

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)

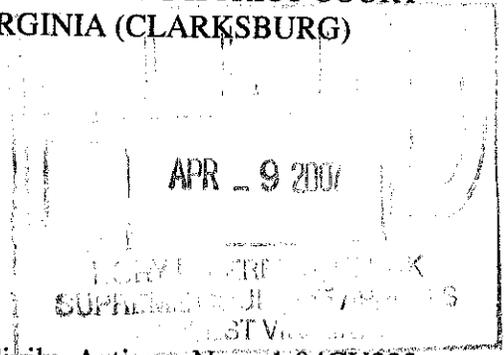
PREUSSAG INTERNATIONAL STEEL
CORPORATION, d/b/a INFRA-METALS CO.,
a Georgia corporation,

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 Action No. 1:04CV233
(Judge Keeley)

Appeal No. 33286

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

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I. INTRODUCTION

The Order of Certification asks this Court to define "subcontractor" under W. Va. Code § 38-2-39 ("Statute") in consideration of the facts contained in the Order of Certification which were submitted to this Court by the United States District Court for the Northern District of West Virginia ("District Court"). Plaintiff, Preussag International Steel Corporation, d/b/a Infra-Metals Co. ("Infra-Metals") 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 collectively "Defendants"), each submitted a Proposed Certified Question to the District Court on October 5, 2006. On October 26, 2006, counsel for Infra-Metals and Defendants agreed to the exact terms of the Order for Certification in a conference call with District Court Judge Keeley, which was submitted to this Court pursuant to West Virginia Uniform Certification Act (W. Va. Code § 51-1A-1 *et seq.*). (See Document 64)

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 Order of Certification from the District Court.¹

¹ As stated in the Order of Certification, March-Westin concedes that Infra-Metals is covered under the bond if the District Court determines Titan is a subcontractor. The parties do not dispute the point that the Statute covers materials supplied to subcontractors as well as contractors, as this has been the law in West Virginia for over 75 years. Syl. Pt. 1 of *Hibner v. Ebersbach*, 110 W. Va. 177, 157 S.E. 178 (1931). The only issue for the Court to decide is whether or not Titan is a subcontractor as presented in the Order of Certification.

II. TITAN IS A SUBCONTRACTOR BECAUSE MARCH-WESTIN AGREED TO THE ORDER OF CERTIFICATION AND NEVER RAISED ANY OBJECTIONS IN THE DISTRICT COURT TO THE FACTS SUPPORTING THE CHARACTERIZATION OF THE COMPLEXITY OF TITAN'S STEEL FABRICATION

The Order of Certification asks this Court to determine whether Defendant, Titan Fabrication & Construction, Inc. ("Titan"), is a subcontractor in relation to the Fairmont State College Construction Project ("Project" or "Rec Center") under W. Va. Code § 38-2-39 ("Statute") 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?

West Virginia law provides that upon responding to an order of certification, "the receiving court may require the certifying court to deliver its record, or any portion of the

record, to the receiving court. W. Va. Code § 51-1A-5. The order of certification also must include:

- (1) The question of law to be answered;
- (2) The facts relevant to the question, showing fully the nature of the controversy out of which the question arose.

W. Va. Code § 51-1A-6.

Pursuant to that statutory mandate, the Order of Certification also contained a STATEMENT OF FACTS which specifically included the following facts:

- C. In accordance with the Project's design specifications, Titan worked the raw steel into specially fabricated structural steel components;
- D. The specially fabricated steel components were not readily marketable without further modification.

(See Document 64).

It is important to note that the parties, including March-Westin, agreed to this language during a conference call with the District Court on October 26, 2006. Now, at the eleventh hour, March-Westin appears to distance itself from what it had earlier agreed to — that Titan specially fabricated the structural steel to the Project's exacting specifications. For example, in its Response to Plaintiff's Brief Upon the Certified Question From the United States District Court for the Northern District of West Virginia ("Response"), March-Westin attaches the affidavit of its Project Manager, Thomas Hillegas, who apparently disagrees with the fact that Titan specially fabricated the structural steel to the Project's exacting specifications. Although March-Westin attached an affidavit of Mr. Hillegas to its response to Infra-Metals' motion for summary judgment (*see* Document 38), that affidavit did not contain the assertions contained in his most recent affidavit. March-Westin also did not raise these arguments in its Proposed

Certified Question. (See Document 60). Mr. Hillegas' affidavit seems to refute the characterization of the complexity of Titan's steel fabrication as stated in the summary judgment briefing and in the ORDER OF CERTIFICATION. In the District Court, however, March-Westin primarily argued that Titan did not perform its work at the Project. Moreover, March-Westin did not dispute Infra-Metals' contention that Titan specially fabricated the structural steel to the Project's exacting specifications. Infra-Metals respectfully requests the Court to disregard the assertions contained in Mr. Hillegas' Affidavit.²

III. TITAN IS A SUBCONTRACTOR BECAUSE THE CASES CITED BY MARCH-WESTIN IN ARGUING TITAN IS NOT A SUBCONTRACTOR ARE NOT SUPPORTED BY WEST VIRGINIA PRECEDENT AND ARE DATED

March-Westin asserts that *Rosenbaum v. Price Constr. Co.*, 117 W. Va. 160, 164, 184 S.E. 261 (1936) and *Marsh v. Rothey*, 117 W. Va. 94, 183 S.E. 914 (1936) support its position. Contrary to March-Westin's argument, these cases support Infra-Metals.

First, while *Rosenbaum* recognizes similar to the facts here, that a materialman is covered under the Statute when the subcontractor with whom it is in privity defaults, it otherwise is factually distinct. *Rosenbaum* involved a plaintiff who contracted with a subcontractor's surety to complete a job for which the subcontractor defaulted. *Id.* at 262.

² See e.g. *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 285, 387 S.E.2d 511, 520 (1989) (making new doctrine of comparative assumption of risk applicable on appeal only if raised at trial); syllabus point 13, *LaRue v. LaRue*, 172 W. Va. 158, 304 S.E.2d 312 (1983), *overruled on other grounds*, *Butcher v. Butcher*, 178 W. Va. 33, 357 S.E.2d 226 (1987) (holding that equitable distribution based on economic contributions is available in pending cases when issue was asserted below); *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (1995) (explaining that counsel's failure to object to the State's closing argument failing to preserve the error for appellate review." 195 W. Va. at 643 n.22, 466 S.E.2d at 497 n.22; syllabus point 3, *O'Neal v. Peake Operating Co.*, 185 W. Va. 28, 404 S.E.2d 420 (1991) ("[w]here objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal").

The subcontractor's surety agreed to pay plaintiff more than the amount the subcontractor was guaranteed under its contract with the general contractor. When the subcontractor's surety became insolvent, the plaintiff sued the general contractor's surety for the amount over that which the general contractor agreed to pay the original subcontractor. *Id.* The court held that the plaintiff's agreement with the subcontractor's surety could not confer onto plaintiff greater rights against the general contractor's surety and denied the over payment. *Id.* at 263.

Here, *Infra-Metals* had an agreement with Titan, and not just with a surety. *Infra-Metals* does not argue that the Statute should be extended to cover third-parties such as a subcontractor's surety, or that the Statute should grant greater rights against a surety to those not in privity to a contractor or subcontractor. As such, *Rosenbaum* is factually distinct, and Defendants' reliance on it for its positions is misplaced.

Second, *March-Westin* argues that *Marsh v. Rothery*, 117 W. Va. 94, 183 S.E. 914 (1936) supports its position because the holding infers leaving the determination of a subcontractor definition under the Statute to a later date. *March-Westin* does not refute, however, nor can it, that *Marsh* is West Virginia's only case to define subcontractor, and Titan falls squarely within that definition.

Another questionable assertion by *March-Westin* is that West Virginia's "Legislative intention [is] to limit the protection" provided by a bond under the Statute. (Response at p. 10) Notably, *March-Westin* fails to cite a single case to support this proposition.³ In fact, West Virginia courts have expanded the interpretation of the Statute where such interpretation is consistent with the Statute's legislative intent.⁴

³ West Virginia courts have endeavored to extend the protection afforded by statutory bonds as far as reason and logic will permit. *Cecil I. Walker Mach. Co. v. Stauben, Inc.*, 159 W. Va. 563,

Instead, March-Westin refers to the 1960 Louisiana appellate court case, *Jesse F. Heard & Sons v. Southwest Steel Prods.*, 124 So.2d 211 (La. Ct. App. 1960). Defendants' reliance on *Heard* is not persuasive. *Heard's* holding of subcontractor status is based upon performance of on-site labor.⁵ In fact, all of the cases cited by March-Westin to support its claim that Titan is not a subcontractor hinge upon a subcontractor performing on-site project work. As stated in *Infra-Metals' Brief*, this is not a requirement under West Virginia law, nor is it dispositive of subcontractor status under the modern and more enlightened test for determining subcontractor status. (Brief at pp. 14-17) Accordingly, the cases March-Westin cites from other jurisdictions to support its argument that Titan was not a subcontractor are easily distinguishable,⁶ (Response at pp. 13-14), as are, for the reasons stated below, the cases March-Westin relies upon for its

568, 230 S.E.2d 818, 820 (1976). The purpose of West Virginia's statutory bond is to protect those furnishing labor and material on public buildings in lieu of the protection afforded by liens. *Tug River Lumber Co. v. Smithey*, 107 W. Va. 482, 148 S.E. 850, 853 (1929); *Hicks v. Randich*, 106 W. Va. 109, 144 S.E. 888 (1928). The statute also is remedial such that it "will be construed most liberally to suppress the mischief and advance the remedy." *Tug River*, 148 S.E. at 853.

⁴ See, e.g., *Hicks v. Randich*, 106 W. Va. 109, 144 S.E. 887 (1928); *State ex rel. West Virginia Sand & Gravel Co. v. Royal Indem. Co.*, 99 W. Va. 277, 128 S.E. 439 (1925) (court expanded statutory term "structure" to include highways because it was within statute's legislative intent); and *Julian v. Cavin*, 111 W. Va. 395, 162 S.E. 318 (1932) (court expanded bond statutory terms "machinery and equipment" to include rental costs associated therewith).

⁵ *Heard's* holding also is contrary to West Virginia's propensity to liberally construe the Statute. See *Tug River Lumber Co. v. Smithey*, 107 W. Va. 482, 148 S.E. 850, 853 (1929).

⁶ *Leonard B. Hebert, Jr. & Co. v. Kinler*, 336 So.2d 922, 924 (La. Ct. App. 1976), addressed whether a supplier in privity to a materialman (not a subcontractor) could recover under a mechanic's lien rather than a supplier to a party in privity with a general contractor. The *American States Ins. Co. v. Tri Tech, Inc.*, 35 Ark. App. 134, 137, 812 S.W.2d 490, 492 (1991), court held that a furnisher of handrails to a supplier of miscellaneous metals could not recover on a bond when the supplier defaulted because the supplier did not install the metals in the construction project. Here, because Titan provided a substantial amount of fabricated steel for the project, the District Court did not analyze whether the amount of "miscellaneous" metals was substantial. Similarly in *Rudolph Hegener Co. v. Frost*, 108 N.E. 16 (Ind. App. 1915), the court did not analyze whether a mere two staircases for a house amounted to substantial value for the entire project to support subcontract status. In *Edward E. Buhler Co. v. New York Dock Co.*, 156 N.Y.S. 457, 459 (N.Y. App. Div. 1915), the only facts mentioned are that the lien sought payment for the installation of steel sash. Finally, the court in *C. E. Frazier v. O'Neal Steel, Inc.*, 223 So.2d 661, 665 (Miss. 1969) was bound to follow Mississippi precedent requiring a subcontractor to take part in the actual construction. West Virginia has no such precedent.

argument that requiring a subcontractor to perform work at a jobsite affords a principle a reasonable degree of certainty as to liability under the bond.⁷ (Response at pp. 14-15)

IV. TITAN IS A SUBCONTRACTOR BECAUSE WEST VIRGINIA COURTS HAVE NEVER LOOKED TO THE MILLER ACT IN CONSTRUING THE STATUTE, BUT EVEN IF IT DOES NOW, TITAN IS STILL A SUBCONTRACTOR

A. The Miller Act

The West Virginia Supreme Court of Appeals has never relied on the Miller Act (40 U.S.C. § 3131 *et seq.*) for guidance in interpreting the Statute. Notably, March-Westin does not cite a single case stating such. The West Virginia Federal District Court has recognized, however, that the Miller Act must be liberally construed to accomplish its purpose. *Zurich Gen. Accident & Liab. Ins. Co. v. Taylor*, 38 F. Supp. 159, 164 (S.D. W. Va. 1941) (citing *Fleisher Eng'g & Constr., Co. v. U.S.*, 311 U.S. 15 (1940) construing Miller Act notice provision).

The Miller Act covers two categories under a surety bond: (1) materialmen, laborers, and subcontractors dealing directly with the prime contractor; and (2) materialmen, laborers, and subcontractors without an express or implied contract with the prime contractor, but with a direct contract with a subcontractor." *U.S. for use and benefit of E&H Steel Corp. v. C. Pyramid Enters., Inc.*, No. 04-2519 (RBK), 2006 WL 2570849 *5

⁷ In *Indiana Limestone Co. v. Cuthbert*, 126 Kan. 262, 267 P. 983 (1928), the plaintiff, a stone supplier, did not argue that the stone cutter to whom it supplied raw materials was a subcontractor. Rather, the issue was whether the plaintiff, as a supplier to a materialman, was covered under the bond. The court also noted that it was not clear whether the stone supplied by the plaintiff was actually used in the building being constructed - a requirement under West Virginia law (see *Bank of Follansbee v. Follansbee Lumber Co.*, 248 F. 645 (4th Cir. 1918) (West Virginia law "requires the lien claimant to show [] that the materials furnished by him have actually been used in the building on which the lien is claimed")). *Id.* Similarly distinguishable is *Matzinger v. Harvard Lumber Co.*, 155 N.E. 131 (Ohio 1926), where the court's holding was based on Ohio's statutory definition of subcontractor. The court held that the words "construct" and "erect" inferred that a subcontractor must perform work on site. *Matzinger*, 155 N.E. at 132. West Virginia has no statutory definition of subcontractor.

(D.N.J. Sept. 1, 2006). Under the Miller Act, Courts have defined "subcontractor" under the second category as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract." *Id.* The court reached this definition based on the practical concern that it is nearly impossible for a prime contractor to foresee liability and protect itself against claims of laborers and materialmen. *Id.*

Courts interpreting the Miller Act have added to this definition by requiring a fact-intensive inquiry necessary to determine subcontractor status, but without creating a general rule dispositive of any particular case. *C. Pyramid* at *6. Factors courts consider are the following: (1) the nature of material or service supplied by the subcontractor to the prime contractor (e.g. goods custom-manufactured, significant and integral to overall project, general availability of goods in the market, subcontractor on-site work,⁸ subcontractor design or installation responsibility and subcontractor ultimate responsibility for its portion of work); (2) the financial magnitude of goods or services in relation to the federal contract (e.g. progress payments and backcharges); (3) payment terms and information exchange between subcontractor and prime contractor; and (4) overall relationship between prime contractor and subcontractor. *Id.* at *6-7.

In *C. Pyramid*, a steel fabricator hired by the general contractor hired the plaintiff to perform steel work for the construction of an aircraft hangar. The steel fabricator failed to pay the plaintiff, and pursuant to the Miller Act, the plaintiff sought payment under the general contractor's bond. *Id.* at *1. In considering the Miller Act factors, the court determined: (1) the structural steel provided by the steel fabricator was more akin to pre-

⁸ *C. Pyramid* noted that failure to perform on-site work is not necessarily fatal to subcontractor status. *Id.* at *6.

cut wood beams on residential construction than custom-fabricating and performed no on-site work; (2) the steel fabricator's work amounted to only 7.8% of the entire project price, and the steel fabricator did not have to post a bond or provide insurance or payroll; and (3) other than this project, the general contractor and the steel fabricator had no prior relationship. Under these facts, the court held that the steel fabricator was a materialman and not a subcontractor. *Id.* at *7-8.

B. Miller Act Analysis of Titan's Steel Fabrication Under the Facts Presented

Under the facts presented here, however, Titan is a subcontractor under the Miller Act. First, as stated in *Infra-Metals'* Brief and in the Order of Certification, Titan fabricated the steel in accordance with the construction project's unique design specifications, it produced shop drawings for the fabricated steel components based on the project's engineering calculations and design specifications, submitted its shop drawings for approval by the project's architect and general contractor before fabricating the structural steel components, worked the raw steel into specially fabricated structural steel components, delivered the fabricated steel components on a delivery schedule based on construction progress, and the specially fabricated steel components were not readily marketable without further modification.

As stated in *C. Pyramid*, and under the modern test for determining subcontractor status (as articulated in *Vulcraft v. Midtown Bus. Park, Ltd.*, 110 N.M. 761, 765, 800 P.2d 195, 199 (1990) and *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 403, 529 N.W.2d 16, 20 (1995)), failure to perform on-site work is not fatal to subcontractor status. *See C. Pyramid, supra.*

Also, the complexity of Titan's customization of the steel is not at issue under the Order of Certification, nor was it not in the District Court. March-Westin never contested the complexity of Titan's steel fabrication in its summary judgment brief, and agreed to the terms of the Order of Certification. Only now, in the eleventh hour, March-Westin has taken the position that Titan's steel fabrication "did not involve a complex, integrated system," and merely constituted cutting raw steel to specified lengths, drilling holes for bolt placements, piece marking the steel, and loading it onto trucks for delivery to the Project. (Response Exhibit D at ¶4.a.viii, b-d). These statements are contradicted by the unique specifications set forth in March-Westin's Purchase Order agreement with Titan. (See Response Exhibit B)

March-Westin produced documents in the District Court which contradict its characterization of the complexity of Titan's steel fabrication. For example, on December 9, 2003, Mr. Hillegas emailed Gary Radabaugh at Titan requesting Titan to create a sloped roof condition according to attached specifications from the Project's architect. (See December 9, 2003 email attached as MW 000699) Another example is a May 10, 2004, email from Mr. Hillegas to Titan urgently requesting advice as to missing critical steel. (See May 10, 2004 email attached as MW 002477) In this email, Mr. Hillegas asks Titan to analyze and confirm if diagonal braces are required under certain sections of the Project designs, and if so, then the Project will be shut down while it awaits Titan's fabrication of gusset plates onto completed steel columns. *Id.*

In addition, the financial magnitude of Titan's steel fabrication work was substantial in relation to the entire Project. As stated in Infra-Metals' Brief, it is undisputed that Titan agreed to fabricate steel valued at over 5% of the entire Project.

(Brief at p. 17) March-Westin also admits that the steel fabrication was **integral** to the Project, in its May 26, 2004, letter to Titan, stating 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.**" (See May 26, 2004, letter attached to Brief as MW 000061-000062) Tom Hillegas also stated in his July 25, 2006 deposition, 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." (Tom Hillegas Deposition at pp. 56-57) Further, Titan's Purchase Order references the different amounts of structural and miscellaneous steel required for the Project, (see Response Exhibit B at ¶1), as does the Project bid produced by March-Westin. (See Schedule of Values Revised 12/17/03, attached hereto at MW 000043)

C. March-Westin's Miller Act Cases Are Distinguishable

Titan cites several cases under the Miller Act arguing that Infra-Metals' contribution was not significant or integral to the Project. These cases are not on point with the present matter. In *Aetna Cas. & Sur. Co. v. U.S. for use and benefit of Gibson Steel Co.*, 382 F.2d 615 (5th Cir. 1967), unlike here, the steel fabrication only included miscellaneous steel fabrication such as trench covers and frames, hand, guard and wall rails, pipe sleeves, door lintels, soffit frames floor expansion joint covers and fire extinguisher frames and cabinet recesses, which the record did not support as integral to the project, only amounting to 2% of the project costs. The court held that the variety and simplicity of these items weighed heavily against finding the fabricator was a significant contributor to the project. *Aetna*, 382 F.2d at 618.

Similarly, in *U.S. for use and benefit of Clark v. Lloyd T. Moon, Inc.*, 698 F. Supp. 665 (S.D. Miss. 1988), the most complex steel items fabricated for the project were stairs and ladders for the mezzanine area of the building. The mezzanine area only amounted to fifteen percent of the building's entire physical structure compared to the "steel project" at issue here. Thus, the court found that the steel fabricator was not a subcontractor. *Lloyd*, 698 F.Supp. at 668.

Finally, in *U.S. for use and benefit of Pioneer Steel Co. v. Ellis Constr. Co.*, 398 F. Supp. 719 (E.D. Tenn. 1975), the court held that because the steel fabricator was required to fabricate and furnish only structural miscellaneous steel, and was not bound by the special provisions of the prime contract, it was not a subcontractor. *Ellis*, 398 F. Supp. at 721. To the contrary here, as stated above, Titan's steel fabrication was significant, integral and distinct from that of the steel fabricators in the cases cited by March-Westin under the Miller Act.⁹

Also of noted importance under the Miller Act, is the practical concern for a prime contractor to foresee liability and protect itself against materialmen or laborer claims. Here, it is clear March-Westin was on notice that Titan had not paid Infra-Metals, and anticipated litigation related to Infra-Metals collecting on its invoices. March-Westin's May 26, 2004, letter admits it already had been informed of the total amount of Infra-Metals' invoices for steel shipped to Titan, had discussed paying Titan's steel suppliers, and that Titan's failure to pay its suppliers exposed it "to claims from

⁹ Also distinguishable is *Clifford F. MacEvoy Co. v. U.S. for the use and benefit of Calvin Tomkins Co.*, 322 U.S. 102 (1944), where the court found that a material supplier was not a subcontractor because the material supplier did not perform on-site work. As stated above, this factor has since been determined non-fatal to subcontractor status under the Miller Act. *C. Pyramid*, at *6.

Titan's suppliers for unpaid invoices." (May 26, 2004, letter attached to Brief as MW 000061-000062)

Other evidence also demonstrates March-Westin's knowledge that Infra-Metals would seek collections from March-Westin for payment of the steel it supplied for the Project. First, Mr. Hillegas stated in his deposition that March-Westin began discussions about paying Titan's suppliers as early as February or March 2004, having numerous internal discussions took place regarding payment of Infra-Metals' invoices. (See Hillegas' Deposition at p. 59, 63) Mr. Hillegas also stated that in February or March 2004 he had had discussions with a woman from Infra-Metals regarding the steel supplied to Titan, and making direct payment for that steel to Infra-Metals from March-Westin. (See Hillegas' Deposition at pp. 72-73)

March-Westin also produced several documents showing it contemplated paying Titan's suppliers. For example, on April 23, 2004, an internal March-Westin email from Tom Hillegas to Kevin Salisbury states March-Westin would be paying Titan's suppliers "directly," and that March-Westin's counsel drafted letters for Titan's signature "directing [March-Westin] to purchase material on [Titan's] behalf."¹⁰ (See April 23, 2004, email from Tom Hillegas to Kevin Salisbury attached hereto as Exhibit 1) On April 27, 2004, Tom Hillegas emailed Alisha McIntire at Titan asking her to confirm the content of Infra-

¹⁰ Mr. Hillegas' deposition testimony, March-Westin's documents, Infra-Metals' June 29, 2004 notice to Defendants, and the fact that Infra-Metals filed its complaint in the District Court on October 29, 2004, two weeks prior to Titan filing for bankruptcy on November 15, 2004, belies March-Westin's contention that Infra-Metals disingenuously changed tactics after Titan declared bankruptcy. (Response at pp. 5-6) (See Document 64 at p. 4 n.4)

Metals' invoices before March-Westin would pay them. (See April 27, 2004, email from Tom Hillegas to Alisha McIntire attached hereto as MW 000794)¹¹

Infra-Metals' Brief 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. (Brief at pp. 19-20) As stated therein, the courts following the modern and enlightened test for determining subcontractor status reason 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, thus limiting the scope of those who can file a lien. *See Id.*

In conclusion, based on the strength of the foregoing factors: that Titan's steel fabrication was substantial to the Project; and that March-Westin was on notice of outstanding amounts owed to Infra-Metals and possible litigation related thereto, Titan would be deemed a subcontractor under the Miller Act.¹²

¹¹ In addition, even though Tom Hillegas' Affidavit denies progress payments were made to Titan, documents March-Westin produced in the District Court indicate to the contrary. (See May 14, 2004 Thomas Hillegas email discussing Titan's request for 100% of its next progress payment (attached hereto as MW 001112), and Titan's June 1, 2004, letter to Thomas Hillegas stating March-Westin had informed Titan it would not be making a progress payment to Titan (attached hereto as MW 000794.)

¹² Infra-Metals' June 29, 2004, notice letter to Zurich and Fidelity seeking payment under the bond also satisfies the Miller Act's ninety day notice provision. (See Response Exhibit G at MW 000007-8.) Also, non-dispositive factors such as Titan not providing a performance bond, charging sales tax, and having no previous contracts with March-Westin fail to outweigh the substantial, complex, integrated system, Titan provided to the Project with its steel fabrication, and the fact that March-Westin was aware of the amounts Titan owed Infra-Metals and of the potential legal action related thereto.

V. **TITAN IS A SUBCONTRACTOR BECAUSE THE AMICUS BRIEF OF THE SURETY AND FIDELTY ASSOCIATION OF AMERICA SEEKS TO AVOID A SURETY'S OBLIGATIONS UNDER WEST VIRGINIA LAW**

The Surety & Fidelity Association of America ("S&E") submitted an Amicus Brief in support of March-Westin which makes the additional and erroneous argument that because March-Westin had no contractual obligation to pay Infra-Metals, Infra-Metals cannot be covered under the bond. (S&E Amicus Brief at pp. 4-5) This argument ignores the Statute, West Virginia case law and the entire purpose of the bond. As stated above, March-Westin does not dispute that if Titan is a subcontractor Infra-Metals is covered under the bond through its contract with Titan. March-Westin cites *Rosenbaum* for this exact proposition, quoting that the Statute "gives liens only to general contractors and subcontractors and persons contracting with them." (Response at p. 8, citing *Rosenbaum*, 184 S.E. at 263.)

Under the circumstances here, S&E complains that if the surety becomes legally obligated to pay the materialman, then the surety is left going after the subcontractor for amounts the subcontractor already received from the general contractor. Essentially, S&E argues that it should not be subject to its existing statutory and common law obligations as established by the West Virginia legislature and courts.

Similarly, S&E argues that if sureties are obligated to pay materialmen under the circumstances present in this matter, the public interest will be disserved because the cost of surety bonds will increase and reduce competition for contractors who can afford surety bonds. Again, S&E essentially argues that sureties should be able to avoid the statutory and common law obligations enacted by the State of West Virginia. Allowing sureties to do so would effectively deter entities from entering into construction contracts

in the State of West Virginia because the security of a surety bond would not exist. This would have the devastating effect of shutting down the State of West Virginia's economy.¹³ Therefore, these additional arguments by S&E should not be considered by the Court.

VI. **TITAN IS A SUBCONTRACTOR BECAUSE THE AMICUS BRIEF OF CONTRACTORS ASSOCIATION OF WEST VIRGINIA INCORRECTLY ARGUES THAT USE OF THE AIA AND EJCDC FORM CONTRACTS ARE DISPOSITIVE OF SUBCONTRACTOR STATUS AND MISCONSTRUES THE ORDER OF CERTIFICATION AS SEEKING SUBCONTRACTOR STATUS FOR ANY ENTITY SUPPLYING MATERIAL TO A CONSTRUCTION SITE**

The other Amicus Brief filed in support of March-Westin's position was submitted by the Contractors Association of West Virginia ("Contractors"), an organization of which March-Westin is a member. (Contractor's Amicus Brief at p. 4) The basis of the Contractor's brief is that subcontractor status requires work performed at a construction site. Contractors makes this statement without citing any legal authority. As stated above, this factor is not considered dispositive of subcontractor status under the modern and enlightened test for subcontractor status or under the Miller Act. Nor is there legal support in Contractor's brief for its contention that use of the American Institute of Architects ("AIA") and the Engineers Joint Contract Documents Committee ("EJCDC") form contracts are dispositive of subcontractor status. In fact, Infra-Metals already addressed this argument in its Brief at p. 18. *See Blue Tee*, 247 Neb. at 403, 529 N.W.2d at 20; *Heard*, 124 So.2d 211, 213 (La. Ct. App. 1960) ("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"); *Vulcraft*, 110 N.M. at 765 (actions of parties or their perceptions of their

¹³ These same policy arguments are made in the Contractor's Amicus Brief at pp. 9-11.

status are not dispositive of a determination of subcontractor status).¹⁴ Furthermore, West Virginia has not recognized the AIA and EJCDC definitions and standards as factors determinative of subcontractor status. Notably, Contractors does not cite a single case stating such.

The Contractor's brief also misconstrues the Order of Certification before this Court. Contractors argues that the Order of Certification asks this Court to deem *each and every* entity supplying material to a construction site a subcontractor. (Contractor's Amicus Brief at pp. 11-16) The Order of Certification makes no such request. Rather, as stated above, the Order of Certification asks this Court to define subcontractor under the Statute in light of the specific facts set forth by the District Court. Because the Order of Certification is narrowly tailored to the facts of this matter, Contractor's argument that answering the Order of Certification in the affirmative will have "far-reaching adverse consequences" is totally unfounded.

Contractor's public policy argument also was addressed in Infra-Metals' Brief under the modern and enlightened test for determining subcontractor status. Under this test courts have held that the requirement that a subcontractor perform according to a project's plans, and contribute substantial value to a project, provides an owner with notice that the subcontractor will be acting as an agent so that the owner can take protective steps to insure its subcontractor is responsible. (Brief at pp. 18-19) Accordingly, Contractor's public policy argument also is not persuasive, and should be rejected.

¹⁴ March-Westin plays both sides of the fence on this issue when it claims its designation of the Purchase Order with Titan as a "subcontract" was made in error. (Response at p. 22 n.20)

VII. CONCLUSION

Infra-Metals respectfully requests the Court to answer the Order of Certification 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.

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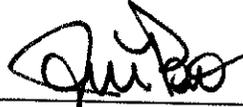
CERTIFICATE OF SERVICE

Service of the foregoing **REPLY 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 April 6, 2007:

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