IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5399

Summary Calendar

GREAT WESTERN METALS WAREHOUSE, INC.,

Plaintiff-Appellee,

versus

R.L. MIXON CONTRACTING, INC, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
(6:92-CV-2216)

(June 6, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

This case involves whether a company can receive compensation from a general contractor or its bonding company under the Miller Act, 40 U.S.C. § 270(a) et seq., for raw steel provided for a federal construction project. The outcome depends on whether the

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

company passed its steel to either a supplier or a subcontractor before it reached the general contractor.

I.

Great Western Metals Warehouse supplied raw steel to Summit Manufacturing, which fabricated flood gate components for R.L. Mixon Contractors. Mixon served as the general contractor for the U.S. Army Corps of Engineers on the Chauvin Bayou Control Structure Project near Monroe, Louisiana. After receiving no payment from Summit for certain shipments, Great Western demanded payment under the Miller Act from Mixon and Ohio Casualty Insurance, Mixon's bonding company. Mixon responded that Great Western could not bring the lawsuit. The district court held that Great Western could recover under the Mixon bond. We reverse.

II.

The Miller Act allows certain claimants who provide labor or materials to federal construction projects to sue on contractor payment bonds. See 40 U.S.C. § 270b(a). A company providing goods to a middle party may recover against a general contractor and its surety only when the middle party is a subcontractor and not a supplier. F.D. Rich Co. v. United States, 417 U.S. 116, 122 (1974). The Miller Act protects only companies with contractual agreements with general contractors or subcontractors engaged in federal projects.

At first glance, Summit looks like the quintessential subcontractor. The fact that Summit took raw steel and fashioned it into functional flood gate components suggests as much, but,

according to Aetna Cas. & Sur. Co. v. United States, 382 F.2d 615, 617 (5th Cir. 1967), such custom manufacturing is not enough in itself to establish the relationship of responsibility and importance necessary to render Summit a subcontractor.

The Ninth Circuit has summarized the factors of responsibility and importance that courts have weighed in deciding whether a party is a subcontractor or a supplier:

> In distinguishing a subcontractor from a materialman, courts apply a balancing test with certain factors tending to weigh in favor of a subcontractor relationship, particularly where the company assumed a significant and definable part of the construction project, and other factors tending to weigh in favor of a materialman relationship.
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> Generally, courts have found the following factors weigh in favor of a subcontractor relationship: (1) the product supplied is custom fabricated; (2) the product supplied is a complex integrated system; (3) a close financial interrelationship exists between the companies; (4) a continuing relationship exists with the prime contractor as evidenced by the requirement of shop drawing approval by the prime contractor or the requirement that the supplier's representative be on the job site; (5) the supplier is required to perform on site; (6) there is a contract for labor in addition to materials; (7) the term "subcontractor" is used in the agreement; (8) the materials supplied do not come from existing inventory; (9) the supplier's contract constitutes a substantial portion of the prime contract; (10) the supplier is required to furnish all the material of a particular type; (11) the supplier is required to post performance bond; (12) there is a backcharge for cost of correcting supplier's mistakes; and (13) there is a system of progressive or proportionate fee payment.
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> Generally, cases have found the following factors tend to weigh in favor of a materialman relationship: (1) a purchase order form is used by the parties; (2) the materials come from preexisting inventory; (3) the item supplied is relatively simple in nature; (4) the contract is a small percentage of the total construction cost; and (5) sales tax is included in the contract price.

United States v. Aetna Cas. & Sur. Co., 981 F.2d 448, 451-52 (9th Cir. 1992) (citations omitted). These factors do not constitute an inflexible test for determining whether a party is a subcontractor or a supplier, but they provide general parameters for that inquiry.

Summit worked on a small part of the flood control project and did not furnish all the steel work. The purchase order listed Summit as a vendor. Summit constructed relatively simple components. Another company installed the devices. Summit did not have a close financial relationship with Mixon, significant input on specifications, or a representative or laborers on the job site. The fact that Summit did not have to post a performance bond, the failure of Mixon to back charge Summit for any mistakes, and the fact that Summit sought payment upon delivery weigh in favor of classifying Summit as a supplier rather than as a subcontractor.

Great Western argues to the contrary in part by pointing to unrealized possibilities rather than actual reality. Great Western states that Summit could have been asked to post a performance bond, that it could have been back charged for mistakes, and that it could have been awarded all the steel fabrication work. The fact remains that these events did not happen. Summit performed custom fabrication work and did not supply the flood gate components from preexisting inventory, but, again, these factors alone do not make Summit a subcontractor. Summit largely acted like a supplier, which means that Great Western had no contractual relationship with a subcontractor and cannot sue on the Mixon bond.

REVERSED.