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When Is Toiling Over Design Not "Labor?" When Making A Bond Claim!

by Patrick R. Kinglsey

In the case of *Widmer Engineering, Inc., v. Five-R Excavating, Inc., et al.*, No, 257 C.D. 2016 (Pa. Comm. March 13, 2017), the Commonwealth Court of Pennsylvania recently decided that professional engineering services are not covered by a public works bond.

In *Widmer*, PennDot awarded a design-build contract to a general contractor who agreed to provide and procure all necessary design and engineering services. Thereafter, the general contractor engaged an engineering firm to provide the necessary services. The general contractor provided a surety bond that covered 100 percent of the contract price of the project and therefore, included all such procured design engineering services. The design firm eventually suspended its performance due to the general contractor's failure to pay. When the design firm sought payment from the surety under the bond, the payment request was denied and the instant litigation ensued. The trial court concluded that professional engineering services were not "labor" and therefore not covered by the bond. The design firm appealed this decision.

The Commonwealth Court determined that there was no controlling precedent on the definition of "labor" in this context. Consequently, it proceeded to examine how the term "labor" was used in similar statutes, such as the Federal Miller Act and Pennsylvania Mechanic's Lien Law.1 The court noted that the Pennsylvania Supreme Court has routinely relied on interpretations of the Miller Act as persuasive authority in determining the proper construction of terms under the Bond Law and, in this case, the bond language was substantially similar to the text of the Bond Law. Miller Act cases have consistently determined that "labor" as used therein is construed to refer to the physical labor as opposed to technical and/or professional skill and judgment. Similarly, the Pennsylvania Mechanic's Lien has been held to apply to physical labor but not to engineering or architectural services.

The court acknowledged that there were distinctions between the Miller Act and Mechanic's Lien Law it was using as persuasive guidance. Nevertheless, the court seemed to look past these distinctions in an effort to construe the bond at issue in harmony with the larger legislative scheme. Consequently, the court affirmed the trial court's decision, holding that the term "labor" in a public works bond does not include engineering services.

[1] The court noted that the bond law was repealed as to Commonwealth agencies as per Section 6(b) of the Act of May 15, 1998 and was replaced by the Commonwealth Procurement Code. 62 Pa. CS §101-2311. However, the Procurement Code contains substantially similar language for bonds. Moreover, the parties' contract purported to incorporate the bond law.

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