

# Does a Design Professional Have Payment Bond Rights?

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Over the last 10 to 15 years, PennDOT has made increasing use of the design-build method of project delivery, whether it be for entire projects or for just limited portions thereof. The use of the design-build method of project delivery, as opposed to the traditional design-bid-build method on public projects, has both its supporters and its detractors. Regardless of one's position with respect to the wisdom of the use of the design-build process, one of the primary problems inherent with the design-build method of project delivery on a public project is that there is very little statutory guidance as to the rights and liabilities of the various parties under design-build agreements. One such issue is whether a design professional has the right to bring a payment bond claim in the event the contractor with which the design professional has a contract fails to make payment.

On virtually every public project in Pennsylvania, the prime contractor is required by law to provide both a payment bond and a performance bond. The purpose of a payment bond, as described in the Pennsylvania Bond Law, is "solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract..." A significant question remains,

however, as to whether a design professional providing design services to a contractor on a design-build job is considered to be an entity that provides "labor or materials" so as to have payment bond rights against the surety of a prime contractor which fails to make payment.

In a recent unreported Commonwealth Court decision, the Court held that design professionals do not have payment bond rights. The Pennsylvania Supreme Court is currently considering whether or not to hear an appeal of that decision. The case in question is *Widmer Engineering, Inc. ("Widmer") v. Five-R Excavating, Inc. and the Pennsylvania National Mutual Casualty Insurance Company ("Surety" or "Penn National")*. In that case, Five-R entered into a contract with PennDOT on a \$3.9-million bridge replacement project in Westmoreland County. Five-R provided payment and performance bonds to PennDOT as required by law, and hired Widmer to perform design services. The scope of Widmer's services included roadway, structural, geotechnical, right-of-way, and traffic-control engineering services.

Between April and December 2010, Widmer provided design services to Five-R, but eventually ceased performance of the work due to the alleged nonpayment of approximately \$400,000. Widmer filed suit against both Five-R and the Surety in the Court of Common Pleas of Beaver County in 2011, alleging that Five-R breached its contract by failing to pay amounts due and owing, and that Penn National breached its obligations under the bond by not making

payments to Widmer when Widmer requested. Eventually, Widmer filed a Motion for Partial Summary Judgment with respect to its claim against Penn National and the trial court subsequently issued an opinion that denied that motion and ruled in favor of the Surety. Widmer subsequently appealed the trial court's decision with respect to the payment bond issue. In the interim, Widmer eventually also proceeded directly against Five-R and obtained a judgment in excess of \$800,000 against Five-R. Five-R then subsequently filed for bankruptcy, making it extremely unlikely that Widmer would recover any funds from Five-R. Thus, Widmer's only recourse was to pursue claims against the Surety on appeal.

In March 2017, a three-judge panel of Commonwealth Court issued an unreported opinion that ruled in favor of the Surety. In so ruling, the Court considered statutory provisions in both the Commonwealth Procurement Code ("Procurement Code") and the Pennsylvania Bond Law, as well as the exact language of the payment bond itself. For many decades, statutory payment bond rights for claimants on all public projects in Pennsylvania were governed by the Public Works Contractors Bond Law ("Bond Law") of 1967. The overall purpose of the Bond Law was to ensure that subcontractors and suppliers on public projects would be paid, as those entities typically do not have mechanic's lien rights on public jobs since no mechanic's liens can be filed on projects with a purely public purpose. The PA Bond Law of 1967 is also sometimes referred to as a little "Miller



Act" as it is similar to the Federal Miller Act ("Miller Act") which provides payment bond rights on federal contracts. The importance of the Miller Act to the Court's decision in Widmer will be discussed below.

Notably, when the General Assembly passed the Commonwealth Procurement Code in 1998, the PA Bond Law was actually repealed by the Procurement Code with respect to Commonwealth agencies. However, Section 903(a) of the Procurement Code contains very similar language to the Pennsylvania Bond Law. Additionally, inasmuch as the payment bond at issue in the Widmer case made reference to the Public Work Contractors Bond Law, the parties to the dispute agreed that the Court should apply the Pennsylvania's Bond Law provisions to the case it was considering.

The primary inquiry that the Court considered in Widmer was whether or not professional engineering services are "labor" for the purposes of the Bond Law. Unfortunately, neither the Procurement Code nor the Bond Law defines the term "labor" as it was used in the statute. Additionally, while one section of the Procurement Code technically authorizes "design build" contracts, there is very little guidance in the Procurement Code as to how such contracts are to be treated. Thus, Commonwealth Court was forced to look beyond the terms of the Bond Law and the Code to interpret what the General Assembly meant by the term "labor."

In support of its position, Widmer made several arguments. On the face of the statute, presumably "labor" could and/or should be construed to include labor provided by engineers. Widmer also noted that professional engineering services were not specifically excluded from any definition of "labor," and also noted that the Bond Law's definition of the term "claimant" did not expressly exclude architects and engineers. Moreover, Widmer argued that since both the Procurement Code and the Bond Law require payment bonds to provide "100% coverage of the contract price," that it was the intent of the General Assembly to include these entities that provide design

services that are part of that contract price as potential payment bond claimants.

Conversely, Penn National argued that while the term "labor" was not defined by the Bond Law or the Procurement Code, that term had been consistently interpreted in the context of several other statutes, including both state law mechanic's lien claims as well as claims brought under the Federal Miller Act, to exclude professional engineering services from their coverage. Penn National argued that the term "labor" had been defined in mechanic's lien claims and Miller Act claims to include only physical labor rather than technical and professional skill and judgment, and therefore argued that Widmer had no payment bond rights. Penn National further argued that the scope of the payment bond coverage under the Bond Law should be no greater than the Mechanic's Lien Law, and that since engineers are not entitled to submit a lien, they should similarly not be permitted to submit a claim under the payment bond.

In considering the positions of the parties, Commonwealth Court first noted that no cases had specifically examined the question of what the term "labor" means in the Bond Law. Thus, Commonwealth Court noted that the lower court was correct in interpreting the Bond Law by looking to how courts have interpreted comparable statutes such as the Mechanic's Lien Law and the Miller Act. Moreover, Commonwealth Court noted that the Mechanic's Lien Law specifically defines "subcontractor" as not to include an architect or engineer who contracts with a contractor or subcontractor. Commonwealth Court also discussed several cases decided under the Federal Miller Act, all of which held that while the Miller Act does not define "labor," the term "labor" referred to "physical labor rather than technical and professional skill and judgment." Finally, Commonwealth Court addressed Widmer's argument that since the bond that Five-R provided was for 100 percent of the contract price, and since that contract price included professional engineering services that Widmer provided, the Bond Law should be interpreted to

include professional engineering services. Commonwealth Court agreed with Widmer's argument that it was "troubling" that the contractor was required to provide a bond for the full amount of the contract, which included professional engineering services. However, the Court noted that such a disparity was not determinative given the long standing and consistent interpretations of the term "labor" under the comparable statutes. Thus, the Court concluded that Widmer's professional engineering services were not covered by the Bond Law.

While Commonwealth Court ruled in favor of the Surety and against Widmer, inasmuch as the Court issued an unreported opinion, its precedential value is limited. However, Widmer subsequently filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Inasmuch as the appeal is not an appeal as of right, the Pennsylvania Supreme Court will have the option of either hearing the appeal or allowing Commonwealth Court's decision to stand. Unless the decision is overturned, design professionals should be aware of the risks they face in the event the prime contractor becomes insolvent.

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