime contractor can protect itself. In deciding what is sufficient to establish subcontractor status, the Court should keep in mind that the lack of notice already makes it difficult for the contractor to avoid double liability.

Finally, *Infra-Metals* relies heavily on the Court’s opinion in *Marsh v. Rothery*, 183 S.E. 914 (1936). However, while the Plaintiff cites portions of the opinion which, at first glance, appear to favor its argument, a closer review of the court’s application of the definitions of subcontractor and materialman supports *March-Westin’s* position. First, the Court specifically emphasized that material furnished to, or work performed for, a materialman is not protected by the statute. *Id.* at 915. Further, the court specifically defined a materialman as one from whom the principal contractor or a subcontractor secures material of a general type for use on a structure. *Id.* In its determination that the Plaintiff was a materialman and not a subcontractor

the court stated "One who contracts to furnish, from his own screening plant, at so much per yard, all the sand and gravel needed for cement work by a contractor on an irrigating canal, is not a subcontractor, but a materialman." *Id.* (citations omitted.)

In *Marsh*, the plaintiffs worked for or furnished materials to a company, Foster Bland ("Bland"), who was preparing and delivering crushed stone to the general contractor on the project. *Id.* at 914. As in this case, the general contractor paid Bland, but Bland failed to pay the material supplier. *Id.* The Supreme Court held that Bland was a materialman and not a subcontractor despite the fact that: (1) Bland was providing materials necessary for the project; and (2) Bland was preparing the stone for the general contractor's use. Although the court recognized that the Plaintiff seeking the protection of the bond was providing materials which were necessary to the construction of the project, the statute did not "extend that security to those who prepared the material for [Plaintiff]". *Id.*

The Court's decision in *Marsh*, taken in conjunction with the opinions of other jurisdictions which specifically address steel fabrication, *Aetna Casualty & Surety Co. v. U.S. for the use of Gibson Steel Company, Inc.*, 382 F.2d 615, 617 (5th Cir. 1967) ("Custom manufacturing is simply not enough in itself to establish the relationship of responsibility and importance necessary to render a middle party a subcontractor."); *Frazier v. O'Neal Steel, Inc.*, 223 So.2d 661, 665 (Miss. 1969) ("the fact that the retailer cut off certain of the steel to lengths required by the building specifications and joined other parts so as to prefabricate and rearrange the steel material into sizes, lengths and forms required by the builder did not constitute the retailer as a subcontractor."), clearly supports March-Westin's position that a steel fabricator is materialman and is not a subcontractor. West Virginia expressly declined to extend the definition of a subcontractor in *Marsh*, and should decline to do so again.

B. Case Law from other Jurisdictions

The federal Miller Act,² limits claims to persons in privity with the prime contractor or a “subcontractor.” In *Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co.*, supra., the Court stated:

Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot.

Id., 322 U.S. at 104.

The Court noted that as used in the building trades, “a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen.” *Id.* at 109.

In *F.D. Rich Co., Inc. v. U.S. ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974) the Court again considered the subcontractor versus materialman issue in the context of the Miller Act and stated:

The Court of Appeals properly construed our holding in *MacEvoy* to establish as a test for whether one is a subcontractor, the substantiality and importance of his relationship with the prime contractor. It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few ‘subcontractors’ with whom he has a substantial relationship in the performance of the contract.

Id., 417 U.S. at 123-124, footnote omitted.

Some courts hold that performance of work on the job site is a prerequisite to subcontractor status, and March-Westin discusses those cases in its Brief. SFAA agrees with March-Westin’s position and will not burden the Court by repeating its arguments.

² 40 U.S.C. §§ 3131, et seq. The subcontractor limitation is part of § 3133(b)(2).

Courts that do not require on-site work instead rely on several factors with no single factor a definitive, bright line rule. In cases determining whether a steel fabricator was a subcontractor or materialman, courts from other jurisdictions have considered the fact that the steel was specially fabricated according to the job's specifications as a factor weighing in favor of subcontractor status, but not determinative of the question. See, for example, *Aetna Casualty & Surety Co. v. U.S. for the use of Gibson Steel Company, Inc.*, supra (5th Cir. 1967) ("Custom manufacturing is simply not enough in itself to establish the relationship of responsibility and importance necessary to render a middle party a subcontractor."); *Frazier v. O'Neal Steel, Inc.*, supra ("the fact that the retailer cut off certain of the steel to lengths required by the building specifications and joined other parts so as to prefabricate and rearrange the steel material into sizes, lengths and forms required by the builder did not constitute the retailer as a subcontractor.")

A consistent factor considered by the courts is the percentage of the prime contract work performed by the middle party. *Gibson Steel*, supra. at 382 F.2d 618 ("other matters to which we give weight are that Rogers' contract amounted roughly only to two percent of the total construction cost"); *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 741 P.2d 58, 60 (Wash.App. 1987) ("It appears that a substantial and important relationship does not exist where the value of the contract is less than ten percent of the value of the prime contract."); *U.S. for the use of E & H Steel*, supra. ("The work done by Havens amounted to only 7.8% of the total contract price.") In each of these cases, the court held that the middle party was a materialman. In *Miller Equipment Co. v. Colonial Steel and Iron Co.*, 383 F.2d 669 (4th Cir. 1967) the middleman's contract amount was more than 15% of the prime contract and the court held that it was a subcontractor. In holding that the middleman was a subcontractor, *LaGrand Steel*

Products Co. v. A.S.C. Constructors, Inc., 702 P.2d 855, 857 (Idaho 1985) stated, "we deem it particularly significant that the contract between A.S.C. and Steel Management embraced more than one million dollars and constituted approximately ten percent of the total prime contract in a major public works project."

Other factors include whether the parties used a purchase order or a more complex subcontract form, whether the middle party was paid only upon delivery of the steel or received progress payments as the work proceeded in its plant, and whether the prime contractor required the middle party to furnish a bond. *U.S. for the use of E & H Steel*, supra. at p. 6; *Gibson Steel*, supra. at 382 F.2d 618.

Applying these factors to the instant case, it is clear that Titan was a materialman not a subcontractor. Titan did not take any definite, substantial part of the work from March-Westin. There was no contract requirement for steel piled on the ground. The requirement was for steel erected in the air, and Titan did no erection and, in fact, no work on the site. March-Westin's two page Purchase Order to Titan was for only 5.9% of the contract amount. The Purchase Order did not require Titan to provide a bond or call for progress payments. It did not include the myriad other terms typically found in construction subcontracts.

Indeed, the only factor favoring subcontractor status is that Titan fabricated the steel to the specific requirements of the contract specifications, and the cases cited above each held that fact alone to be insufficient to make the middle party a subcontractor. After all, every materialman does some fabrication or work to make its raw materials comply with the contract requirements. A paint manufacturer adds the right pigments and chemicals, a lumber dealer selects the right grade of wood and cuts it to the required sizes, and a pipe supplier sends pipe of

the correct diameter, length and fittings. That does not make them subcontractors, and under the factors considered by other courts, Titan was a mere materialman.

C. The Public Interest

W.Va. Code § 38-2-39 requires bonds on public construction projects. W.Va. Code §38-2-39. The contractor includes the cost of the bond in its bid, and the public owner reimburses that cost. In the long run, if sureties' losses increase, so will premiums. In the shorter run, if the bonds are more risky, sureties will have to tighten their underwriting standards and provide bonds only for larger, better capitalized contractors who can be counted on to pay any claims by second tier claimants even if it means double liability to the contractor. This in turn will reduce competition on public projects and lead to higher construction costs.

In most cases, however, losses from an expansion of payment bond liability will be paid by prime contractors, not by their sureties. The primary liability for any bond obligation remains with the principal, and the surety pays only if the principal is insolvent. On a public works payment bond, the prime contractor is faced with the prospect of paying the first tier subcontractor and then having to pay that subcontractor's suppliers for the same material. This double liability comes out of the contractor's pocket.

If such double liability cannot be avoided, the contractor must include an estimate of the cost in its bid. An expansion of bond liability will directly and immediately increase the cost of public construction in West Virginia. Public owners and taxpayers, therefore, have an interest in this Court's decision on the Certified Question.

As the U.S. Supreme Court noted in the *MacEvoy* and *F.D. Rich* decisions, a prime contractor can protect itself from having to pay the debts of the relatively few subcontractors on

the job. As long as a subcontractor is someone with whom the contractor has a significant relationship and to whom the contractor has turned over a defined, substantial portion of the contract, the contractor can require bonds, monitor performance, know who is working on the job site and, if necessary, withhold payments or issue joint checks to avoid double liability.

On the other hand, there is little a prime contractor can do to avoid the debts of someone who does no work on the job site, fabricates a commodity that it can purchase from any one or more among numerous suppliers, performs only a small percentage of the work, and does not have to submit information on its sources of supply or a monthly requisition with a detailed breakdown of its work. Titan's monthly invoices are part of the record in this case. They give no information on its costs of material and labor or its sources of materials. The Purchase Order does not require such information because Titan was a materialman. If this Court extends coverage of the § 38-2-39 payment bond to the suppliers of such a materialman, it will increase the risk and costs of public construction in West Virginia.

In the *MacEvoy* and *F.D. Rich* cases, the Supreme Court recognized that Congress would not have imposed the risk of such unavoidable double liability on federal contractors. SFAA respectfully suggests that the same is true of the West Virginia Legislature and contractors on state and local projects subject to W.Va. Code § 38-2-39.

IV. CONCLUSION

This Court should answer “no” to the certified question. A “subcontractor” must be more than a mere material supplier who fabricates its material before sending it to the job site. Even if not required to work on the site, a subcontractor must take over responsibility for a specified, substantial part of the work. That is the result reached by the United States Supreme Court in cases arising under the Miller Act, and it is the result required under the facts of this case. Titan simply does not meet that requirement and was not a subcontractor.

Respectfully submitted,

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COMPANY OF MARYLAND, a Maryland
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Defendants.

Civil Action No. 1:04cv233
(Judge Keeley)

Appeal No. 33286

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE THE SURETY & FIDELITY ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANTS MARCH-WESTIN CO., INC., ET AL. ON THE CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA PURSUANT TO W.V.A.R.A.P. 19** was served this 20th day of **March, 2007**, upon the following, by depositing the same in the United States Mail, First Class, Postage Pre-Paid:

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