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PAYMENT BOND MYTHBUSTERS

By John V. Burch and David A. Harris March 6, 2019

Many of the so-called hard and fast "rules" that we "know" to be true related to payment bond claims have exceptions, subtleties, and cases in which the rules simply do not apply. This year at the Southern Surety & Fidelity Claims Conference, John V. Burch and David A. Harris will bust several payment bond myths. In this newsletter, we will preview two of these myths.

Myth: Project managers may have a claim under a payment bond.

Several Miller Act cases have held that, even if a project manager is on site, unless he or she does some physical labor or might be called upon to do manual labor, the project manager has no claim.

In *U.S. ex rel. Olson v. WH Cates Constr. Co., Inc.*, 972 F.2d 987 (8th Cir. 1992), the claimant project manager was an estimator, testified that he managed employees and subcontractors, and even did some work such as sanding, patching, and removing light fixtures. The court held that he could recover payment for his onsite work, but he had the burden of producing evidence of how much he earned for work he actually did, and only that could be recovered.

Only certain professional supervisory work is covered by the Miller Act, namely, "skilled professional work which involves actual superintending, supervision, or inspection at the job site." *United States ex re. Naberhaus-Burke, Inc. v. Butt & Head, Inc.*, 555 F. Supp. 1155, 1160 (S.D. Ohio 1982). Thus skilled professionals such as a supervisor will not be covered even under the Miller Act if they have not provided physical work and labor. *U.S. ex rel. Shannon v. Federal Ins. Co.*, 2006 WL 2349636 (S.D. Miss. 2006).

A very important caveat is in order, however, with regard to analyzing claims of those who were designers and managers. Many bonds, including the AIA A312 form, define a claimant as anyone who has a lien, and architects and engineers have liens in most states. The A312 form goes on to explicitly provide coverage for architectural and engineering services required. So once again, always read the bond.

Myth: Delivery of materials to the project is required for a valid claim.

In a "Little Miller Act" case, the Georgia Court of Appeals followed a line of federal cases holding that, even if materials were diverted to another project, as long as the supplier had a reasonable, good faith belief that materials were intended for the bonded project, the claim is covered. *TDS Const., Inc. v. Burke*, 206 Ga. App. 223, 425 S.E.2d 359 (1992).

The Georgia court fell in line with several federal court cases holding that a reasonable, good faith belief that the supplier intended the material for the job is enough to trigger coverage. *See U.S. ex rel. Pomona*

Tile Mfg. Co. v. Kelly, 456 F.2d 148 (9th Cir. 1972); *U.S. ex rel. Carlson v. W.R. Taylor Co.*, 414 F.2d 431 (5th Cir. 1969) ("re-reiterate that neither delivery of materials to nor use by the contractor is necessary in order . . . to recover"); *U.S. ex rel. Color Craft Corp. v. Dickstein*, 157 F. Supp. 126 (E.D.N.C. 1957).