

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

vs.

MARCH-WESTIN CO., INC.; TITAN FABRICATION &  
CONSTRUCTION, INC.; ZURICH AMERICAN INSURANCE CO.;  
and FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Supreme Court No. 33286

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

BRIEF ON BEHALF OF  
MARCH-WESTIN CO., INC.,  
ZURICH AMERICAN INSURANCE CO., and  
FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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## **II. INTRODUCTION**

This matter is before the West Virginia Supreme Court of Appeals upon certification of a question of law from the United States District Court for the Northern District of West Virginia, pursuant to West Virginia Code § 51-1A-3. Defendants, March-Westin Co., Inc. ("March-Westin"), Zurich American Insurance Co., ("Zurich") and Fidelity Deposit Company of Maryland ("Fidelity") (collectively, "Defendants"), submit this response and ask that this Court answer "No" to the certified question now before it.

## **III. KIND OF PROCEEDING AND NATURE OF RULING IN THE UNITED STATES DISTRICT COURT**

By Order of January 10, 2007, this Honorable Court accepted the certified question submitted by the United States District Court for the Northern District of West Virginia by Order of Certification to the Supreme Court of Appeals of West Virginia, dated October 27, 2006.

The certified question was as follows:

Under West Virginia Code § 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?

It is important for this Honorable Court to answer "No" to the certified question, because finding that the steel fabricator was a subcontractor would extend the protection afforded under the applicable West Virginia statute, West Virginia Code § 38-2-39, to an indefinite class of persons that could potentially place general contractors in perilous positions of being unable to protect themselves.

#### **IV. STATEMENT OF FACTS**

March-Westin entered into a contract with Fairmont State College for the construction of a Student Activities Center ("Project"), by Contract #0030343, dated November 4, 2003, for a total Project amount of \$20,210,140.00.<sup>1</sup> The Project was secured by a Labor and Material Payment Bond #08248159 ("bond") issued by Zurich and Fidelity. March-Westin thereafter entered into a Purchase Order agreement ("Purchase Order") with Titan Fabrication & Construction, Inc. ("Titan"), totaling \$1,204,584.00, for Titan to supply certain steel materials on the project and nothing more.<sup>2</sup> The total amount of materials actually supplied by Titan on the Purchase Order totaled \$646,000.00.<sup>3</sup>

Elements pertinent to defining Titan's role under the Purchase Order, included the fact that Titan was not required to engage in any work, nor did Titan engage in any work, on the construction of the Project; Titan was not required to engage in any supervision, nor did Titan engage in any supervision, of the installation or use of its supplied products; Titan's portion of the overall Project was not substantial, as the Purchase Order total amounted to only 5.9% of the total Project amount, with the actual supplied materials only amounting to 3.2%; March-Westin and Titan had no relationship prior or subsequent to entering into the Purchase Order; Titan gave

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<sup>1</sup> Contract, attached as Exhibit "A."

<sup>2</sup> Purchase Order, attached as Exhibit "B."

<sup>3</sup> Invoices and Payments, attached as Exhibit "C."

no performance bond to March-Westin, as the prime contractor; Titan received no progress payments, but payment for the materials when supplied;<sup>4</sup> March-Westin included sales tax in the contract price; and, most importantly, Titan's steel fabrication process was relatively simplistic and did not involve a complex, integrated system.<sup>5</sup>

In particular, the design and engineering of the steel structure was completed in advance and Titan, as the material supplier, was required to merely create a simplified set of shop drawings, which was akin to simple assembly instructions for the steel. The shop drawings showed each piece of fabricated steel with a "piece mark," which enabled the erector on the Project to match the mark to the materials during erection of the structure. The actual fabrication process undertaken by Titan consisted of Titan obtaining raw steel materials of different sizes and dimensions, such as beams and columns, cutting them to the correct lengths, and drilling holes where bolts were to be placed. Titan would then "piece mark" the steel to coordinate with the assembly instructions set forth on the shop drawings and then load the steel on trucks for delivery to the Project site in an order consistent with the erection process.<sup>6</sup> Through preparing

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<sup>4</sup> Pursuant to industry practice and standard, a percentage of the progress payments made to the prime contractor for work completed on a project are retained by the project owner, pending final determination of project completion. *See* Exhibit "A," § 5.1.6. As evidenced by the American Institute of Architects (AIA) standard form used in the construction industry, this same practice is utilized, with respect to progress payments made to subcontractors on a project -- a portion of the payments is retained pending final determination of completion. In contrast, a material supplier receives full payment for materials supplied on the project, with no amount retained pending project completion. Accordingly, as a material supplier, Titan was paid in full for all materials supplied to March-Westin on the Project. *See* Exhibit "C."

<sup>5</sup> Affidavit of Thomas Hillegas, attached as Exhibit "D."

<sup>6</sup> *See* Exhibit "D." Furthermore, when entering into a contract with a subcontractor on a job, March-Westin uses the detailed American Institute of Architects (AIA) standard form used in the construction industry. Said form sets forth the specific conditions that are required under the law when engaging in a contractual relationship with a subcontractor, such as provisions under the West Virginia Prevailing Wage Act, W.Va. Code § 42-7-1 *et seq.*, and the West Virginia Contractor Licensing Act, W.Va. Code § 21-11-1 *et seq.* Furthermore, within the General Conditions, the term "subcontractor" is defined as "a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site."

the shop drawings, Titan was not required to, and did not, alter the design and engineering of the steel structure. In fact, Titan was not qualified to question the actual structural integrity of the design, nor would have been willing to accept responsibility for the viability of the design, and no one would have, and did not, expect this of Titan, as the supplier of the fabricated steel.<sup>7</sup>

As a material supplier on the Project, Titan presented invoices to March-Westin for materials furnished, dated November 24, 2003; December 17, 2003; January 15, 2004; February 20, 2004; and March 23, 2004, and March-Westin fully paid these invoices.<sup>8</sup> Titan submitted a subsequent materials invoice to March-Westin for payment, dated April 21, 2004. However, the invoice was not paid by March-Westin, as it was determined that Titan had not delivered the materials to the Project and, therefore, was billing March-Westin in advance for said materials.

Correspondence thereafter transpired between March-Westin and Titan regarding the materials at issue. It was within this correspondence that the issue of Titan failing to pay Infra-Metals for materials it had supplied to Titan became fully evident. In Titan's letter dated May 25, 2004, Titan inquired of March-Westin about the absence of payment on the April 21, 2004 invoice, while also making numerous inaccurate statements, including one about an alleged agreement by March-Westin to purchase steel from Infra-Metals.<sup>9</sup> These inaccuracies and allegations were immediately corrected and thoroughly addressed by March-Westin through correspondence directed to Titan, dated the next day, May 26, 2004.<sup>10</sup> In said letter, March-Westin specifically informed Titan that, although the option had been discussed with Titan,

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<sup>7</sup> See Exhibit "D."

<sup>8</sup> See Exhibit "C."

<sup>9</sup> Letter from Titan to March-Westin, dated May 25, 2004, attached as Exhibit "E."

<sup>10</sup> Letter from March-Westin to Titan, dated May 26, 2004, attached as Exhibit "F."

March-Westin had not executed any modification to their contract, whereby March-Westin would assume responsibility for direct payments to Titan's suppliers. Specifically, the letter stated, "[d]espite your contentions, we have not yet executed a modification to our contract in which we assume responsibility for all payments to your suppliers although we have discussed this option as a favor to you because I was told that Titan is having financial difficulties. We do not intend to obligate ourselves to pay your costs unless and until you can provide proof of payment to your vendors for all steel for which you have received payment."<sup>11</sup> The letter, further, indicated that March-Westin had just learned from Infra-Metals that Titan had not paid any of Infra-Metals' invoices since January 5, 2004.

Thereafter, by correspondence directed to Zurich and Fidelity, dated June 29, 2004, counsel for Infra-Metals asserted that Infra-Metals had supplied its materials to Titan by virtue of the contract it had with Titan, not March-Westin, and was seeking payment under the bond for those materials.<sup>12</sup> In said correspondence, the relationship and conduct of the parties regarding the materials was made quite evident. The correspondence plainly claimed that the \$554,887.07 worth of materials and labor, for which Infra-Metals alleges it is now owed, was supplied to Titan, not March-Westin, by virtue of a contract it had with Titan, not March-Westin. The correspondence stated, in part, that:

Infra-Metals Co. provided structural steel and other materials to Titan Fabrication & Contraction, Inc., for work on the [Fairmont State College Recreation Center project] in the quantities and at the prices set forth in the statements enclosed herewith. There is currently an outstanding debt of \$554,887.07 as a result of the materials supplied by virtue of the contract with Titan Fabrication & Construction, Inc.

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<sup>11</sup> See Exhibit "F." Furthermore, Titan never provided any such proof of payments made to its vendors.

<sup>12</sup> Letter, dated June 29, 2004, attached as Exhibit "G."

Infra-Metals' present contention that its agreement to supply those same materials was with March-Westin and that March-Westin directly ordered those materials from Infra-Metals is false and contradictory. In fact, Plaintiffs' 30(b) representative, Rosemary Laudani, responded affirmatively to questioning during her deposition testimony that March-Westin did not directly order steel from Infra-Metals.

Q. . . . It's my understanding March-Westin never directly ordered any steel from Infra; is that correct?

A. That's correct.<sup>13</sup>

Furthermore, Plaintiff set forth in interrogatory responses that it was Titan representatives who placed the steel orders with Infra-Metals.<sup>14</sup> While the response indicated that Titan ordered the steel on behalf of March-Westin, in no manner did it state that March-Westin directly ordered the steel from Infra-Metals, which Plaintiff now contends. Given what has transpired, Defendants believe that Infra-Metals' change in tactic has probably been motivated by the fact that Titan has declared bankruptcy and recovery therefrom is now impossible.

It is apparent that the parties substantially disagree as to Titan's role and Infra-Metal's involvement with the Project. Based upon the foregoing statement of facts, quite simply, March-Westin entered into a contract with Fairmont State College, Fairmont, West Virginia, for the construction of a Student Activities Center and that the Project was secured by a Labor and Material Payment Bond issued by Zurich and Fidelity. March-Westin, thereafter, entered into a Purchase Order agreement with Titan for certain materials to be provided on the project and nothing more and, thereafter, paid Titan for all materials supplied. Although Plaintiff provides a factual scenario to this Court that suggests the issue before this Court is more than this, it is not.

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<sup>13</sup> Deposition transcript of Rosemary Laudani, in part, attached as Exhibit "H," p. 121

<sup>14</sup> *Plaintiff's Answers to Defendants March-Westin Co., Inc., Zurich American Insurance Co., and Fidelity and Deposit Company of Maryland's Second Set of Interrogatories*, in part, attached as Exhibit "I," response to Interrogatory No. 1.

The only issue placed before this Court is whether Titan was a material supplier or a subcontractor. The additional presentation of facts regarding the question of whether Titan supplied materials to March-Westin, per the alleged direct ordering by March-Westin, is an issue still before the District Court to be decided at a later time.

## V. DISCUSSION OF LAW

**A. INFRA-METAL'S CLAIM UNDER W.VA. CODE § 38-2-39 FAILS, AS INFRA-METALS IS NOT AN ENTITY ENTITLED TO PROTECTION UNDER THE BOND AND ANY FURTHER EXTENSION OF THE PROTECTION AFFORDED THEREUNDER WOULD BE CONTRARY TO CLEAR LEGISLATIVE INTENT AS RECOGNIZED BY THE WEST VIRGINIA SUPREME COURT.**

Neither Zurich or Fidelity are responsible as sureties to Infra-Metals under the bond at issue in this matter, as Infra-Metals is not an entity entitled to the protections afforded thereunder. West Virginia Code §38-2-39 requires that a contractor who enters into a contract for the construction of a public building purchase a sufficient bond in an amount equal to the reasonable cost of the materials, machinery, equipment and labor required for the contract completion.<sup>15</sup> However, this Court has clearly defined the classes of persons that are afforded the statutory protection under the bond, by virtue of the intentional omission of any further expansion of the protection by the Legislature.

In the West Virginia Supreme Court case of *Rosenbaum v. Price Construction Co.*, 184 S.E. 261 (W.Va. 1936), a company that had been engaged by the subcontractor's surety to complete a job following the subcontractor's default, pursued payment from the general contractor and its surety, after the subcontractor's surety became insolvent. The Court found that

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<sup>15</sup> W.Va. Code §38-2-39. Public building; bond of contractor; recordation of bond; no lien in such case. It shall be the duty of the . . . legal bodies having authority to contract for the erection, construction, improvement, alteration or repair of any public building . . ., to require of every person to whom it shall award, and with whom it shall enter into, any contract for the erection, construction, improvement, alteration or repair of any such public building . . ., that such contractor shall cause to be executed and delivered . . . a good, valid, solvent and sufficient bond. . . .

the company was not within the classes afforded protection under the general contractor's bond. "That bond (so construed) furnishes protection to subcontractors and to those who, under a contract with the general contractor or a subcontractor, contribute labor or material requisite to the structure." *Id.* at Syl.pt. 1. Finding that the plaintiff was not afforded protection under the bond, the Court stated:

The present statute, thus read, gives liens only to general contractors and subcontractors and persons contracting with them. Beyond those three classes, the statute affords no protection. While we have said that the purpose of section 12 (now W.Va. Code § 38-2-39) "is to protect the man who actually furnishes material or machinery, or performs labor on the structure" that statement was applied and meant to apply only to a man within a class specified in section 2 (now W.Va. Code § 38-2-2). Plaintiff did not contract with [the general contractor or its surety], but only with [the subcontractor's surety]. It was neither a general contractor nor a subcontractor. Therefore, plaintiff is not within a class protected by the statute.

*Id.* at 263 (citation omitted). The *Rosenbaum* Court noted the prior Legislative amendment that expanded the protection afforded under the statute to include those contracting with subcontractors, while also recognizing that any further expansion was intentionally omitted by the Legislature. The Court stated: "We must also assume that the legislative extension (in favor of those contracting with subcontractors) was made advisedly; and that any further expansion of the statute was intentionally omitted." *Id.* at 263.

In a similar case factually on point to the present matter, *Marsh v. Rothey*, 183 S.E. 914 (W.Va. 1936), the plaintiffs had furnished materials to a materialman who was engaged in the preparation and delivery of crushed stone to a contractor constructing a public dam. When the materialman failed to pay the plaintiffs for the materials they supplied, they pursued the contractor and his surety for the money due, arguing that the materialman was actually a subcontractor for which they supplied material. The Court noted that:

Counsel emphasizes the provisions of Code, 38-2-2, and 38-2-39, which afford protection for those who shall furnish any material or do any work necessary to the completion of such a structure. 38-2-2, however, specifies that the material shall be furnished and the work done under a contract with either the general contractor or a subcontractor. Material furnished to, or work performed for, a materialman is not so protected.

*Id.* at 915.<sup>16</sup> The Court held that, as the materialman furnished material to the contractor on the construction of the dam, he was protected under the contractor's bond. However, as the plaintiffs only prepared materials for the materialman, the statute did not afford them security under the bond.

While *Infra-Metals* urges that the *Marsh* Court based its finding that the materialman was not a subcontractor on the fact that the stone he had provided to the contractor was not "worked to a special design according to drawings[,]," it is clear that, in ruling, the Court simply looked to the P.W.A. specifications for the project for guidance, which specifically defined the term subcontractor. The project specifications provided that a subcontractor is "one who furnishes material worked to a special design according to drawings and specifications of this work, but does not include one who merely furnishes material not so worked." *Id.* at 915. Acknowledging that a subcontractor or materialman was not defined statutorily, the Court merely looked to accepted definitions in the law to support its recognition of the contract term, stating that:

A subcontractor, **ordinarily**, is one to whom the principal contractor sublets a portion or all of the contract itself. A materialman, **ordinarily**, is one from whom the principal contractor or a subcontractor secures material of a general type, for use on the structure.

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<sup>16</sup> W.Va. Code §38-2-2. Lien of subcontractor. Every person, firm or corporation who, under and by virtue of a contract with such general contractor as is mentioned in section one [§38-2-1] of this article, or with a subcontractor for a part of such work, either for an agreed contract price or by day for by piece, or other basis of payment, shall furnish any part of the materials, machinery or other necessary supplies or equipment, or shall perform any labor, do any work or provide any services necessary to the completion of any general contract, such as is mentioned in section one of this article, shall have such a lien for his or her compensation, as is provided for in section one of this article.

*Id.* at 915 (citations omitted) (emphasis added). It is apparent that, because of the clear definition of a subcontractor under the contract language for the project, the Court left until a later time to definitively define the terms under West Virginia law. The loose use of the terms as defined is without significance. Thus, it is clear after *Marsh* that it has not been thoroughly settled as to what it takes to reach subcontractor status or to be deemed a materialman in West Virginia for purposes of surety bond analysis.

While decisions throughout the United States are divided as to whether a supplier who fabricates material according to certain plans and specifications is a subcontractor, rather than a materialman, and, therefore, subject to statutory protection under a bond, it is evident, based upon the Legislative intention to limit the protection and our Supreme Court's deference of this intent, that following any line of cases other than those holding that Titan in the case, *sub judice*, was a materialman, is contrary to the clearly defined policy of this state.

In a case factually on point to the present matter, *Jesse F. Heard & Sons v. Southwest Steel Products*, 124 So.2d 211 (La.Ct.App. 1960), this issue was thoroughly analyzed. In *Heard*, the contractor entered into an agreement to construct the student union building at a state college and executed the required surety bond on the project. In turn, the contractor entered into a contract with a company, Industrial Fabricators, to furnish structural steel and miscellaneous items that required special fabrication in order to comply with the project's detailed architectural plans and specifications. Industrial Fabricators then contracted with Southwest Steel Products to provide the fabricated steel to be incorporated into the project structure. Neither Industrial Fabricators nor Southwest Steel Products engaged in any work on the structure, but provided the fabricated steel only. During the course of the project, Industrial Fabricators became bankrupt and was indebted to Southwest Steel Products for the materials furnished under their contract. In

an attempt to recover the indebtedness, Southwest Steel Products pursued protection under the bond executed on the project by the contractor by arguing that Industrial Fabricators was a subcontractor, which under the law afforded Southwest Steel Products protection as a supplier of material to a subcontractor. Southwest Steel Products argued that, since the steel that Industrial Fabricators furnished to the contractor was specially fabricated steel according to specifications of the project, then Industrial Fabricators was a contractor and not a materialman. As with the present matter, the *Heard* court expressed the question before it as “whether one who actually delivers steel products to a general contractor at the job site which steel products have been fabricated and constructed to meet certain definite specifications for the job for which such materials are intended, is a materialman or a subcontractor within the meaning of the law.” *Id.* at 214.

As under West Virginia law, the court recognized the settled jurisprudence of the state that while a general contractor and its surety are obligated to creditors of subcontractors in connection with any public works but not to creditors of a materialman on the job, the particular positions occupied by Industrial Fabricators and Southwest Steel Products had not been thoroughly settled. In its analysis, the court noted certain language of a prior decision indicating that stretching the protection provided for suppliers of material any further than actually contemplated by the statute would not be favored. In that case, the court reasoned that:

[The statute] protects, and was meant to protect, only the creditors of contractors and subcontractors. Otherwise, where would the far-flung “protection” of the statute cease? If the furnishers of material to materialmen, ad infinitum, are successively to have their recourse against the contractor, and the contractor’s surety, and the work, and the owner of the work, then it will be all an endless chain, for we know by the (doubtless truthful) claim of a certain public utility that it requires the bringing together of the products (both crude and finished) of some three score or more nations, regions, and climes, to produce merely one small part of one certain small household necessity.

*Id.* at 216 (citation omitted).

Analyzing decisions on the issue throughout the United States, the *Heard* court noted the division in the decisions, as to whether a firm such as Southwest Steel Products is entitled to protection under the bond. However, the *Heard* court did conclude that as the provisions of the statute which grant the protections are to be strictly construed, the rights granted thereunder should never be interpreted to be in any way broader than the statute which grants it. The court stated:

It seems to the court that it would be an unwise policy of this State to decide under the statute which relates to the granting of liens upon contracts involving public buildings that every person who supplied any materials which went into the construction of such public construction, where it was necessary to alter or build or especially construct said materials to meet certain specifications, would thereby entitle the furnisher of such materials to a lien against the proceeds of the contract involved in such case.

*Id.* at 219. Accordingly, the *Heard* court determined that where an entity simply contracts to furnish completed materials to be used in a building, and has no obligation or takes any action at the site to join in the installation of such materials in the building, that the entity and its employees are simply suppliers of materials and, therefore, afforded no protection under the statute. The court found this to be especially so where the labor performed in preparing the materials was done away from the site of the building project and at the place of the materials supplier's business. The court explained:

In other words, the test ought to be not whether or not there has been time and labor expended in producing the material, for that would be true in the preparation of all materials, but the test should be whether or not the person furnishing the material thereafter performed any labor in attaching to or incorporating the materials into the building or improvements involved in that case. Otherwise, it is evident that there would be no end to those who might do some labor away from the job site in the preparation of materials and because they had thus performed some labor would be able to file a claim or a lien against the project as provided for by law and the owner and the contractor would be subject to harassment by

virtue of the claims of materialmen with whom they had not contracted and about whose claims they had no knowledge or information.

*Id.* at 219-220. The court, further, elaborated:

It seems to this Court clear that as is indicated in Phillips on Mechanic's Lien, as hereinabove referred to, that the question of determining whether the person is a subcontractor or simply a materialman depends upon the nature of his contract obligation. As stated in that work, there is a palpable distinction between a contract to erect or in being a subcontractor and a contract to furnish toward the erection or being simply a furnisher of materials. And one who contracts to put up the building or one of its leading divisions, its brickwork, its woodwork or its steelwork is not a mere workman or materialman, but is in fact, under the decision of law, a subcontractor, whereas one who is simply employed to furnish materials, whether such materials be manufactured or not and whether he be required to transform or fabricate such materials into a condition where it meets the requirements of the contract and the specifications, is nonetheless a materialman and is not employed in any way to erect or put up any part of the building or of its primary divisions and is, therefore, simply a materialman. Under the settled law of this State, a materialman who furnishes material to a materialman, has no right to a lien.

*Id.* at 220. Accordingly, Southwest Steel Products was not afforded protection under the bond, as a material supplier to Industrial Fabricators, a materialman. *See also Leonard B. Hebert, Jr. & Co., Inc. v. Kinler*, 336 So.2d 922, 924 (La.Ct.App. 1976) ("If the fabricator of material does not engage in any process that incorporates the item furnished into the immovable under construction, he is a materialman. It matters not whether [the fabricator's] product is procured from another manufacturer and delivered unchanged to the building site or if it is shaped by him from other materials before it is delivered to the job site."); *American States Ins. Co. v. Tri Tech, Inc.*, 812 S.E.2d 490, 492 (Ark.Ct.App. 1991) ("Under the authorities, one who takes no part in the construction of a building, but merely furnishes material for use in a building, is not a subcontractor. . . One who is simply employed to furnish materials, whether such materials be manufactured or not and whether he be required to transform or fabricate such materials into a condition where it meets the requirements of the contract, or the specifications, is nonetheless a

materialman.”); *Frazier v. O’Neal Steel, Inc.*, 223 So.2d 661, 665 (Miss. 1969) (The steel fabricator “did no more than retail steel supplies to the general contractor, and 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.”); *Rudolph Hegener Co. Frost*, 108 N.E. 16 (Ind.App. 1915) (Supplier of stairs, who contracted to build the stairs according to the specifications for the particular dwelling, was a materialman, in that the supplier did not engage in attaching the stairs to the dwelling or performing work on them after they were delivered to the premises.); and *Edward E. Buhler Co. v. New York Dock Co.*, 156 N.Y.S. 457, 459 (N.Y.App.Div. 1915) (“One who furnishes to a contractor, but does not install, steel sash as called for by plans and specifications, and by whom working drawings are to be submitted for approval, and who neither employed nor performed any labor on the sash after delivery, is a materialman.”).

It is quite evident that the rationale supporting the enunciated principles is to afford a reasonable degree of certainty with regard to the extent of liability under the bond. In the case of *Indiana Limestone Co. v. Cuthbert*, 267 P. 983 (Kan. 1928), the court determined that J. R. Cuthbert, a supplier whom the contractor had engaged to supply stone fabricated in accordance with the plans and specifications of the public project, was a materialman, and that the plaintiff from whom the supplier purchased material dealt with him as a materialman and not as a subcontractor as urged by the plaintiff. The supplier took no part in the placing of the stone or in the construction of the building. Accordingly, the contractor and its surety were not liable under the bond at issue for the materials provided by the plaintiff to the materialman. The court

reasoned that the plaintiff's theory of the case, regarding the liability of the contractor, would be extended far beyond that intended by the Legislature:

Upon plaintiff's theory, the liability would be extended, not only to the plaintiff for the stone sold to the materialman, but the contractor might be liable to those operating the stone quarry where the stone was obtained and, still further, to the owner of the land from which the stone was procured. Such an interpretation of this quasi mechanic's lien law would leave the owner and contractor in a precarious and perilous position indeed, as they could not well know that the claim of some remote person in the material furnished by the materialman, some manufacturer, wholesale dealer, or retail dealer, through whose hands the material had passed, had been paid. That view of the act was not, we think, within the purpose of the Legislature, but, rather, that the provision was enacted according to the principles of the Mechanic's Lien Law and should be viewed in the light of its relation to that law.

*Id.* at 985.

Similarly, in *Matzinger v. Harvard Lumber Co.*, 155 N.E. 131 (Ohio 1926), the plaintiff asserted that one who furnishes materials on the construction project that have been prepared according to detailed plans and specifications of the original contract is therefore a subcontractor, as it consists of constructing part of the structure. However, the court found that whether the furnished material was altered or manufactured at the supplier's place of business, procured from another for the special purpose, or sold from the supplier's stock on hand, when the supplier furnishes or performs no labor in the installation or fabrication of the materials into the structure, the supplier is a material man, not a contractor or subcontractor.<sup>17</sup> The court reasoned:

The construction of these statutes, contended for by counsel for plaintiff in error, would lead to rather absurd consequences, for, if a dealer constructs or alters any door or sash, or even reduces lumber in his stock to the size specially required to

<sup>17</sup> The *Matzinger* court cited to several cases from the courts of last resort of other states in support of its finding. "This view has been announced by the court of last resort of other states in construing and applying mechanic's lien statutes similar to our own. *Sterner v. Haas*, 108 Mich. 488, 66 N.W. 348; *Kerr-Murray Mfg. Co. v. Kalamazoo Heat Light & Power Co.*, 124 Mich. 111, 82 N.W. 801; *Stephens Lumber Co. v. Townsend-Stark Corp.*, 228 Mich. 182, 199 N.W. 706, 201 N.W. 213; *Haynes v. Holland* (Tenn. Ch.) 48 S.W. 400; *St. L., Ark. & Texas Ry. Co. v. Mathews*, 75 Tex. 92, 12 S.W. 976; *Arnold v. Budlong*, 11 R.I. 561; *Beckhard v. Rudolph*, 68 N.J. Eq. 315, 59 A. 253." *Matzinger*, 155 N.E. at 132.

meet the specifications of a particular building, he would thereby become a subcontractor, and the employees in his own establishment would be entitled to perfect liens for labor upon the building for which such materials were furnished.

*Id.* at 132. See also *Vulcraft, a Div. of Nucor Corp. v. Midtown Business Park, Ltd.*, 800 P.2d 195, 201 (N.M. 1990) (“It should be noted that all material required at a construction site must conform to the project specifications, and the mere fact that goods supplied were required to conform to the project plans, without more, is not determinative.”).

Each of these cases holds that the material fabricator is a materialman and not a subcontractor, because of the courts’ refusal to extend the protections afforded under the bond to an indefinite class of persons that could place the general contractor in a perilous position of being unable to protect itself.

Guidance is also provided by decisions interpreting the federal statute, requiring that a payment and performance bond be posted on federal public contracts in order to protect those supplying labor or materials, termed the Miller Act and codified at 40 U.S.C. § 3131 *et seq.*<sup>18</sup> However, as with the statute at issue in the matter, *sub judice*, which is similar in context to the Miller Act, the protection afforded is limited to those having a contractual relationship with either the prime contractor or a subcontractor on the contract, and does not protect those who contract with a material supplier.<sup>19</sup> However, again, as with the West Virginia statute, the Miller

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<sup>18</sup> 40 U.S.C. § 3131. Bonds of contractors of public buildings or works.

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(b) Type of Bonds Required. – Before any contract of more than \$100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:

- (1) Performance bond. – A performance bond with a surety satisfactory to the officer awarding the contract, and in an amount the officer considers adequate, for the protection of the Government.
- (2) Payment bond. – A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person. . . .

<sup>19</sup> 40 U.S.C. § 3133. Rights of persons furnishing labor or material.

Act failed to define the term "subcontractor." The United States Supreme Court decided in *MacEvoy v. U.S. for Use and Benefit of Calvin Tomkins Co.*, 322 U.S. 102 (1944), that the relevant definition for a subcontractor should be the specific, technical meaning used in the building trades. Accordingly, the *MacEvoy* court defined subcontractor as "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. The *MacEvoy* court had adopted the narrow, technical definition, according to the legislative history and intent behind the Miller Act, that "Congress could not have intended to impose liability on the payment bond in situations where it is nearly impossible for the prime contractor to foresee such liability and protect itself." *Id.*

The existing case law interpreting the protection afforded under the statute is varied and factually sensitive and, subsequent to *MacEvoy* and decisions interpreting the same, a number of factors have been considered by the courts in making the determination. In *U.S. for Use and Benefit of E&H Steel Corp. v. C. Pyramid Enterprises, Inc.*, 2006 WL 2570849 (D.N.J.), the court found that the fabricator was a material supplier, after application of several factors recognized by the courts as determinative. Accordingly, the plaintiff was afforded no protection under the surety statute, the Miller Act.

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(b) Right to Bring a Civil Action. –

(1) In general. – Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.

(2) Person having direct contractual relationship with a subcontractor. – A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond . . .

The factors recognized by the *Pyramid* court included: (1) the nature of the material or service supplied by the alleged subcontractor to the prime contractor; (2) the financial magnitude of the goods or services provided in relation to the total federal contract; (3) the payment terms and exchange of information between the prime contractor and alleged subcontractor; and (4) the overall relationship between the prime contractor and the alleged subcontractor. *Id.* at \*6. Applying the factors to the facts before it, the *Pyramid* court first noted that, while there was no dispute that the fabricator's work was necessary to the construction of the building, the structural steel it provided was more akin to a company supplying pre-cut wood beams on a residential construction project, rather than custom-fabricating a complex, integrated system. Under the purchase order for the fabricator to supply the structural steel, the fabricator agreed to provide the custom fabricated steel according to the specifications set forth in the Army Corps of Engineers contract on the project. Furthermore, the fabricator was to prepare structural steel shop drawings for submission to the Army Corps of Engineers for review and approval prior to the fabrication process to ensure that the steel fabrication complied with the Corps' contract specifications. However, notwithstanding the specific requirements for the fabrication of the steel, the court found that the fabricator did no more than any competent steel fabricator would do on the job, which weighed against a finding of subcontractor status. Secondly, the fact that the work performed by the fabricator constituted only a small portion of the total contract, making up only 7.8% of the overall contract price, also demonstrated that the fabricator was a material supplier. Also, with respect to the payment terms and exchange of information, the fabricator was not required to post any bond nor provide any insurance or payroll data to the prime contractor, which also weighed in favor of a material supplier status. Finally, with respect to the overall relationship the fabricator had with the prime contractor, no evidence revealed the

kind of ongoing symbiotic relationship that might weigh in favor of subcontractor status. In fact, the evidence revealed that no prior or subsequent relationship existed between the two entities beyond the building project at issue. Therefore, the court concluded that the fabricator was a material supplier under the Miller Act and, accordingly, the plaintiff was afforded no protection as a supplier to a material supplier.

Similarly, in *Aetna Cas. & Sur. Co. v. U.S. for Use and Benefit of Gibson Steel Co.*, 382 F.2d 615 (5<sup>th</sup> Cir. 1967), the plaintiff was a supplier to the purported subcontractor, who was the steel and iron fabricator on the purchase order with the prime contractor. Pursuant to the purchase order, the fabricator was to furnish all of the miscellaneous steel and iron products for the project, according to the specifications set forth in the prime government contract. In furtherance of the requirements, the fabricator custom manufactured virtually all of the materials, with the exception of a few items bought already fabricated. Although the plaintiff supplier argued that the fabricator enjoyed subcontractor status, in that it was required to submit shop drawings for approval, it carried no inventory, and the prime contractor backcharged it for the cost of correcting any unacceptable work, the court concluded that these factors were insufficient to outweigh the important factors determinative of a finding of material supplier. In particular, the court found that the necessary relationship of responsibility did not exist to find that the fabricator was a subcontractor. The court explained:

The most important factor is the nature of the items [the fabricator] supplied. None was a complex, integrated system. The most complex items were prefabricated stairs and ladders. Most of the items were such things as trench covers and frames; hand, guard, and wall rails; pipe sleeves; door lintels; soffit frames; floor expansion joint covers; and frames for fire extinguisher cabinet recesses. Both the variety and the relative simplicity of the items supplied weigh heavily against finding that [the fabricator] took over a significant and definable part of the construction project.

*Id.* at 618. "Custom manufacturing is simply not enough in itself to establish the relationship of responsibility and importance necessary to render a middle party a subcontractor." *Id.* at 617. Other factors also considered by the court were that the fabricator's contract only amount to about 2% of the total cost of the construction project, the fabricator did no onsite work with either installation of its products or supervision of the installation; the fabricator received no progress payments from or gave any performance bond to the prime contractor, and the fabricator included sales taxes in the contract price.

In *U.S. for Use and Benefit of Clark v. Lloyd T. Moon, Inc.*, 698 F.Supp. 665 (S.D.Miss. 1988), the district court relied upon a similar rationale as the *Gibson Steel* court. In *Moon*, the steel fabricator entered into a purchase order with the prime contractor to supply all structural and miscellaneous steel and metal decking for use in constructing the government project. The plaintiff supplied the fabricator with structural steel joists and decking. The facts revealed that the fabricator prepared shop drawings and cut length sheets depicting the assembly and placement of structural joists and decking, beams, stairwells, and other structural components, all of which were submitted to and approved by the prime contractor. Additionally, the fabricator maintained an inventory of raw steel used for fabrication, was responsible for the correction of its unacceptable work, and performed approximately two days of on-site repair work on the project. However, beyond the limited repair work, which was performed on-site as a matter of convenience and nothing more, the fabricator was not required to have any employee at the job site during project construction and did not permanently install any of its product or supervise its installation. The fabricated materials were simply shipped to the job site for unloading by the prime contractor. Furthermore, the fabricator did not post a bond and did not receive progress payments, but was paid by the prime contractor within days of invoicing for its goods.

The plaintiff argued that since the fabricator supplied all the structural steel for the project, it assumed a specific part of the material requirements of the prime contract and, thereby, supplied a complex integrated structural system for the project. However, the court found that the fabricated steel only amounted to 5.15% of the entire project and was considered to be standard fabrication in the industry. Therefore, the fabricator was a material supplier and the plaintiff did not fall within the coverage afforded under the Miller Act.

Furthermore, the district court in *U.S. for Use and Benefit of Pioneer Steel Co. v. Ellis Const. Co., Inc.*, 398 F.Supp. 719 (E.D.Tenn. 1975), also determined that the steel supplier was not a subcontractor for the purposes of a bond claim under the Miller Act. The general contractor on the project entered into a purchase order with the steel supplier to furnish and supply certain prefabricated structural and miscellaneous steel for the government project. The supplier was required to prepare and submit shop drawings to the general contractor for approval, carried no inventory of steel, did none of the steel erection on the construction site, did no supervision of the erection, gave no performance bond to the general contractor, charged sales taxes on the materials sold to the general contractor, and invoiced the general contractor for each shipment of materials. While the supplier argued that the steel prefabrication furnished was complex in design and detail, the court noted that the bulk of the steel constituted trusses to support the superstructure of the buildings being constructed and another significant quantity was prefabricated for a pipe-bridge to support conveyors. "The fact that [the supplier] custom-manufactured the trusses, pipe-bridges, and other items for the project does not constitute it a subcontractor. 'Custom manufacturing is simply not enough in itself to establish the relationship of responsibility and importance necessary to render a middle party a subcontractor.'" *Id.* at 721 (citation omitted). Furthermore, the supplier's total contribution to the total cost of the project

amounted to less than 9%. Accordingly, the court found that the supplier's responsibility on the construction project was not such a large and definable part as to constitute the supplier a subcontractor, but was that of a mere materialman of the general contractor.

In this matter, it is quite evident that the agreement entered into between March-Westin and Titan defines Titan as a supplier of material to March-Westin, the general contractor on the project, and nothing more.<sup>20</sup> It is also quite evident that Infra-Metals was a material supplier to Titan. As a result, Infra-Metals lacks standing to prosecute a claim against the payment bond at issue here.

Infra-Metals wants this Court to find in its favor, based upon two theories: (1) that Titan was a subcontractor on the Project, as it supplied fabricated material to March-Westin made to contract specifications and that Titan's portion of the total contract was a substantial amount; therefore, Infra-Metals should be afforded protection under the bond, as a material supplier to a subcontractor; or (2) that in the interest of public policy, since March-Westin had notice that Titan would purchase steel from a supplier of its own, it could have taken steps to protect itself from liability claims from those other suppliers. However, Defendants represent that neither theory is valid. Not only would extending the statutory protection to cover yet another class of persons be contrary to the Legislative intent, as interpreted by this Court, but permitting such an extension would create too great of an uncertainty of liability, in fact no end would result, on general contractors and their sureties. Indeed, where would the far-flung "protection" of the statute cease? The answer to this question – and the correct answer to the certified question – is

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<sup>20</sup> Plaintiff would have this Court believe that a designation in the Purchase Order identifying the document as a "subcontract agreement," as well as statements made by Thomas Hillegas during his deposition testimony, renders Titan a subcontractor, rather than a material supplier. However, not only was the specific designation made by error, but as set forth by the court in the *Heard* case, "whether or not one is a subcontractor within the purview of the lien statute must be resolved from essential factors of legal significance other than simple designation as such by the prime contractor." *Heard* 124 So.2d at 213.

apparent. Defendants urge that, not only would the extension be contrary to the interest of public policy, but such a result would well cause construction businesses throughout the state of West Virginia to extensively change their current business practices in an attempt to afford themselves the degree of certainty of liability that they presently enjoy.<sup>21</sup> The certified question should, therefore, be answered with an emphatic "No."

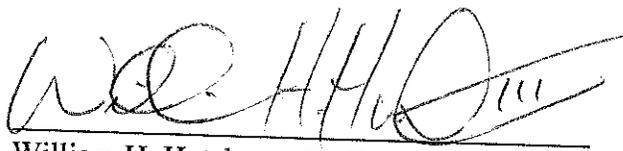
#### **VI. PRAYER FOR RELIEF**

For the foregoing reasons, Defendants, March-Westin Co., Inc., Zurich American Insurance Co., and Fidelity and Deposit Company of Maryland, respectfully request that this Honorable Court correctly answer "No" to the certified question before it.

Respectfully submitted,

**MARCH-WESTIN CO., INC.,  
ZURICH AMERICAN INSURANCE CO.,  
and FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,**

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<sup>21</sup> Under such an interpretation, construction businesses would be required to treat most, if not everyone, they deal with on a project, which could be hundreds of various vendors in some circumstances, as a subcontractor, thereby, causing each to comply with the statutory mandates specific to subcontractors presently in place in the business or face penalties. Certainly, the West Virginia Legislature and Supreme Court did not intend such a burden to be placed on West Virginia businesses.