

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)

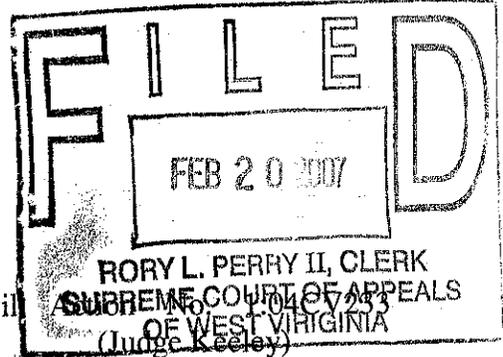
PREUSSAG INTERNATIONAL STEEL CORPORATION, d/b/a INFRA-METALS CO.,  
a Georgia corporation,

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.



Civil

Appeal No. 33286

**BRIEF OF THE PLAINTIFF PREUSSAG INTERNATIONAL STEEL CORPORATION, d/b/a INFRA-METALS CO.**

Counsel for Plaintiff

William K. Kane (IL Bar #6194466)  
(admitted *pro hac vice*)  
Erin Bolan Hines (IL Bar #6255649)  
(admitted *pro hac vice*)  
LOVELLS  
330 North Wabash Avenue  
Suite 1900  
Chicago, Illinois 60611  
312.832.4400

Counsel for Plaintiff

James F. Companion, Esq. (WV Bar # 790)  
John Porco, Esq. (WV Bar # 6946)  
SCHRADER BYRD & COMPANION, PLLC  
The Maxwell Centre  
32-20th Street, Suite 500  
Wheeling, West Virginia 26003  
304.233.3390

TABLE OF CONTENTS

I. INTRODUCTION.....4

II. THE CERTIFIED QUESTION FROM THE DISTRICT COURT .....4

III. STATEMENT OF FACTS.....6

IV. DISCUSSION OF LAW.....11

    A. STANDARD OF REVIEW.....11

    B. Titan Is A Subcontractor Because its Work Clearly Satisfies the West Virginia Definition of A Subcontractor .....11

    C. Titan Is A Subcontractor Because West Virginia Code § 38-2-39 Does Not Require A Subcontractor to Perform Labor on a Jobsite to be Deemed a Subcontractor.....13

    D. Titan Is A Subcontractor Because the Modern and Enlightened Test for Determining the Status of a Subcontractor Hinges Upon A Project's Unique Design Specifications, Does Not Require Work to be Performed on a Jobsite, and Considers Whether the Fabricated Steel Is Not Fungible and Not Readily Marketable.....14

    E. Titan Is A Subcontractor Because in the Interest of Public Policy the Modern and Enlightened Test for Determining the Status of a Subcontractor Limits the Scope of Those Who Can File A Lien Against the General Contractor.....19

V. CONCLUSION.....20

## TABLE OF AUTHORITIES

### CASES

<i>T. Weston Inc. v. Mineral County</i> , 638 S.E.2d 167 (W.Va. 2006).....	11
<i>Marsh v. Rothey</i> 117 W.Va. 94, 183 S.E. 914, 915 (1936).....	11
<i>Miners in Gen. Group v. Hix</i> , 123 W.Va. 637, 17 S.E.2d 810 (1941), <i>overruled on other grounds by Lee-Norse Co. v. Rutledge</i> , 170 W.Va. 162, 291 S.E.2d 477 (1982).....	12
<i>Tug River Lumber Co. v. Smithey</i> , 107 W.Va. 482, 148 S.E. 850, 853 (1929).....	13
<i>Keatley v. Mercer County Bd. of Educ.</i> , 200 W. Va. 487, 491 n. 6, 490 S.E.2d 306, 310 n. 6 (1997).....	13
<i>Vulcraft v. Midtown Business Park, Ltd.</i> , 110 N.M. 761, 800 P.2d 195 (1990).....	14, 15, 16, 18, 19
<i>Blue Tee Corp. v. CDI Contractors, Inc.</i> , 247 Neb. 397, 402, 529 N.W.2d 16, 20 (1995).....	15, 16, 17, 18
<i>LaGrand Steel Products, Co. v. A.S.C. Construction, Inc.</i> , 108 Idaho 817, 818-19, 702 P.2d 855, 856-57 (Idaho Ct. App. 1985).....	16
<i>Baumhoefener Nursery v. A&amp;D Partnership</i> , 618 N.W.2d 363 (Iowa 2000).....	17
<i>T.K. Kobayashi v. Meehleis Steel, Co.</i> , 472 P.2d 724, 728 (Colo. App. 1970) .....	17
<i>Jesse F. Heard &amp; Sons v. Southwest Steel Products</i> , 124 So.2d 211, 213 (La. Ct. App. 1960).....	18

### OTHER AUTHORITIES

W. Va. Code Ann. § 38-2-39 (2005).....	<i>Passim</i>
--	---------------

## **I. INTRODUCTION**

The issue before this Court is the definition of a "subcontractor" under W.Va. Code § 38-2-39 ("Statute"). (See W. Va. Code Ann. § 38-2-39 (2005), attached hereto). On February 6, 2006, Plaintiff, Preussag International Steel Corporation, d/b/a Infra-Metals Co. ("Infra-Metals"), filed its Motion for Partial Summary Judgment ("Motion") against Defendant, Titan Fabrication & Construction, Inc. ("Titan"), and Defendants March-Westin Company, Inc. ("March-Westin"), Zurich American Insurance Co. ("Zurich"), and Fidelity and Deposit Company of Maryland ("Fidelity") (March-Westin, Zurich and Fidelity hereinafter collectively "Defendants"), in the United States District Court for the Northern District of West Virginia ("District Court") arguing, in part, that Infra-Metals was entitled to payment under the subject bond because Titan was a subcontractor. (See Attached Bond at MW 000016-000020). On February 21, 2006, Defendants filed their Response to the Motion, and on March 2, 2006, Infra-Metals filed its Reply. The District Court heard oral argument on the Motion on September 25, 2006. On September 26, 2006, the District Court ruled on the Motion, ordering that it be dismissed "subject to renewal following the West Virginia Supreme Court's answer to [the District] Court's forthcoming certified question." On October 27, 2006, the District Court entered an Order of Certification to the West Virginia Supreme Court of Appeals. On January 19, 2007, this Court accepted review of the Certified Question from the District Court.

## **II. THE CERTIFIED QUESTION FROM THE DISTRICT COURT**

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

1. The steel fabricator enters a fixed-price contract with the general contractor of a public works construction project, pursuant to which the fabricator
  1. Agrees to fabricate and deliver structural steel components conforming to the construction project's unique design specifications;
  2. Produces shop drawings for the fabricated steel components based on the project's engineering calculations and design specifications' [sic]
  3. Submits its shop drawings for approval by the project's architect and general contractor before fabricating the structural steel components; and
  4. Delivers the fabricated steel components on a delivery schedule based on construction progress;
2. The steel fabricator performs all physical fabrication processes at its own facility, away from the project site; AND
3. The fabricated steel components are not fungible and not readily marketable without further modification?"

Infra-Metals respectfully requests the Court to answer the Certified Question in the affirmative and find that the steel fabricator, Titan, is a subcontractor because: (1) its work clearly satisfies the West Virginia definition of a subcontractor; (2) West Virginia Code § 38-2-39 does not require a subcontractor to perform labor on a jobsite to be deemed a subcontractor; (3) the modern and enlightened test for determining the status of a subcontractor hinges upon a project's unique design specifications, does not require work to be performed on a jobsite, and considers whether the fabricated steel is not fungible and not readily marketable; and (4) in the interest of public policy, the modern and enlightened test for determining the status of a subcontractor limits the scope of those who can file a lien against the general contractor. Thus, Infra-Metals, as a supplier to a

subcontractor, Titan, would be entitled to payment under the bond for the steel it supplied to Titan.

### **III. STATEMENT OF FACTS**

Infra-Metals supplied steel to Titan for the Fairmont State College Project ("Project") in Fairmont West Virginia. March-Westin was the general contractor for the Project. Zurich and Fidelity secured the Project under a labor and materials bond. Infra-Metals brought this action against Defendants in the United States District Court for the Northern District of West Virginia seeking payment under the bond issued by Zurich and Fidelity for the steel Infra-Metals supplied to Titan for the Project.

Infra-Metals supplies structural steel and materials for use in sophisticated building projects throughout the United States. One such project was located in Fairmont, West Virginia, where Fairmont State College ("College") constructed a Student Recreation Center (hereinafter "Rec Center" or "Project"). The College hired Defendant March-Westin as the general contractor. March-Westin contracted with Titan to fabricate all the steel necessary to erect and completely build the Rec Center. (*See* September 5, 2003, Purchase Order Agreement attached at MW 000026-000028). Between January 16, 2004 and April 16, 2004, Titan ordered \$182,040.27 worth of steel from Infra-Metals. Between March 31, 2004 and June 22, 2004, March-Westin ordered \$375,224.70 worth of steel directly from Infra-Metals to be delivered to Titan. Titan and March-Westin owe Infra-Metals \$557,264.97 for steel Infra-Metals supplied to them to fabricate for building the Rec Center.

The Project was secured with a labor and materials bond, numbered 08248159, issued August 27, 2003 by Zurich and Fidelity (hereinafter "Bond"). (*See* attached Bond

at MW 000016-000020). The Bond was issued pursuant to an August 25, 2003 contract entered into between March-Westin and the Fairmont State Board of Governors for the Fairmont State College Student Recreation Center ("Contract"). (See Document 38, Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, at Exhibit A). The Contract specifications were in accordance with the drawings and specifications prepared by VOA, Richard A. Sawell, Principal, 224 S. Michigan Avenue, Suite 1400, Chicago, Illinois 60604 ("VOA"). (*Id.*).

West Virginia Statute § 38-2-39 ("Statute") requires a bond to secure the construction of public buildings, stating:

It shall be the duty of . . . legal bodies having authority to contract for the . . . construction . . . of any public building . . . to require . . . [contractors to] cause to be executed . . . a good, valid, solvent and sufficient bond, in a penal sum equal at the least to the reasonable cost of the materials, machinery, equipment and labor required for the completion of such contract, and 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, furnishers of machinery or equipment, and furnisher or performer of such labor.

(See W. Va. Code Ann. § 38-2-39 (2005), attached hereto).

The Bond covering labor and material under the Contract provides in pertinent part:

[I]f Contractor [March-Westin] shall well and truly perform the CONTRACT, [Contractor] shall pay off, satisfy and discharge all claims of subcontractors, laborers, materialmen and all persons furnishing material or [] work pursuant to the CONTRACT . . .

(See Labor and Materials Bond attached at MW 000016-000020).

On September 5, 2003, Titan entered into a fixed-price Purchase Order Agreement ("Agreement") with March-Westin to fabricate and deliver steel necessary to

build the Rec Center. (See September 5, 2003, Purchase Order Agreement attached at MW 000026-000028). Under the Agreement, Titan agreed to fabricate and deliver steel in accordance with the following:

1. Specification section #05120- structural steel, 05310-steel deck, 05500-metal fabrications, 05511- metal stairs, 05521-pipe and tube railings, 05721-interior ornamental railings, 05722- exterior ornamental railings, issued by VOA Architects dated 5/19/03.
2. Project documents issued by VOA architects dated 5/19/03 and Addendums 1 thru 7 with various dates.
3. All required submittal information such as shop drawings, details, calculations, product data, Mill certification, including AISC Certification, etc. Titan will submit the steel shop drawings for approval based on 4 weeks maximum per zone, based on a sequencing the project [sic] per zones #2,1,4,3. The stairs 2,3,4 will be detailed, fabricated and delivered with the structural steel on a per zone basis.
4. Titan will provide any engineering calculations, engineer's seal, and compliance with professional engineer requirements indicated in the project specifications.
5. All detailing and shop drawings will be provided using "X" steel design software, including providing a disc with steel model, with permission to allow March Westin to review and offer recommendations as a concurrent submission of the shop drawings to the engineer of record for the project. Titan will also forward copies of shop drawings to Forest City Erectors for their review and comment.
6. Steel materials will be delivered as scheduled with the erector and March Westin. Most of the deliveries will need to occur between 5:00 pm and 6 a.m Sunday thru [sic] Thursday. Deliveries will include all required permits and traffic control necessary to have the steel delivered to the site. Steel deliveries for Zone 1 and 2 will occur within 4 weeks after receipt of Zone #2 approved shop drawings. The balance of steel deliveries to the project will be consistent, so that the fabricator can continuously utilize their crane every day.
7. Titan and Forest City Erectors, Inc. will coordinate required material deliveries and erection sequencing with materials being delivered to the project site starting no later than Mid December 2003, with continuous deliveries to the project site.
8. March Westin will not accept any back charges from either Titan or Forest City erectors unless there is mutual consent among the parties.
9. Anchor bolt layout drawings will be furnished for all zones within 2 weeks after issuance of the purchase order with delivery of the bolts and hardware to the jobsite within 3 weeks.
10. Our Breakdown for the **subcontract** agreement \$ value is as follows: . . .
12. This purchase order agreement includes 6% West Virginia sales tax.

13. Titan Steel will furnish all required embeds (for steel beam connections or loading dock areas) to be placed in concrete walls no later than 10/01/03.
14. Included here-in are all structural steel tube supports for the curtain wall system and all lintel plates, stiffener brackers, etc. as required to support masonry – see typical detail #2-A5.01; #1&2-A5.02; #1-A5.03; #E-A5.07E; #F-A5.07F; shop plate at overhead rolling door – see A5.09, including miscellaneous steel support angles for masonry walls, ships ladders, etc. as shown on the architectural drawings
15. Includes all galvanizing of steel indicated in the project specifications, architectural and structural drawings, for example; exterior columns at main street- elevation #E-A5.07E, #F-A5.07F; #G-A5.07G.
16. Titan will “shop attach” items such as bent plates to perimeter beams for masonry shelf angle supports, roof frames for mechanical or other hatch openings, including fabricating trusses in segments due to shipping and trucking limitations, and site logistics. The trusses will have bolted connections. All perimeter columns will be drilled to receive a 2-line safety cable as required by OSHA. Titan will also provide shear tabs at floor connections to the main girders as requested by Forest City Erectors.
17. March Westin will forward approved metal decking drawings for Titan’s use and coordination with areas receiving bent plate.

Although March-Westin states that the form used for the Agreement was not an AIA standard form contract for subcontractors for the Agreement, March-Westin, nonetheless, referred to the Agreement as a “subcontract” in paragraph No. 10.

Titan ordered the steel necessary to fabricate and build the Rec Center pursuant to the Agreement from Infra-Metals.<sup>1</sup> Infra-Metals shipped and delivered the steel to Titan, and Titan accepted the steel without ever objecting to its quality. From March 31, 2004 through June 22, 2004, Infra-Metals shipped steel to Titan as ordered by March-Westin.<sup>2</sup> Infra-Metals shipped and delivered the steel to Titan which was ordered by March-Westin. March-Westin never rejected or returned the steel supplied by Infra-Metals.

---

<sup>1</sup> Infra-Metals' agreement with Titan specified, “Credit Hold” and “F.O.B. Delivered.”

<sup>2</sup> The terms of Infra-Metals' agreement with March-Westin required steel “1/2 % 10-N30” and “F.O.B. Delivered,” with the exception of the last delivery which specified “Credit Hold” and “F.O.B. Delivered.”

In or about early spring 2004, March-Westin became aware that Titan was having financial problems and was not paying its steel suppliers.<sup>3</sup> On May 26, 2004, Tom Hillegas, March-Westin's Project Manager, wrote a letter to Matt Brook at Titan disputing Titan's invoices to March-Westin, and expressing concern for Titan's threat to withhold shipment of fabricated steel for the Project. (See May 26, 2004, letter attached hereto as MW 000061-000062). In the letter, March-Westin stated that Infra-Metals had informed March-Westin the total cost of steel Infra-Metals shipped to Titan was \$644,089.13.<sup>4</sup> March-Westin also stated that Titan's failure to pay its suppliers and refusal to perform under the Agreement placed Titan at substantial risk of litigation by "shutting down th[e] project" and "exposing March-Westin to claims from Titan's suppliers for unpaid invoices." (May 26, 2004, letter attached hereto as MW 000061-000062).

In his July 25, 2006, deposition, Tom Hillegas reiterated March-Westin's concerns regarding Titan's threat to shut down the project in May 2004 if it refused to deliver the fabricated steel. Mr. Hillegas testified that Titan was a key supplier for the Project, and defined key supplier as a "major material supplier . . . furnishing all of the steel for the project." (Tom Hillegas Deposition at pp. 56-57). Mr. Hillegas also stated that the Project "was a steel project. It was a structural steel project. It's a very key part to building the project as a supplier." *Id.* Finally, Mr. Hillegas testified that Titan's failure to provide structural steel to the Project would have had a serious impact on the Project's

---

<sup>3</sup> Titan filed for bankruptcy on November 15, 2004. (See Document 64, Order of Certification to the Supreme Court of Appeals of West Virginia, at p. 4 n. 4).

<sup>4</sup> The letter also stated that even though Titan and March-Westin had discussed March-Westin paying Titan's steel suppliers (which would include Infra-Metals), no such modification to the Agreement had been executed.

completion, as it did in early April 2004 when, as a result of Titan's failure to supply the Project's fabricated steel, the Project was shutdown. (*Id.* at 57-58 and 107-108).

#### **IV. DISCUSSION OF LAW**

##### **A. STANDARD OF REVIEW**

The standard of review applied by the West Virginia Supreme Court of Appeals in addressing legal issues presented by a certified question from a federal district court is *de novo*. Syllabus Point 1 *T. Weston Inc. v. Mineral County*, 638 S.E.2d 167 (W.Va. 2006) (*citing* Syllabus Point 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998)).

##### **B. Titan Is A Subcontractor Because its Work Clearly Satisfies the West Virginia Definition of A Subcontractor.**

The issue before this Court is the definition of a "subcontractor" under W.Va. Code § 38-2-39 ("Statute"), and Titan falls squarely within that definition. *See Marsh v. Rothey* 117 W.Va. 94, 183 S.E. 914, 915 (1936). *Marsh* is West Virginia's authority on the definition of a subcontractor under the Statute. In *Marsh*, the court defined a subcontractor as, "one to whom the principal contractor sublets a portion or all of the contract itself." *Id.* *Marsh* based this definition on "accepted definitions in the law," including West Virginia law. (Response Brief at 10). *See Marsh*, 117 W.Va. 94, 183 S.E. at 915. The *Marsh* court also relied on persuasive authority from the Public Works Act which defined subcontractor as including "those having a direct contract with the contractor and . . . [those] who furnish[] material worked to a special design according to drawings and specifications of the[] work." *Id.* (emphasis added).

West Virginia law also provides that "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, [words and terms]

will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982). In looking to accepted definitions in the law and the Public Works Act, the *Marsh* court followed West Virginia precedent and defined a subcontractor under the Statute.

*Marsh* is controlling here, and Titan is on all fours with its definition of subcontractor. Titan entered an agreement with March-Westin whereby it would fabricate steel for the Project in accordance with the Contract designs and specifications. In its Response to Infra-Metals' Motion for Partial Summary Judgment, March-Westin admits to subletting the Project's steel fabrication to Titan when it references and attaches the Agreement. (See Document 38, Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, at p. 3). As stated above, the Agreement sets forth in great detail specifications for the steel fabrication for the Project. Under the Agreement, Titan agreed to fabricate and deliver structural steel components conforming to the construction project's unique design specifications (Agreement ¶¶ 1-5, 14-17); produce shop drawings for the fabricated steel components based on the project's engineering calculations and design specifications (Agreement ¶¶ 3-5); submit its shop drawings for approval by the project's architect and general contractor before fabricating the structural steel components (Agreement ¶¶ 3-5); and delivering the fabricated steel components on a delivery schedule based on construction progress (Agreement ¶¶ 6-9, 13). Liberally construing the Statute under the foregoing facts, as is required under West Virginia law,

the Court must find that under these facts Titan was a subcontractor for the Project. See *Tug River Lumber Co. v. Smithey*, 107 W.Va. 482, 148 S.E. 850, 853 (1929).

**C. Titan Is A Subcontractor Because West Virginia Code § 38-2-39 Does Not Require A Subcontractor to Perform Labor on a Jobsite to be Deemed a Subcontractor.**

Although March-Westin argues that a subcontractor is required to perform its work on the actual jobsite, there is no such requirement under West Virginia law. The Statute states in brief:

It shall be the duty of . . . legal bodies having authority to contract for the . . . construction . . . of any public building . . . to require . . . [contractors to] cause to be executed . . . a good, valid, solvent and sufficient bond, in a penal sum equal at the least to the reasonable cost of the materials, machinery, equipment and labor required for the completion of such contract, and 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, furnishers of machinery or equipment, and furnisher or performer of such labor.

Nowhere in the Statute is it stated that a subcontractor has to perform labor on a jobsite in order to be deemed a subcontractor. In fact, the Statute does not even use the term "subcontractor," let alone define it. (See attached Statute). Further, West Virginia's Supreme Court of Appeals has repeatedly made clear that it follows the long-standing rule of statutory construction entitled *inclusio unius est exclusio alterius*, meaning, the inclusion of "one is the exclusion of the others." See e.g. *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 491 n. 6, 490 S.E.2d 306, 310 n. 6 (1997) (quoting *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996)). This doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language. *Keatley*, 200 W.Va. at

491 n. 6, 490 S.E.2d at 310 n. 6. The Statute contains no language requiring a party to perform work at a jobsite to maintain subcontractor status, and reading such language into the Statute is contrary to established West Virginia law. Furthermore, consistent with the language of the Statute, *Marsh*, as West Virginia's only precedent on the definition of a subcontractor under the Statute, did not condition subcontractor status to performance of on-site labor, nor should this Court.

**D. Titan Is A Subcontractor Because the Modern and Enlightened Test for Determining the Status of a Subcontractor Hinges Upon A Project's Unique Design Specifications, Does Not Require Work to be Performed on a Jobsite, and Considers Whether the Fabricated Steel Is Not Fungible and Not Readily Marketable.**

To the extent this Court must look outside West Virginia law to determine the definition of a subcontractor under the Statute, this Court should follow the more modern and enlightened approach which hinges upon a project's unique design specifications, does not condition subcontractor status on work being performed on a jobsite, and considers whether the fabricated steel is not fungible and not readily marketable.

The argument that a subcontractor must perform work on the job site is dated, and contrary to West Virginia's propensity to liberally construe the Statute. *See Tug River, supra*. The modern trend approach rejects the requirement that a subcontractor needs to perform labor at a jobsite recognizing that the substance of a subcontractor's work is determined by other factors such as following design specifications and the value of the fabricated steel. *See Vulcraft v. Midtown Business Park, Ltd.*, 110 N.M. 761, 800 P.2d 195 (1990). In *Vulcraft*, the court analyzed whether the plaintiff, a steel supplier to a steel fabricator, was entitled to file a lien as a materialman. The statute at issue did not allow a furnisher of material to a materialman to file a lien. The facts were uncontested

that the fabricator performed no work at the building site. The plaintiff contended it supplied the fabricator with a significant amount of steel goods which were specifically fabricated according to the general contractor's plans for use in the project. *Id.* at 763. The court noted the two divergent lines of authority, one requiring subcontractors to perform work at a jobsite, and the other requiring a subcontractor to provide substantial value to the project in accordance with plan specifications, whether or not its work was performed at the job site. *Id.* at 764.

*Vulcraft* noted New Mexico law, like West Virginia's, requires liberal interpretation of its lien statute to satisfy its remedial purpose. *Vulcraft*, at 764. The statute also did not condition subcontractor status on those performing work at the jobsite. *Id.* at 765. The court also noted that New Mexico's previous definition of a subcontractor, "one who has entered into a contract express or implied, for the performance of an act, with a person who has already contracted for its performance," did not require limiting a subcontractor's status to one who does work at the site. *Id.* at 766. The court, therefore, adopted the following rule for determining subcontractor status: (1) whether the party's work was performed in accordance with contract plans and specifications; and (2) whether the party's work performed was substantial so as to give notice to the owner/general contractor that the subcontractor would be acting as an agent to its suppliers. *Id.* at 766-67.<sup>5</sup> The court held that its test distinguished a subcontractor from a materialman based on performance in conformity with contract specifications. *Id.*

A similar case following *Vulcraft* is *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 402, 529 N.W.2d 16, 20 (1995). The plaintiff in *Blue Tee*, a steel supplier to a

---

<sup>5</sup> Other factors which the court noted as informative in determining subcontractor status are (1) whether the custom in trade considers the party a subcontractor; and (2) the intent of the parties. *Id.*

steel fabricator, sought to enforce a construction lien against a general contractor. The issue in the case was whether the steel fabricator was a subcontractor or materialman. The plaintiff's expert testified that fabrication could not be done at a jobsite, and that fabricated steel is only worth its scrap value if not installed in its intended structure. *Blue Tee*, 247 Neb. at 399, 529 N.W.2d at 18. At trial, the general contractor produced documents stating the steel fabricator was a "materialman." *Id.* The general contractor's employees also testified that because the fabricator lacked proper insurance, retainer agreements and workplace safety standards normally associated with subcontractors, the general contractor treated the fabricator as a materialman. *Id.*

The court first stated that because the object of a mechanic's lien is to secure claims of those who have contributed to the erection of a building, the statute should be liberally construed. *Id.* at 402, 529 N.W.2d at 20. Following *Vulcraft's* rule, the court held that the evidence that the fabricator's steel work was a substantial part of a building, made to contract specifications, and only worth its scrap value if not used, supported a finding that the fabricator was a subcontractor. *Id.*<sup>6</sup> The court held that the fact that the fabricator did not install the steel was not dispositive of subcontractor status. The court also acknowledged that evidence showing custom in the trade designating steel fabricators as materialmen and documents in support of the parties' intent that the fabricator was a materialman were not compelling enough to minimize the value of the

---

<sup>6</sup> See *Vulcraft*, 110 N.M. at 764, n. 2 (other courts adopting alternative view as articulated in *Theisen v. County of Los Angeles*, 54 Cal.2d 170, 183, 352 P.2d 529, 537-38 (1960)); see also *LaGrand Steel Products, Co. v. A.S.C. Construction, Inc.*, 108 Idaho 817, 818-19, 702 P.2d 855, 856-57 (Idaho Ct. App. 1985) (holding that steel fabricator was a subcontractor based on substance of work performed even though none was performed on jobsite).

labor the fabricator contributed to the project. *Id.* at 403, 529 N.W.2d at 20: As such, the court held that the steel fabricator was a subcontractor. *Id.*<sup>7</sup>

In the present case, Titan fabricated the steel furnished by Infra-Metals according to March-Westin's and its architect's specific plans. As stated above, the Agreement required Titan to fabricate and deliver the steel in accordance with the Project documents issued by VOA architects, and subject to various other specifications. Titan's performance also was significant in relation to the project. Titan agreed to fabricate the steel at a fixed-price amount of \$1,204,584.00 for a Project estimated to cost \$20,210,140.49 in material, machinery, equipment and labor. (See Document 38, Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, at Exhibits C and B). The fabricated steel provided by Titan actually accounted for over five percent of the entire project, or a total cost of \$1,606,285.32. (Document 38 at Exhibit I). This amount is substantial. Also, because the Agreement required Titan to fabricate the steel according to very specific design plans, the steel was not fungible and not readily marketable for use.

---

<sup>7</sup> See also *Baumhoefener Nursery v. A&D Partnership*, 618 N.W.2d 363 (Iowa 2000):

In these days a large proportion of the material furnished for the construction of buildings, such as cut stone, inside finishing, etc., is prepared at the yard or shop of the contractor or manufacturer, in accordance with plans and specifications for particular buildings, with the implied consent of the owner, and which in many cases would be of comparatively little value for use elsewhere. Such work of preparation should be deemed part of the construction or 'furnishing' under the contract. *Id.* (quoting *Howes v. Reliance Wire Works Co.*, 46 Minn. 44, 47, 48 N.W. 448, 449 (1891)); see also *T.K. Kobayashi v. Meehleis Steel, Co.*, 472 P.2d 724, 728 (Colo. App. 1970) (fact that building components were constructed off-site did not defeat lien for labor and materials); *Blue Tee Corp.*, 529 N.W.2d at 20 (off-site steel fabrication recognized as lienable labor where product unique and of no value unless incorporated into building).

March-Westin's own admissions provide further support that the steel fabricated by Titan was substantial in relation to the Project. In its May 26, 2004, letter to Titan, Tom Hillegas (March-Westin's Project Manager) stated that Titan's failure to pay its suppliers and refusal to perform under their Agreement placed Titan at substantial risk of litigation by "shutting down th[e] project" and "exposing March-Westin to claims from Titan's suppliers for unpaid invoices." Mr. Hillegas also stated that Titan was a key supplier for the Project, defining key supplier as a "major material supplier . . . furnishing all of the steel for the project," and that the steel from Titan was "a very key part to building the project." (Tom Hillegas' Deposition at pp. 107-108). Mr. Hillegas testified that Titan's failure to provide structural steel for the Project would have had a serious impact on the Project's completion, as it did in early April 2004 when Titan's failure to supply the Project's fabricated steel shutdown the Project. (*Id.* at pp. 107-108).

Moreover, the fact that March-Westin did not use an AIA standard form contract for "subcontractors" in its Agreement is not dispositive of subcontractor status.<sup>8</sup> Rather, the labor that Titan contributed to the project is determinative of its subcontractor status.<sup>9</sup> *See Blue Tee*, 247 Neb. at 403, 529 N.W.2d at 20; *Jesse F. Heard & Sons v. Southwest Steel Products*, 124 So.2d 211, 213 (La. Ct. App. 1960) ("whether or not one is a subcontractor within the purview of lien statute must be resolved from essential factors of legal significance other than simple designation as such by the prime contractor"); *Vulcraft*, 110 N.M. at 765 (actions of parties or their perceptions of their status are not dispositive of a determination of subcontractor status). This Court should find that Titan

---

<sup>8</sup> March-Westin, nonetheless, referred to the Agreement as a "subcontract" in paragraph No. 10.

<sup>9</sup> To the extent such evidence is relevant, Defendants did not present any evidence in the record that steel fabricators are considered materialman in the construction industry.

is a subcontractor because the Statute clearly is in line with the modern approach as stated in *Vulcraft* and followed by *Blue Tee*.

**E. Titan Is A Subcontractor Because in the Interest of Public Policy the Modern and Enlightened Test for Determining the Status of a Subcontractor Limits the Scope of Those Who Can File A Lien Against the General Contractor.**

*Vulcraft* also addresses the concern of limiting subcontractor status such that a general contractor will not be subject to liens about which it had no knowledge. *Vulcraft*, at 767. *Vulcraft* reasoned that requiring a subcontractor to perform according to the project's plans, and to contribute substantial value to a project provides an owner with notice that the subcontractor will be acting as an agent, and the owner can take protective steps to insure its subcontractor is responsible. *Id.* This, the court held, limits the scope of those who can file a lien. *Id.*

*Vulcraft's* test is particularly appropriate here where March-Westin not only admits Titan was a key supplier (*see* above), March-Westin admits it was aware Titan was working with Infra-Metals and other steel suppliers and worried that it would be liable for Titan's default. As stated previously, Tom Hillegas stated that he spoke directly with Infra-Metals, and was aware Infra-Metals may be seeking payment from March-Westin for the steel Infra-Metals supplied for the Project, and it was aware that, because of Titan's failure to pay its suppliers and refusal to perform, Titan had "expos[ed] March-Westin to claims from Titan's suppliers for unpaid invoices." (May 26, 2004, letter attached hereto as MW 000061-000062). It follows that March-Westin cannot now claim it had no notice Titan would use outside steel suppliers to whom March-Westin would be liable.

Further, the Statute does not expressly require work to be performed on a jobsite to qualify as a subcontractor. *Marsh's* definition of a subcontractor, "one to whom the principal contractor sublets a portion or all of the contract itself," also does not condition subcontractor status upon performing work on a jobsite. Like the statute in *Vulcraft*, the Statute is to be liberally construed under West Virginia law to further its remedial purpose. *Tug River, supra*. Thus, to the extent this Court must look outside West Virginia law to determine a definition of subcontractor for purposes of the Statute, for public policy reasons the Court should adopt the modern and more enlightened approach set forth in *Vulcraft* and other jurisdictions adopting the same, under which Titan is a subcontractor.

## V. CONCLUSION

Infra-Metals respectfully requests the Court to answer the Certified Question in the affirmative and find that the steel fabricator, Titan, is a subcontractor because: (1) its work clearly satisfies the West Virginia definition of a subcontractor; (2) West Virginia Code § 38-2-39 does not require a subcontractor to perform labor on a jobsite to be deemed a subcontractor; (3) the modern and enlightened test for determining the status of a subcontractor hinges upon a project's unique design specifications, does not require work to be performed on a jobsite, and considers whether the fabricated steel is not fungible and not readily marketable; and (4) in the interest of public policy, the modern and enlightened test for determining the status of a subcontractor limits the scope of those who can file a lien against the general contractor. Thus, Infra-Metals, as a supplier to a subcontractor, Titan, would be entitled to payment under the bond for the steel it supplied to Titan.

INFRA-METALS, CO., Plaintiff

By 

Of Counsel

William K. Kane (*IL Bar #6194466*)

(admitted *pro hac vice*)

Erin Bolan Hines (*IL Bar #6255649*)

(admitted *pro hac vice*)

**LOVELLS**

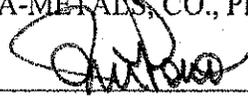
330 North Wabash Avenue

Suite 1900

Chicago, Illinois 60611

312.832.4400

INFRA-METALS, CO., Plaintiff

By 

Of Counsel

James F. Companion, Esq. (*WV Bar # 790*)

John Porco, Esq. (*WV Bar # 6946*)

**SCHRADER BYRD & COMPANION, PLLC**

The Maxwell Centre

32-20th Street, Suite 500

Wheeling, West Virginia 26003

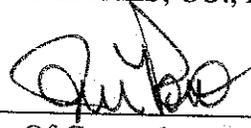
304.233.3390

CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF OF THE PLAINTIFF PREUSSAG INTERNATIONAL STEEL CORPORATION, d/b/a INFRA-METALS, CO.**, was had upon the following via U.S. First Class Mail on February 19<sup>th</sup>, 2007:

William H. Hutchens, III  
**JACKSON KELLY PLLC**  
150 Clay Street, Suite 500  
Morgantown, WV 26501  
**COUNSEL FOR MARCH-WESTIN CO., INC.**  
**ZURICH AMERICAN INSURANCE CO., AND**  
**FIDELITY AND DEPOSIT COMPANY OF**  
**MARYLAND**

INFRA-METALS, CO., Plaintiff

By 

Of Counsel

James F. Companion, Esq. (WV ID #790)  
John Porco, Esq. (WV ID #6946)  
**SCHRADER, BYRD & COMPANION, PLLC**  
The Maxwell Centre  
32-20<sup>th</sup> Street, Suite 500  
Wheeling, West Virginia 26003  
304.233.3390