

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball III, Circuit Court Judge

Case No. 2010-CP-46-1951

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JUN 05 2012
SC Court of Appeals

Hard Hat Workforce
Solutions, LLC.....Appellant

v.

Mechanical HVAC
Services, Inc.....Respondent

RECORD ON APPEAL

Volume I of I

Henry Pickett Wall
Bruner Powell Wall
& Mullins, LLC
Post Office Box 61110
Columbia, South Carolina 29260
Phone: 803-252-7693

Attorneys for Appellant

Charles Harry McDonald
Robinson McFadden & Moore, PC
Post Office Box 944
Columbia, South Carolina 29202
Phone: 803-779-8900

Attorneys for Respondent

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Hard Hat Workforce Solutions, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 Mechanical HVAC Services, Inc., Great)
 American Insurance Company, and Liberty)
 Mutual Insurance Company,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

Case No.: 2010-CP-46-01951

ORDER

FILED-RECEIVED
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 DAVID HAMILTON
 C.C.P. & GS
 YORK COUNTY, SC

This matter came before me on September 15, 2011, on Defendant Great American Insurance Company's ("Great American") motion for summary judgment on all claims against it pursuant to Rule 56, S.C.R.C.P. Appearing on behalf of Great American was Charles H. McDonald. Henry P. Wall appeared on behalf of Hard Hat Workforce Solutions, LLC ("Hard Hat"). In support of its motion, Great American relies on the pleadings, the interrogatory responses of Hard Hat, and the affidavits of Amy Miller, J.T. East, Linda Schilling and Robert White, all of which were filed with the motion. In opposition to the motion, Hard Hat, filed affidavits from Eric Byrd and Eric Schmidt. Based on the record presented, I find and conclude as follows.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), S.C.R.C.P. In determining whether genuine issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997).

The purpose of summary judgment is to expedite disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). "[I]nterpretation of a statute is a question of law for the court." *Catawba Indian Tribe of South*

Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995); *Bostic v. American Home Mortgage Servicing, Inc.*, 375 S.C. 143, 147, 650 S.E.2d 479, 481 (Ct.App. 2007). Thus, where there are no issues of fact to consider, summary judgment is the appropriate disposition of the issue.

FACTS NOT IN DISPUTE

This matter arises out of the construction of a new high school in York County known as York Comprehensive High School and Floyd D. Johnson Tech Center (the "Project"). Edifice, Inc., was the general contractor for the Project and Walker White, Inc. ("Walker White"), was the mechanical subcontractor to Edifice, and had responsibility for constructing the mechanical and plumbing work for the Project. Walker White in turn subcontracted certain work to Mechanical HVAC Services, Inc. ("MHS"). MHS entered into an agreement with Hard Hat wherein Hard Hat would provide temporary skilled labor to assist MHS with performing the work under its subcontract with Walker White.

As part of the requirements of its subcontract with Edifice, Walker White furnished a labor and materials payment bond covering its work on the Project. Great American acted as surety on this payment bond with Walker White as the principal on the bond. Hard Hat made a claim against this payment bond seeking to recover \$108,337.68, an amount owed by MHS to Hard Hat, and for which Hard Hat has a judgment against MHS. Hard Hat ultimately gave notice of its claim to Walker White, as the bonded contractor, by certified mail on March 5, 2010. Hard Hat subsequently filed this action on May 12, 2010, seeking recovery on the payment bond.

The parties placed in the record three e-mail messages sent from Eric Schmidt, Hard Hat's Territory Manager, to J.T. East, Walker White's assistant project manager. These e-mails are dated August 4, 2009, September, 29, 2009 and October 22, 2009. J.T. East worked from a jobsite trailer located at the Project in York County, and received the e-mails on his computer at the jobsite trailer. Walker White maintains its permanent office at 5728 Shakespeare Road, Columbia, S.C., 29223. This is also the same address shown for Walker White on the records of the Department of Labor, Licensing and Regulation, and on the payment bond at issue.

DISCUSSION

Claims against a payment bond such as that at issue in this case are governed by S.C. Code Ann. § 29-5-440 (1976, as amended). In this matter, the issue is interpretation of certain

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notice requirements set forth in this statute. As already stated, interpretation of a statute is a question of law for the court. Thus, "... determination of legislative intent is a matter of law."

Charleston County Parks & Recreation Comm'n, supra, 319 S.C. at 67, 459 S.E.2d at 843.

The pertinent provisions of § 29-5-440 are as follows:

Every person who has furnished labor, material, or rental equipment to a bonded contractor or its subcontractors in the prosecution of work provided for in any contract for construction, and who has not been paid in full . . . shall have the right to sue on the payment bond for the amount . . . unpaid at the time of the institution of such suit

A remote claimant shall have a right of action on the payment bond . . .

. . . However, in no event shall the aggregate amount of any claim against such payment bond by a remote claimant exceed the amount due by the bonded contractor to the person to whom the remote claimant has supplied labor, materials, rental equipment, or services, unless **the remote claimant has provided notice of furnishing labor, materials, or rental equipment to the bonded contractor. Such written notice . . . shall be personally served or sent by fax or sent by electronic mail or sent by registered or certified mail, postage prepaid, to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation.** After receiving the notice of furnishing labor, materials, or rental equipment, no payment by the bonded contractor shall lessen the amount recoverable by the remote claimant. (Emphasis added.)

I find and conclude that Hard Hat is a "remote claimant", and that Walker White, as principal on the bond sued on, is the "bonded contractor" as those terms are defined and used in § 29-5-440. As provided by § 29-5-440, Great American, through Walker White as the bonded contractor, asserts as a complete defense to Hard Hat's bond claim that Walker White had paid MHS in full prior to receiving the notice of claim from Hard Hat. Great American submitted the affidavit of Walker White's project manager, Amy Miller, attesting that as of February 8, 2010, Walker White owed no money to MHS. Hard Hat submitted no evidence to the contrary. Therefore, I find that there is no genuine issue of material fact on this issue and conclude that as of February 8, 2010, Walker White owed no money to MHS.

While § 29-5-440 provides a "payment defense" to the surety and the bonded contractor against claims on the payment bond, it also provides for the means for a remote claimant such as Hard Hat to avoid this defense. If a remote claimant provides proper and sufficient notice of furnishing labor or material to the bonded contractor ("notice of furnishing"), then no payments made after receipt of such notice reduce the amount that the remote claimant may recover on the payment bond. The issue here is whether Hard Hat, as a remote claimant, gave Walker White,



the bonded contractor, proper and sufficient "notice of furnishing" as required by § 29-5-440.

There are four requirements for giving "notice of furnishing" labor under § 29-5-440. They are: (1) notice must be in writing; (2) notice must be to the bonded contractor; (3) notice must be given through a specified manner of delivery/service (personal service, fax, electronic mail, or by registered or certified mail); and (4) notice must be sent to any place the bonded contractor maintains a permanent office, or the address listed for the bonded contractor on records of Department of Labor, Licensing, and Regulation ("LLR").

It is undisputed that the only attempted giving of any purported "notice of furnishing" was the three e-mail messages sent from Eric Schmidt of Hard Hat to J.T. East of Walker White at the job site. Upon examination, the e-mail messages are in the nature of a solicitation by Hard Hat for business from Walker White. They do not give notice of any actual, contemporaneous furnishing of labor or materials.

In construing the requirements of § 29-5-440, I am guided by the cardinal rule of statutory construction, namely, to ascertain and effectuate the intent of the legislature. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). While § 29-5-440 has no specified requirements for the information a remote claimant must include in a "notice of furnishing", I find and conclude that the legislature intended more than that contained in the Hard Hat e-mail messages. By analogy, a "notice of furnishing" under S.C. Code Ann. § 29-5-20 for a mechanic's lien has specific requirements, which are not present in the Hard Hat e-mails. Moreover, the notices were sent only to an assistant project manager of Walker White at the jobsite, which is necessarily a temporary location, rather than an officer, managing agent, or other responsible person, at Walker White's office in Columbia, S.C., which is its permanent address, and the one address listed with LLR. Such notice is not sufficient, and not calculated to give such a critical notice to a person responsible for payment of any claim.

I find and conclude that the legislative intent for a notice of furnishing labor under § 29-5-440 is that written notice be delivered to a responsible person employed with the bonded contractor at its permanent place of business, not a jobsite. None of the three e-mails sent by Hard Hat satisfy this requirement. Thus, I find and conclude that Hard Hat did not provide Walker White with sufficient notice of furnishing labor as required by § 29-5-440.

Hard Hat asserts that the payment bond on which it claims is a "private bond", or contract, and that the private contract and its terms control the parties' rights here, without regard to the provisions of § 29-5-440. However, such a conclusion would nullify the statutory scheme.

MLC
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The statutory law of South Carolina is a part of every contract whether stated therein or not. "It is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract." *Catawba Indian Tribe of South Carolina, supra*, 372 S.C. at 524, 642 S.E.2d at 753. Thus, I find and conclude that the terms and provisions of § 29-5-440 govern Hard Hat's claim on the payment bond at issue.

Hard Hat also asserts a constitutionality defense to § 29-5-440, namely, that the interpretation of the section urged by Great American will result in disparate treatment among remote claimants. This position is based on the requirement of S.C. Code Ann. § 29-5-23 (1976, as amended) that a general contractor must file a notice of project commencement in order to receive the "payment" protection against remote claimants provided in § 29-5-440, while a bonded subcontractor does not. Hard Hat urges that because Walker White was not required to file a notice of project commencement as a general contractor, § 29-5-440 treats Hard Hat differently than it would had Walker White been the general contractor. Hard Hat contends that there is no rational basis for such disparate treatment, and thus, there is a violation of the equal protection under the Constitution. I disagree.

First of all, this argument affects the application of § 29-5-23, not § 29-5-440, and affords such an argument to general contractors as a class, not remote claimants. Construction or interpretations of § 29-5-23 is not relevant to the circumstances of the parties here, or necessary to the Court's ruling in this matter. Secondly, all remote claimants as a class are treated equally under § 29-5-440. Thirdly, any constitutional deficiency in § 29-5-23 does not affect an equal application of § 29-5-440 in so far as it relates to the requirements imposed on all remote claimants. Therefore, I find and conclude that Hard Hat's constitutional argument lacks merit.

Finally, Hard Hat argues that the affidavits filed by Walker White show a balance due MHS; however, the same affidavits also show a basis for a set-off against any claim MHS might have. Hard Hat's affidavits do not contradict this fact. There is nothing in the record to contradict the assertion in Amy Miller's affidavit that there was no amount owed by Walker White to MHS. Thus, there is no genuine issue of material fact as to that issue. To defeat summary judgment, it is not sufficient that the nonmoving party seeks to create an inference which is not reasonable or an issue of fact that is not genuine. *Rothrock v Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991).

In summary, I find and conclude that Hard Hat failed to give notice of its furnishing of labor to Walker White, the bonded contractor; as required by S.C. Code Ann. § 29-5-440. In any

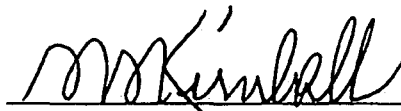
MMC
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event, Hard Hat's recovery on the bond is limited to any amount that Walker White owed MHS when Walker White received notice of Hard Hat's formal claim, which was nothing. Thus, pursuant to § 29-5-440, Hard Hat is not entitled to recover any amount against the payment bond, and Great American is entitled to summary judgment.

Therefore, it is ordered that Great American be granted summary judgment on Hard Hat's claim under the bond, and that Hard Hat's claim against Great American be dismissed with prejudice.

AND IT IS SO ORDERED.

September 30, 2011



S. Jackson Kimball
Special Circuit Judge
York County

#6

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

COURT OF COMMON PLEAS
CIVIL ACTION 2010CP4601951

Hard Hat Workforce Solutions, LLC)
)
Plaintiff,)

Vs.)

**COMPLAINT
(Jury Trial Demanded)**

Mechanical HVAC Services, Inc. &)
Great American Insurance Company)
)
Defendants.)

2010 MAY 12 AM 11:28
CLERK OF COURT
C.O.C.P. & C.S.
YORK COUNTY, SC

The Plaintiff, Hard Hat Workforce Solutions, Inc. (“HHWS”), complaining of the Defendants, Mechanical HVAC Services, Inc. (“Mechanical”) and Great American Insurance Company of America (“GAIC”), would show:

General Factual and Jurisdictional Allegations

1. HHWS is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business in Greensboro. At all times relevant hereto, HHWS was engaged in the business of providing skilled manpower and construction labor to contractors and subcontractors in the construction industry.
2. Mechanical is, upon information and belief, a corporation organized and existing under the laws of the State of Georgia. At all times relevant hereto, Mechanical was engaged in the business of mechanical contracting.
3. GAIC is a corporation organized and existing under the laws of some state other than the State of South Carolina. At all times relevant hereto, GAIC was engaged in the business of serving as payment bond surety for Walker White, Inc.

4. Upon information and belief, in the Fall of 2008, York County School District Number One (“the District”) entered into a contract with Edifice, Inc. (“Edifice”) to serve as the general contractor for a school known as the York Comprehensive High School and Floyd D. Johnson Tech Center (“the Project”). Edifice subcontracted the mechanical work to Walker White, Inc. GAIC issued a labor and material payment bond for the Project for the protection and benefit of Walker White’s subcontractors and suppliers, and their sub-subcontractors and suppliers. Walker White subcontracted a portion of their scope of work to Mechanical, and Mechanical, in turn, employed the services of HHWS.

5. HHWS supplied labor for the benefit of Mechanical, Walker White and Edifice in the completion of the project for which HHWS has not been paid in full. The unpaid principal balance due to HHWS is \$108,337.68, (one hundred eight thousand three hundred thirty seven dollars and sixty eight cents).

By Way of a First Cause of Action Against Mechanical
(Breach of Contract)

6. HHWS properly completed and performed all work required of it for the Project pursuant to a written contract and account application which is attached hereto as **Exhibit A**. Mechanical has satisfied all conditions precedent to final payment.

7. There is currently due to HHWS a balance of in excess of \$108,337.68 exclusive of interest and attorney’s fees.

8. Mechanical has breached the subcontract by failing to pay HHWS in accordance with the contract and is therefore liable to HHWS for damages in the amount of 108,337.68, plus interest and attorney’s fees as provided for in the contract.

By Way of a Second Cause of Action Against Mechanical
(Quantum Meruit/Unjust Enrichment)

9. HHWS has provided labor and materials to Mechanical with a reasonable worth and value in excess of \$108,337.68 under circumstances which would make it inequitable for Mechanical to retain the benefits of the labor and materials without properly compensating HHWS and under circumstances for which HHWS reasonably expected to be paid and relied upon that expectation.

10. Mechanical is therefore indebted and liable to HHWS for an amount in excess of \$108,337.68 under the doctrines of *quantum meruit* and/or unjust enrichment.

By Way of a First Cause of Action Against GAIC
(Labor and Material Payment Bond)

11. HHWS has provided labor and materials to the Project with a reasonable worth and value in excess of \$108,337.68 for which HHWS has not been paid.

12. GAIC issued a labor and material payment bond for the benefit and protection of all claimants, subcontractors and sub-subcontractors to Walker White on the project, including HHWS. HHWS has properly perfected its payment bond claim.

13. As a consequence of Mechanical's breach and refusal to pay the contract balance to HHWS, GAIC is liable to HHWS pursuant to the terms and conditions of the payment bond for the reasonable value of the labor and materials HHWS provided to the Project in an amount in excess of \$108,337.68.

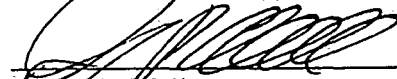
**By Way of a Third Cause of Action Against Mechanical and a Second Cause of
Action Against GAIC**
(Statutory Interest and Attorney's Fees)

14. Heretofore, HHWS made a lawful and proper demand upon both GAIC and Mechanical for payment pursuant to S.C. Code §27-1-15. Neither GAIC nor Mechanical properly remitted payment to HHWS in accordance with the statute.

15. As a consequence of the foregoing, both GAIC and Mechanical are liable to HHWS for post-judgment interest and attorney's fees.

Wherefore, HHWS prays for judgment in its favor against Defendants on all causes of action, for actual damages in an amount in excess of \$108,337.68, (the exact amount to be proven at trial), for attorney's fees, for prejudgment interest and statutory interest, for the costs of this action, for a trial by jury and for such other and further relief as is just and proper.

BRUNER, POWELL, ROBBINS
WALL & MULLINS, LLC



Henry P. Wall
Post Office Box 61110
Columbia, SC 29260-1110
803.252.7693
Attorneys for Plaintiff

May 11, 2010



SCHMIDT

ACCOUNT APPLICATION

Company Name: Mechanical HVAC Service Corporation LLC Sole Proprietorship Partnership
 Street Address: 5 Hallie Henderson Rd. City: Tifton State: GA Zip Code: 31794
 Billing Address: 5 Hallie Henderson Rd. City: Tifton State: GA Zip Code: 31794
 Business Phone: 229, 387-0600 Fax: 229, 387-0655
 Account Contact Person: April Dore Pager: () Mobile: 229, 472-6393
 D & B #: _____ E-Mail: mhbhacservices@yahoo.com
 Nature of Business: Construction Years in Business: 10 Number of Employees: 30
 Purchase Order Required: Yes No

BANK REFERENCES						
Bank Name / Branch	Contact Officer	Phone	Account No.	CK	SV	LN
Ameris Bank	Donna Ferrin	229, 387-2232	2048437046			

TRADE REFERENCES				
Firm Name	Contact	City, State	Phone	Account No.
Home Depot	Home Office	Des Moines	(603) 222-0500	
		IA 50368-9100	1-800-607-0232	

PRINCIPALS/OWNERS						
Full Name	Title	Address	City	State	Zip	SSN
Willie Walter Carver		5 Hallie Henderson Rd	Tifton	GA	31794	25666 283

By signing below, you affirm that the information provided above is true and correct to the best of your knowledge and agree that HardHat Workforce Solutions, Inc. (hereinafter HardHat), or its designees, may conduct a credit investigation contacting the above references, and order a consumer credit report(s) where a personal guarantee may be required. Provided credit is granted, we may without further notice to you, use or request subsequent credit bureau reports to update our information.

Clients will be invoiced weekly based on an hourly rate multiplied by the number of hours worked while assigned to the client. Client affirms and acknowledges that HardHat employees will be paid time and half for each hour of work beyond (40) hours during any one-work week. Invoices are due and payable upon receipt of invoices and the parties agree that any and all amounts due over thirty (30) days will accrue interest at the rate of (2%) per month. Client will immediately notify HardHat of disputed invoice amounts and client agrees to be responsible for all cost associated with the collection including attorney fees.

As a HardHat client, the client understands and affirms that they shall be solely responsible for directing the HardHat employees on site activities and shall retain full control over the means and methods of work at the job site. The client shall assign to HardHat employees only duties which are consistent with the HardHat employee's skills and abilities. The client shall have on-site personnel responsible for the supervision of HardHat employees and shall establish and enforce a health and safety program and maintain the work site in a safe and hazard free condition. The client shall ensure compliance with OSHA and applicable state regulations, and shall provide HardHat employees with any and all site specific safety training. Client shall also maintain the workplace free from discrimination and unfair labor practices.

Client shall not request or require HardHat employees to perform tasks which require driving a vehicle unless client delivers to HardHat, in advance, an insurance policy acceptable to HardHat naming HardHat as additional insured and execute a vehicle addendum.

Client is responsible for maintaining comprehensive general liability insurance covering the work performed by HardHat employees with such coverages and in such amounts as necessary to fully protect client from all such claims.

Authorized Officer or Owner (Print Name): CONNIE CARVER Title: Secretary
 Authorized Signature: Connie Carver Date: Aug. 4, 09

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
Hard Hat Workforce Solutions, LLC,	)	Case No.: 2010-CP-46-01951
)	
Plaintiff,)	
)	
v.	)	ANSWER BY GREAT AMERICAN
	)	INSURANCE COMPANY
Mechanical HVAC Services, Inc.,)	
Great American Insurance)	
Company, and Liberty Mutual)	
Insurance Company)	
)	
Defendants.)	

Now comes the Defendant Great American Insurance Company ("Great American"), who responds to the allegations of the Amended Complaint as follows:

FOR A FIRST DEFENSE

1. All allegations of the Amended Complaint not specifically admitted herein are denied.
2. Paragraph 1 is admitted.
3. Paragraph 2 is admitted.
4. Paragraph 3 is admitted.
5. Great American lacks sufficient information to admit the allegations of Paragraph Four (4).
6. In responding to Paragraph 5, Great American admits only that Edifice is the general contractor on the Project; that Edifice subcontracted certain mechanical contracting work to Walker White; that Great American is the surety on a payment bond

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surety and Walker White is principal, then HHWS is a "remote claimant" as that term is defined by S.C. Code Ann. § 29-5-440.

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16. HHWS's recovery on the bond is limited to the amount, if any, that Walker White, as the "bonded contractor" owed to Mechanical at the time Walker White received notice of HHWS's claim for payment.

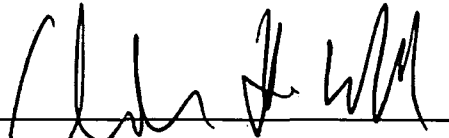
17. Walker White and Great American will show that Walker White owed no money to Mechanical at the time that HHWS gave notice of its claim for payment. Accordingly, HHWS is not entitled to any recover on the payment bond.

FOR A THIRD DEFENSE

18. HHWS has failed to plead compliance with all conditions precedent to recovering on the bond and its bond claim should be dismissed pursuant to Rules 9(c) and 12(b)(6), SCRCP.

19. Great American does not admit or consent that HHWS has complied with all conditions precedent to recovering on the payment bond and demands strict proof thereof.

Wherefore, having responded to the Amended Complaint, Great American prays that the claims set forth therein against Great American be dismissed with prejudice with costs and fees taxed against the Plaintiff.



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Counsel for Defendant Great American

July 20, 2010

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Hard Hat Workforce Solutions, LLC)
)
 Plaintiff,)
)
 Vs.)
)
 Mechanical HVAC Services, Inc. &)
 Great American Insurance Company)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 Civil Action No.: 2010-CP-46-1951

**AMENDED COMPLAINT
 (Jury Trial Demanded)**

FILED-RECEIVED
 2010 JUN 18 PM 2:00
 CLERK OF COURT
 YORK COUNTY, SC

The Plaintiff, Hard Hat Workforce Solutions, Inc. (“HHWS”), complaining of the Defendants, Mechanical HVAC Services, Inc. (“Mechanical”), Great American Insurance Company of America (“GAIC”), and Liberty Mutual Insurance Company (“Liberty Mutual”) would show:

General Factual and Jurisdictional Allegations

1. HHWS is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business in Greensboro. At all times relevant hereto, HHWS was engaged in the business of providing skilled manpower and construction labor to contractors and subcontractors in the construction industry.
2. Mechanical is, upon information and belief, a corporation organized and existing under the laws of the State of Georgia. At all times relevant hereto, Mechanical was engaged in the business of mechanical contracting.

3. GAIC is a corporation organized and existing under the laws of some state other than the State of South Carolina. At all times relevant hereto, GAIC was engaged in the business of serving as payment bond surety for Walker White, Inc.

4. Liberty Mutual is a corporation organized and existing under the laws of some state other than the State of South Carolina. At all times relevant hereto, Liberty Mutual was engaged in the business of serving as payment bond surety for Edifice, Inc.

5. Upon information and belief, in the Fall of 2008, York County School District Number One ("the District") entered into a contract with Edifice, Inc. ("Edifice") to serve as the general contractor for a school known as the York Comprehensive High School and Floyd D. Johnson Tech Center ("the Project"). Liberty Mutual issued a payment bond for the benefit and protection of all subcontractors, suppliers, and their subcontractors and suppliers. Edifice subcontracted the mechanical work to Walker White, Inc. GAIC issued a labor and material payment bond for the Project for the protection and benefit of Walker White's subcontractors and suppliers, and their sub-subcontractors and suppliers. Walker White subcontracted a portion of their scope of work to Mechanical, and Mechanical, in turn, employed the services of HHWS.

6. HHWS supplied labor for the benefit of Mechanical, Walker White and Edifice in the completion of the project for which HHWS has not been paid in full. The unpaid principal balance due to HHWS is \$108,337.68, (one hundred eight thousand three hundred thirty seven dollars and sixty eight cents).

By Way of a First Cause of Action Against Mechanical
(Breach of Contract)

13. GAIC issued a labor and material payment bond for the benefit and protection of all claimants, subcontractors and sub-subcontractors to Walker White on the project, including HHWS. HHWS has properly perfected its payment bond claim.

14. HHWS is a proper claimant under the bond. GAIC is liable to HHWS pursuant to the terms and conditions of the payment bond for the reasonable value of the labor and materials HHWS provided to the Project in an amount in excess of \$108,337.68.

By Way of a First Cause of Action Against Liberty Mutual
(Labor and Material Payment Bond)

15. HHWS has provided labor and materials to the Project with a reasonable worth and value in excess of \$108,337.68 for which HHWS has not been paid.

16. Liberty Mutual issued a labor and material payment bond for the benefit and protection of all claimants, subcontractors and sub-subcontractors to Edifice, inc. on the Project, including HHWS. HHWS has properly perfected its payment bond claim. A copy of the bond is attached as exhibit B.

17. HHWS us a proper is a proper claimant under the bond. Liberty Mutual is liable to HHWS pursuant to the terms and conditions of the payment bond for the reasonable value of the labor and materials HHWS provided to the Project in an amount in excess of \$108,337.68.

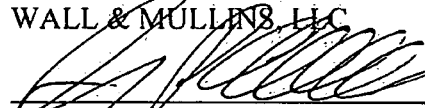
By Way of a Third Cause of Action Against Mechanical and a Second Cause of Action
Against GAIC and Liberty Mutual
(Statutory Interest and Attorney's Fees)

18. Heretofore, HHWS made a lawful and proper demand upon GAIC, Mechanical and Liberty Mutual for payment pursuant to S.C. Code §27-1-15. Neither GAIC, Mechanical properly, nor Liberty Mutual remitted payment to HHWS in accordance with the statute.

19. As a consequence of the foregoing, GAIC, Mechanical and Liberty Mutual are liable to HHWS for post-judgment interest and attorney's fees.

Wherefore, HHWS prays for judgment in its favor against Defendants on all causes of action, for actual damages in an amount in excess of \$108,337.68, (the exact amount to be proven at trial), for attorney's fees, for prejudgment interest and statutory interest, for the costs of this action, for a trial by jury and for such other and further relief as is just and proper.

BRUNER, POWELL, ROBBINS
WALL & MULLINS, LLC



Henry P. Wall
Post Office Box 61110
Columbia, SC 29260-1110
803.252.7693
Attorneys for Plaintiff

June 17, 2010



SCHMIDT

ACCOUNT APPLICATION

Company Name: Mechanical HVAC Service Corporation LLC Sole Proprietorship Partnership
 Street Address: 5 Hallie Henderson Rd. City: Tifton State: GA Zip Code: 31794
 Billing Address: 5 Hallie Henderson Rd. City: Tifton State: GA Zip Code: 31794
 Business Phone: 229, 387-0600 Fax: 229, 387-0655
 Account Contact Person: April Dore Pager: () Mobile: 229, 472-6393
 D & B #: _____ E-Mail: mhracservices@yahoo.com
 Nature of Business: Construction Years in Business: 10 Number of Employees: 30
 Purchase Order Required: Yes No

BANK REFERENCES						
Bank Name / Branch	Contact Officer	Phone	Account No.	CK	SV	LN
<u>Ameris Bank</u>	<u>Donna Ferrin</u>	<u>229-387-2222</u>	<u>2048437006</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

TRADE REFERENCES				
Firm Name	Contact	City, State	Phone	Account No.
<u>Home Depot</u>	<u>Home Office</u>	<u>Des Moines</u>	<u>(603) 222-0511</u>	<u>0000</u>
		<u>IA 50318-9100</u>	<u>1-800-607-0232</u>	

PRINCIPALS/OWNERS							
Full Name	Title	Address	City	State	Zip	SSN	
<u>Willie Walter Carver</u>		<u>5 Hallie Henderson Rd</u>	<u>Tifton GA</u>	<u>GA</u>	<u>31794</u>	<u>25666203</u>	

By signing below, you affirm that the information provided above is true and correct to the best of your knowledge and agree that HardHat Workforce Solutions, Inc. (hereinafter HardHat), or its designees, may conduct a credit investigation contacting the above references, and order a consumer credit report(s) where a personal guarantee may be required. Provided credit is granted, we may without further notice to you, use or request subsequent credit bureau reports to update our information.

Clients will be invoiced weekly based on an hourly rate multiplied by the number of hours worked while assigned to the client. Client affirms and acknowledges that HardHat employees will be paid time and half for each hour of work beyond (40) hours during any one-work week. Invoices are due and payable upon receipt of invoices and the parties agree that any and all amounts due over thirty (30) days will accrue interest at the rate of (2%) per month. Client will immediately notify HardHat of disputed invoice amounts and client agrees to be responsible for all cost associated with the collection including attorney fees.

As a HardHat client, the client understands and affirms that they shall be solely responsible for directing the HardHat employees on site activities and shall retain full control over the means and methods of work at the job site. The client shall assign to HardHat employees only duties which are consistent with the HardHat employee's skills and abilities. The client shall have on-site personnel responsible for the supervision of HardHat employees and shall establish and enforce a health and safety program and maintain the work site in a safe and hazard free condition. The client shall ensure compliance with OSHA and applicable state regulations, and shall provide HardHat employees with any and all site specific safety training. Client shall also maintain the workplace free from discrimination and unfair labor practices.

Client shall not request or require HardHat employees to perform tasks which require driving a vehicle unless client delivers to HardHat, in advance, an insurance policy acceptable to HardHat naming HardHat as additional insured and execute a vehicle addendum.

Client is responsible for maintaining comprehensive general liability insurance covering the work performed by HardHat employees with such coverages and in such amounts as necessary to fully protect client from all such claims.

Authorized Officer or Owner (Print Name): CANNIE CARVER Title: Secretary
 Authorized Signature: Cannie Carver Date: Aug. 4, 09

Exhibit B

THE AMERICAN INSTITUTE OF ARCHITECTS



Bond No. 018017384

AIA Document A312

Payment Bond

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

CONTRACTOR (Name and Address):

Edifice, Inc.
1401 W. Morehead Street
Charlotte, NC 28208

SURETY (Name and Principal Place of Business):

Liberty Mutual Insurance Company
175 Berkeley Street
Boston, MA 02117

OWNER (Name and Address):

York School District Number One
1475 East Liberty Street, P.O. Box 770
York, SC 29745

CONSTRUCTION CONTRACT

Date: July 28, 2008

Amount: (\$80,970,953.00) Eighty Million Nine Hundred Seventy Thousand Nine Hundred Fifty Three Dollars and 00/100

Description (Name and Location):

York One Comprehensive High School and Floyd D. Johnson Technology Center, York, SC 29745

BOND

Date (Not earlier than Construction Contract Date): August 4, 2008

Amount: (\$ 80,970,953.00) Eighty Million Nine Hundred Seventy Thousand Nine Hundred Fifty Three Dollars and 00/100

Modifications to this Bond

None

See Page 6

CONTRACTOR AS PRINCIPAL

Company:
Edifice, Inc.

SURETY

Company:

(Corporate Seal)

Liberty Mutual Insurance Company

Signature:

Handwritten signature of Gary W. Creed, VP, with circular corporate seal for Edifice, Inc., North Carolina.

Signature:

Handwritten signature of Jennifer B. Gullett, Attorney-in-Fact.

Name and Title: Gary W. CREED, VP

Name and Title: Jennifer B. Gullett
Attorney-in-Fact

(Any additional signatures appear on page 6)

(FOR INFORMATION ONLY—Name, Address and Telephone)

AGENT or BROKER:

Willis of North Carolina, Inc.
P.O. Box 31817
Charlotte, NC 28231-1817

OWNER'S REPRESENTATIVE (Architect, Engineer or other party):

LS3P Associates, LTD
701-A Lady St.
Columbia, SC 29201

1 The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference.

2 With respect to the Owner, this obligation shall be null and void if the Contractor:

2.1 Promptly makes payment, directly or indirectly, for all sums due Claimants, and

2.2 Defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity whose claim, demand, lien or suit is for the payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, provided the Owner has promptly notified the Contractor and the Surety (at the address described in Paragraph 12) of any claims, demands, liens or suits and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety, and provided there is no Owner Default.

3 With respect to Claimants, this obligation shall be null and void if the Contractor promptly makes payment, directly or indirectly, for all sums due.

4 The Surety shall have no obligation to Claimants under this Bond until:

4.1 Claimants who are employed by or have a direct contract with the Contractor have given notice to the Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and, with substantial accuracy, the amount of the claim.

4.2 Claimants who do not have a direct contract with the Contractor:

- .1 Have furnished written notice to the Contractor and sent a copy, or notice thereof, to the Owner, within 90 days after having last performed labor or last furnished materials or equipment included in the claim stating, with substantial accuracy, the amount of the claim and the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed; and
- .2 Have either received a rejection in whole or in part from the Contractor, or not received within 30 days of furnishing the above notice any communication from the Contractor by which the Contractor has indicated the claim will be paid directly or indirectly; and
- .3 Not having been paid within the above 30 days, have sent a written notice to the Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and enclosing a copy of the previous written notice furnished to the Contractor.

5 If a notice required by Paragraph 4 is given by the Owner to the Contractor or to the Surety, that is sufficient compliance.

6 When the Claimant has satisfied the conditions of Paragraph 4, the Surety shall promptly and at the Surety's expense take the following actions:

6.1 Send an answer to the Claimant, with a copy to the Owner, within 45 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.

6.2 Pay or arrange for payment of any undisputed amounts.

7 The Surety's total obligation shall not exceed the amount of this Bond, and the amount of this Bond shall be credited for any payments made in good faith by the Surety.

8 Amounts owed by the Owner to the Contractor under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under any Construction Performance Bond. By the Contractor furnishing and the Owner accepting this Bond, they agree that all funds earned by the Contractor in the performance of the Construction Contract are dedicated to satisfy obligations of the Contractor and the Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work.

9 The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that are unrelated to the Construction Contract. The Owner shall not be liable for payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligations to make payments to, give notices on behalf of, or otherwise have obligations to Claimants under this Bond.

10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.

11 No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the location in which the work or part of the work is located or after the expiration of one year from the date (1) on which the Claimant gave the notice required by Subparagraph 4.1 or Clause 4.2.3, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

12 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the signature page. Actual receipt of notice by Surety, the Owner or the Contractor, however accomplished, shall be sufficient compliance as of the date received at the address shown on the signature page.

13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this

Bond shall be construed as a statutory bond and not as a common law bond.

14 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the Contractor shall promptly furnish a copy of this Bond or shall permit a copy to be made.

15 DEFINITIONS

15.1 Claimant: An individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Contract. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the

Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment were furnished.

15.2 Construction Contract: The agreement between the Owner and the Contractor identified on the signature page, including all Contract Documents and changes thereto.

15.3 Owner Default: Failure of the Owner, which has neither been remedied nor waived, to pay the Contractor as required by the Construction Contract or to perform and complete or comply with the other terms thereof.

MODIFICATIONS TO THIS BOND ARE AS FOLLOWS:

AIA312 Document Rider Attached

(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)

CONTRACTOR AS PRINCIPAL
Company: _____ (Corporate Seal)

SURETY
Company: _____ (Corporate Seal)

Signature: _____
Name and Title:
Address:

Signature: _____
Name and Title:
Address:



Interchange Corporate Center
 450 Plymouth Road, Suite 400
 Plymouth Meeting, PA. 19462-1644
 Ph. (610) 832-8240

RIDER AMENDING AIA312 PAYMENT BOND

This rider is to be attached to and form a part of surety bond number 018017384, dated the 4th day of August, 2008 executed by LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts stock insurance company, as surety (the "Surety"), on behalf of Edifice, Inc.
1401 W. Morehead Street, Charlotte, NC 28208, as principal (the "Principal"),
 in favor of York School District Number One
1475 East Liberty Street, P.O. Box 770, York, NC 29745, as obligee (the "Obligee").

WHEREAS, the Principal has by written agreement dated the 28th day of July, 2008, entered into a contract (the "Contract") with the Obligee for: York One Comprehensive High School and Floyd D. Johnson Technology Center, York, SC 29745

WHEREAS, upon the request of the Principal and Obligee, the attached bond is hereby amended as follows:

Paragraph 6 is replaced with the following:

When the Claimant has satisfied the conditions of Section 4 and provided the Surety with a sworn statement and documentation in full support of its claim, then the Surety shall promptly and at Surety's expense take the following actions:

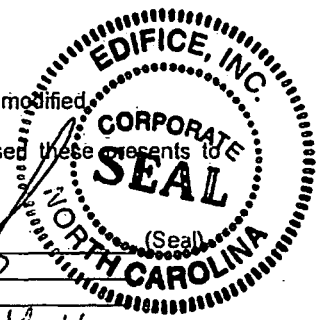
6.1 Send an answer to the Claimant, with a copy to the Owner, within 45 days after receipt of the sworn statement and documentation in full support of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.

6.2 Pay or arrange for payment of any undisputed amounts.

This change is effective as of the effective execution date of the Bond to which it is attached.

The attached bond shall be subject to all of its terms, conditions and limitations except as herein modified.

IN WITNESS WHEREOF, said Principal, Surety, Obligee and Additional Obligee have caused these presents to be duly signed and sealed this 4th day of August, 2008



Edifice, Inc.
 (Principal)

By: [Signature]
 Title: VICE PRESIDENT
 Date: 9.16.08

LIBERTY MUTUAL INSURANCE COMPANY
 (Surety)

By: [Signature]
 Title: Attorney-In-Fact (Seal)
 Date: August 4, 2008

York School District Number One
 (Obligee)

By: _____ (Seal)
 Title: _____
 Date: _____

 (Additional Obligee)

By: _____ (Seal)
 Title: _____
 Date: _____

 (Additional Obligee)

By: _____ (Seal)
 Title: _____
 Date: _____

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated. Not valid for mortgage, note, loan, letter of credit, bank deposit, currency rate, interest rate or residual value guarantees. To confirm the validity of this Power of Attorney call 610-832-8240 between 9:00 am and 4:30 pm EST on any business day.

LIBERTY MUTUAL INSURANCE COMPANY
BOSTON, MASSACHUSETTS
POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS:

That Liberty Mutual Insurance Company (the "Company"), a Massachusetts stock insurance company, pursuant to and by authority of the By-law and Authorization hereinafter set forth, does hereby name, constitute and appoint, Jennifer B. Gullett, its true and lawful attorney-in-fact, with full power and authority hereby conferred to sign, execute and acknowledge, at any location within the United States, the following surety bond:

Principal Name: Edifice, Inc.

Obligee Name: York School District Number One

LMS Surety Bond Number: 018017384

Bond Amount: See Bond Form

That this power is made and executed pursuant to and by authority of the following By-law and Authorization:

ARTICLE XIII - Execution of Contracts: Section 5. Surety Bonds and Undertakings.

Any officer of the Company authorized for that purpose in writing by the chairman or the president, and subject to such limitations as the chairman or the president may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Company by their signature and execution of any such instruments and to attach thereto the seal of the Company. When so executed such instruments shall be as binding as if signed by the president and attested by the secretary.

By the following instrument the chairman or the president has authorized the officer or other official named therein to appoint attorneys-in-fact:

Pursuant to Article XIII, Section 5 of the By-laws, Garnet W. Elliott, Assistant Secretary of Liberty Mutual Insurance Company, is hereby authorized to appoint such attorneys-in-fact as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations.

That the By-law and the Authorization set forth above are true copies thereof and are now in full force and effect.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of the Company and the corporate seal of Liberty Mutual Insurance Company has been affixed thereto in Plymouth Meeting, Pennsylvania this 23rd day of MAY, 2006.



LIBERTY MUTUAL INSURANCE COMPANY

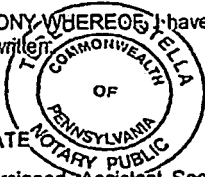
Garnet W. Elliott

By Garnet W. Elliott, Assistant Secretary

COMMONWEALTH OF PENNSYLVANIA ss
COUNTY OF MONTGOMERY

On this 23rd day of MAY, 2006, before me, a Notary Public, personally came Garnet W. Elliott, to me known, and acknowledged that he is an Assistant Secretary of Liberty Mutual Insurance Company; that he knows the seal of said corporation; and that he executed the above Power of Attorney and affixed the corporate seal of Liberty Mutual Insurance Company thereto with the authority and at the direction of said corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at Plymouth Meeting, Pennsylvania, on the day and year first above written.



Notarial Seal
Teresa Pastella, Notary Public
Plymouth Twp., Montgomery County
My Commission Expires Mar. 28, 2009
Member, Pennsylvania Association of Notaries

By Teresa Pastella
Teresa Pastella, Notary Public

CERTIFICATE

I, the undersigned, Assistant Secretary of Liberty Mutual Insurance Company, do hereby certify that the original power of attorney of which the foregoing is a full, true and correct copy, is in full force and effect on the date of this certificate; and I do further certify that the officer or official who executed the said power of attorney is an Assistant Secretary specially authorized by the chairman or the president to appoint attorneys-in-fact as provided in Article XIII, Section 5 of the By-laws of Liberty Mutual Insurance Company.

This certificate and the above power of attorney may be signed by facsimile or mechanically reproduced signatures under and by authority of the following vote of the board of directors of Liberty Mutual Insurance Company at a meeting duly called and held on the 12th day of March, 1980.

VOTED that the facsimile or mechanically reproduced signature of any assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company in connection with surety bonds, shall be valid and binding upon the company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said company, this 4th day of August, 2006.



By David M. Carey
David M. Carey, Assistant Secretary

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
Hard Hat Workforce Solutions, LLC,	)	Case No.: 2010-CP-46-01951
)	
Plaintiff,)	
)	
v.	)	AMENDED ANSWER BY GREAT
	)	AMERICAN INSURANCE COMPANY
Mechanical HVAC Services, Inc.,)	
Great American Insurance)	
Company, and Liberty Mutual)	
Insurance Company)	
)	
Defendants.)	

Now comes the Defendant Great American Insurance Company ("Great American"), who responds to the allegations of the Amended Complaint as follows:

FOR A FIRST DEFENSE

1. All allegations of the Amended Complaint not specifically admitted herein are denied.
2. Paragraph 1 is admitted.
3. Paragraph 2 is admitted.
4. Paragraph 3 is admitted.
5. Great American lacks sufficient information to admit the allegations of Paragraph Four (4).
6. In responding to Paragraph 5, Great American admits only that Edifice is the general contractor on the Project; that Edifice subcontracted certain mechanical contracting work to Walker White; that Great American is the surety on a payment bond

1 (Umm)

furnished by Walker White as principal; and that Walker White subcontracted part of its scope of work to Mechanical.

7. Great American lacks sufficient information to admit the allegations of Paragraph Six (6) and demands strict proof of same.

8. The allegations of Paragraphs 7 through 11 do not relate to Great American.

9. Great American lacks sufficient information to admit the allegations of Paragraph Twelve (12) and demands strict proof of same.

10. In responding to Paragraph 13, Great American admits only that it is the surety on a payment bond with Walker White as principal and that said bond is for the benefit of all defined claimants who are entitled to seek relief against the bond.

11. Paragraph 14 is denied. Great American demands strict proof that HHWS is a claimant on the bond and further denies that HHWS is entitled to recover on the bond if it is a proper claimant.

12. The allegations of Paragraphs 15 through 17 do not relate to Great American.

13. In responding to Paragraph 18, Great American admits only that HHWS made a claim for payment on the bond.

14. Paragraph 19 is denied.

FOR A SECOND DEFENSE

15. If HHWS is a proper claimant on the payment bond on which Great American is surety and Walker White is principal, then HHWS is a "remote claimant" as that term is defined by S.C. Code Ann. § 29-5-440.

2 (Am)

16. HHWS's recovery on the bond is limited to the amount, if any, that Walker White, as the "bonded contractor" owed to Mechanical at the time Walker White received notice of HHWS's claim for payment.

17. Walker White and Great American will show that Walker White owed no money to Mechanical at the time that HHWS gave notice of its claim for payment. Accordingly, HHWS is not entitled to any recover on the payment bond.

FOR A THIRD DEFENSE

18. HHWS has failed to plead compliance with all conditions precedent to recovering on the bond and its bond claim should be dismissed pursuant to Rules 9(c) and 12(b)(6), SCRCP.

19. Great American does not admit or consent that HHWS has complied with all conditions precedent to recovering on the payment bond and demands strict proof thereof.

FOR A FOURTH DEFENSE

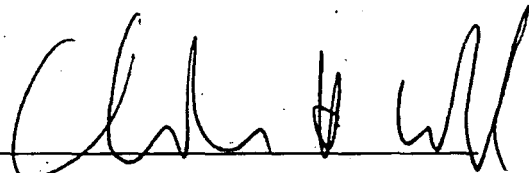
20. Upon information and belief, HHWS continued to supply labor to Mechanical after such time that it was clear that Mechanical could not, or would not, pay for the labor provided by HHWS. Great American is informed and believes that HHWS continued to supply labor to Mechanical despite the fact that Mechanical tendered numerous checks to HHWS which were not honored due to insufficient funds.

21. Under its agreement with Mechanical, HHWS had no continuing obligation to supply labor if Mechanical was not paying for same.

22. By continuing to provide labor to Mechanical with no reasonable expectation of payment, HHWS acted as a volunteer with no accompanying right to payment. HHWS

further failed to act in a reasonable manner so as to limit its economic harm. Therefore, if HHWS is otherwise entitled to any recovery against Great American on the bond, such recovery should be precluded or, alternatively, limited to the amount due HHWS for labor prior to such time that it was no longer reasonable for HHWS to continue to supply labor to Mechanical.

WHEREFORE, having responded to the Amended Complaint, Great American prays that the claims set forth therein against Great American be dismissed with prejudice with costs and fees taxed against the Plaintiff.



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Counsel for Defendant Great American

July 28, 2010

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
Hard Hat Workforce Solutions, LLC,	)	Case No.: 2010-CP-46-01951
)	
Plaintiff,)	
)	
v.	)	MOTION FOR SUMMARY
	)	JUDGMENT
Mechanical HVAC Services, Inc.,)	
Great American Insurance)	
Company, and Liberty Mutual)	
Insurance Company,)	
)	
Defendant.)	

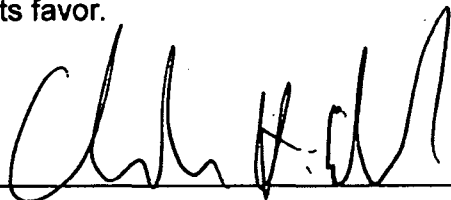
Now comes Defendant Great American Insurance Company, who moves for summary judgment on all claims against it pursuant to Rule 56, SCRPC. In support of this motion, Great American submits the interrogatory responses of Plaintiff Hard Hat Workforce Solutions, LLC, the judgment entered in this matter in favor of Hard Hat Workforce Solutions, LLC against Mechanical HVAC Services, Inc., along with the affidavits of Amy Miller, JT East, Linda Schilling and Robert White, all filed herewith.

This motion is based upon the following undisputed facts:

1. Great American Insurance Company is surety on a payment bond issued by its, principal, Walker White, Inc., on a school project in York County.
2. Hard Hat Workforce Solutions is a provider of skilled labor who provided skilled labor directly to Mechanical HVAC Services for the school project.
3. Hard Hat Workforce Solutions is a "remote claimant" on the subject bond per S.C. Code Ann. § 29-5-440.

4. Walker White, as principal on the bond sued on, is the "bonded contractor" per S.C. Code Ann. § 29-5-440.
5. Hard Hat Workforce Solutions did not provide Walker White with any written notice of furnishing labor as set forth in S.C. Code Ann. § 29-5-440 until February 8, 2010.
6. Per S.C. Code Ann. § 29-5-440, the liability of Great American, as surety, and Walker White, as principal, on the bond is limited to the amount that Walker White owed to Mechanic HVAC Services, Inc. at the time Walker White first received written notice of Hard Hat's furnishing of labor.
7. Walker White first received written notice of Hard Hat's claim by certified mail in a letter dated March 5, 2010.
8. As of February 8, 2010, Walker White owed no money to Mechanical HVAC Services, Inc.

Because the undisputed facts establish that Hard Hat Workforce Solutions is not entitled to recover any amount on the bond sued on, Great American Insurance Company is entitled to summary judgment in its favor.



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Counsel for Defendant Great American
Insurance Company

June 29, 2011

COPY

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

Civil Action No.: 2010-CP-46-1951

Hard Hat Workforce Solutions, LLC,

Plaintiff,

v.

Mechanical HVAC Services, Inc.,
Great American Insurance Company &
Liberty Mutual Insurance Company,

Defendants.

FILED - RECEIVED
2011 SEP 20 AM 8:43
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Facts

Plaintiff ("Hard Hat") contracted with Mechanical HVAC Services, Inc. ("MHS") and provided MHS with more than \$100,000.00 in labor for which it has not been paid. MHS was a Subcontractor to Walker White. Walker White was itself a subcontractor to the general contractor and not required to provide a payment bond. Nonetheless Walker White obtained a private non-statutory bond from Great American Insurance Company ("GAIC"). The bond is an exhibit to the affidavit of Robert White. It contains no notice provisions, no time provisions, no definition of claimant, no definitions, no references to South Carolina statutory law and no limits on coverage. It merely states it is for the condition of the principal to "make payment to all persons supplying labor and material in the prosecution of the work"...and it is "for the benefit of all persons supplying labor and material in the prosecution of the work".... There is no question but that Hard Hat is within the coverage of the scope of the bond, as written.

Walker White was fully aware of Hard Hat's furnishing of labor to MHS almost from the inception of the Project. (see affidavits of Eric Schmidt and Eric Byrd.) Hard Hat provided Walker White with electronic notices of furnishing labor on at least three occasions: August 4, 2009, September 29, 2009, and October 22, 2009. These electronic notices occurred before Walker White made more than \$100,000.00 in payments to MHS. However, in January and February of 2010 Walker White claims to have made a final payment to MHS.

Shortly after the alleged final payment to MHS, Hard Hat asserted a claim for nonpayment against MHS and GAIC. Hard Hat provided notice to GAIC within ninety days of last performing its work and also filed suit within one year of the last date of work. GAIC contends that Hard Hat has no bond claim because it should have allegedly filed a special notice of furnishing based upon the 2000 amendments and changes to Chapter 5 of title 29 of the South Carolina Code. GAIC concedes it did not file a Notice of Project Commencement. Nonetheless GAIC contends that Hard Hat failed to provide Walker White with a special notice of furnishing and consequently, Hard Hat has no rights under the bond. In essence, GAIC contends that all subcontractor payment bonds no longer provide any coverage whatsoever to remote tier claimants unless some kind of special notice of furnishing is filed, notwithstanding the language of the bond itself, and the failure of the principal to file a Notice of Project Commencement. GAIC further argues that the electronic notice sent in this case was insufficient as a matter of law.

Argument

I. Plaintiff Provided Electronic, Actual, and Constructive Notice of Furnishing In Accordance With South Carolina Law.

In order to address GAIC's legal arguments, a close reading of the following statutes is essential:

SECTION 29-5-20. Lien of laborer, mechanic, subcontractor or materialman; limits on aggregate amount of liens filed by sub-subcontractor or supplier; limits on total aggregate amount of liens; exceptions; settlement of action to enforce lien.

(A) Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the costs of the action and a reasonable attorney's fee which must be determined by the court in which the action is brought but only if the party seeking to enforce the lien prevails. If the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court. The fee and the court costs may not exceed the amount of the lien. The lien may be enforced as herein provided.

(B) In no event shall the aggregate amount of any liens filed by a sub-subcontractor or supplier exceed the amount due by the contractor to the subcontractor to whom the sub-subcontractor or supplier has supplied labor, material, or services unless the sub-subcontractor or supplier has provided notice of furnishing labor or materials by certified or registered mail to the contractor. Such notice of furnishing labor or materials shall include:

(1) the name of the sub-subcontractor or supplier who claims payment;

(2) the name of the person with whom the claimant contracted or by whom he was employed;

(3) a description of the labor, services, or materials furnished and the contract price or value thereof. Materials specially fabricated by a person other than the one giving notice and the contract price or value thereof shall be separately stated in the notice;

(4) a description of the project where labor, services, or materials were used sufficient for identification;

(5) the date when the first and the last item of labor or service or materials was actually furnished or scheduled to be furnished; and

(6) the amount claimed to be due, if any.

After receiving such notice, no payment by the contractor to the subcontractor will lessen the amount recoverable by the person so giving notice. However, in no event shall the total aggregate amount of liens on the improvement exceed the amount due by the owner.

SECTION 29-5-23. Notice of Project Commencement; location notice; failure to file notice.

Any person entering into a direct agreement with, or with the consent of, an owner for the improvement of real property may file with the clerk of court or register of deeds in the county or counties where the real property is situate a notice of project commencement. The notice of project commencement shall contain the following information:

- (1) the name and address of the person filing the notice of commencement;
- (2) the name and address of the owner or developer;
- (3) a general description of the improvement; and
- (4) the location of the project.

The notice must be filed within fifteen days of the commencement of work and must be accompanied by a filing fee of fifteen dollars to be deposited in that county's general fund. The name and address of the contractor must be posted at the job site. A location notice also must be posted at the job site. The location notice must contain the following statement: "The contractor on the project has filed a notice of project commencement at the county courthouse. Sub-subcontractors and suppliers to subcontractors shall comply with Section 29-5-20 when filing liens in connection with this project." The failure to file a notice of project commencement shall render the provisions of Sections 29-5-20(B) and 29-5-60(B) inapplicable. The failure to file a notice of project commencement shall also render the provisions of Sections 29-5-440, 11-35-3030(2)(c), 57-5-1660(b), and 11-1-120, relating to the requirement of a notice of providing labor, materials, or rental equipment inapplicable for a claim against a payment bond furnished by a contractor holding a direct contractual agreement with an owner. The filing of a notice of project commencement shall not constitute a cloud, lien, or encumbrance upon, or defect to, the title of the real property described in the notice, nor shall it alter the aggregate amounts of liens allowable under Section 29-5-40, nor shall it affect the priority of any mortgage filed before or after the notice, nor shall it affect any future advances under any mortgage. The clerk of court or register of deeds in each county shall maintain a separate book and index of all notices of project commencements.

SECTION 29-5-40. Notice to owner before lien attaches when laborer was employed by someone other than owner.

Whenever work is done or material is furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner and such laborer, mechanic, contractor or materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof, the lien given by Section 29-5-20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished. But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made.

SECTION 29-5-440. Suit on payment bond.

Every person who has furnished labor, material, or rental equipment to a bonded contractor or its subcontractors in the prosecution of work provided for in any contract for construction, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material or rental equipment was furnished or supplied by him for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him.

A remote claimant shall have a right of action on the payment bond only upon giving written notice by certified or registered mail to the bonded contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or rental equipment upon which such claim is made. However, in no event shall the aggregate amount of any claim against such payment bond by a remote claimant exceed the amount due by the bonded contractor to the person to whom the remote claimant has supplied labor, materials, rental equipment, or services, unless the remote claimant has provided notice of furnishing labor, materials, or rental equipment to the bonded contractor. Such written notice to the bonded contractor shall be personally served or sent by fax or sent by electronic mail or sent by registered or certified mail, postage prepaid, to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. After receiving the notice of furnishing labor, materials, or rental equipment, no payment by the bonded contractor shall lessen the amount recoverable by the remote claimant. However, in no event shall the aggregate amount of claims on the payment bond exceed the penal sum of the bond.

From a plain reading of the statute, several key provisions of the law undermine GAIC's argument:

- The Payment defense is inapplicable as a matter of law, unless the person invoking its protection has first filed a "Notice of Project Commencement". According to the statute creating this instrument: "Any person entering into a direct agreement with, or with the consent of, an owner for the improvement of real property may file with the clerk of court or register of deeds in the county or counties where the real property is situate a notice of project commencement." Walker White failed to file this key document though the statute plainly says that they could have, thus, from the face of the plain language of the

statute it does not appear that the additional notice defense they attempt to assert is even viable.

- The statutory scheme envisions at least three kinds of notices of furnishing. First of all there is the detailed notice with respect to lien law claims set forth in 29-5-20(b) which is clearly inapplicable to the case at hand. This leaves merely the minimal notice of furnishing requirement “in writing” to an owner which is likewise clearly applicable only to a mechanic’s lien, but nonetheless quite instructive because it sets out a lesser notice of furnishing statute in the same section of the law which simply requires very informal written notice for an initial claim, it must be merely a written notice. Finally, there is the similarly informal notice requirement of 29-5-440 which requires nonspecific “written notice” by personal delivery, fax, or electronic mail, among other more formal mediums. The facts of this case establish quite plainly that such electronic notices were in fact given to Walker White in full accordance with the informal lesser notice provisions of the law (see affidavits of Eric Schmidt and Eric Byrd) which establish conclusively that Hard Hat has fully met all terms and conditions of the statute by providing electronic, actual and constructive notice to Walker White.

GAIC cannot avail itself of the defense of lack of notice it attempts to assert because it failed to file a proper Notice of Commencement. Furthermore, even if Walker White could assert such a defense, the only evidence in the record is that Hard Hat gave and Walker White received proper electronic notice of furnishing prior to making more than \$100,000 in payments to MHS. Walker White was plainly in a position to protect itself and Hard Hat through these timely and proper notices.

II. The Terms and Conditions of a Private Bond Are Not Rendered Meaningless by Virtue of Chapter 5 of Title 29 of the South Carolina Code Which Prescribes Merely Minimal Bond Coverage. When the Terms and Conditions of the Bond Provide Broader Than Minimal Coverage and Less Stringent Notice Requirements, the Terms and Conditions of the Bond Prevail Over the Minimum Statutory Coverage and Notice Requirement.

GAIC's argument requires the court to ignore the plain language of the payment bond which imposes no notice requirements, no time limits, no definitions and clearly covers Hard Hat. In essence, GAIC contends the statutes entirely "trump" the language of the bond. This argument is flawed and incorrect as a matter of law.

South Carolina has long recognized the distinction between private bonds, of which this is one, and public statutory bonds. Only in cases of statutorily required bonds is it appropriate to superimpose the statutory requirements which are jurisdictional, on the requirements of a bond. In the case of a private bond, freedom of contract prevails and even in the case of public bonds, the parties are always free to allow broader coverage than the statutory minimum. In other words the language of the bond means something and is never trumped by statute except to the extent that a bond cannot provide lesser than the minimum requirements prescribed by statute. This is quite consistent with the law of insurance in South Carolina and indeed the same rules of interpretation apply. Payment bonds must be construed in favor of coverage in accordance with their remedial purposes. Where a bond provides for broader coverage than may be required in a statute (similar to minimal insurance coverage) the language of the bond prevails. GAIC's failure to incorporate or reference the statutory language in its bond form, which it clearly could have done and determination to leave the language of its bond in the broadest form coverage conceivable, does not now allow it to come in after the fact and claim that it intended to limit coverage in accordance with a statute which it chose to ignore.

See for example the following cases:

- Wheeling v. Algernon-Blair, 329 F. Supp. 1360 (D.S.C. 1971). The terms and conditions of a private bond establish the terms and conditions of coverage and are not modified by reference to statutes unless the bond is statutorily required. Ambiguities in bonds must be construed against compensated sureties and in favor of laborers and materialmen.
- Rish v. Theo Bros., 237 S.E. 2d 61 (S.C. 1977). The written terms and conditions of a bond prevail over a statute and the statutory requirements are minimal, but the bond itself may provide broader coverage to include items not ordinarily covered in a statute.
- South Carolina Supply v. Stewart, 119 S.E. 2d 517 (S.C. 1961). The liability of a payment bond surety depends on the language of the bond.
- Socar v. St. Paul Ins., 341 S.E. 2d 822 (S.C. App. 1986). A payment bond is a contract and it must be construed according to its language to effect the intent of the parties.
- First National Bank v USF&G, 373 F. Supp. 235 (D.S.C. 1974). A payment bond is to be construed similarly to an insurance policy with all ambiguities to be resolved in favor of coverage and recovery for unpaid subs and suppliers.
- Standard Accident v. Simpson 64 F. 2d 583 (4th Cir. 1933). A compensated surety is strictly held to the obligations of the terms and conditions in its bond forms which it writes with all doubts resolved in favor of the claimant.
- Moore Electric v. Ward, 450 S.E. 2d 96 (S.C. App. 1994). The language of the bond determines the sureties liability.

- Antley v. Nobel Insurance, 567 S.E. 2d 872 (S.C. App 2002). Insurance companies have the freedom to contract to offer greater coverage but not lesser coverage than the minimum statutory requirements. (Thus, by extension, a surety can write a bond with broader coverage than the minimum protections of the protections imposed by statute.)
- USAA v. Markosky, 530 S.E. 2d 660 (S.C. App. 2000). An insurer can offer broader but not lesser coverage than the statutory minimums by the language in its policy.
- SCDOT v. M&T, 667 S.E. 2d 7 (S.C. App. 2008). South Carolina Courts recognize and uphold the freedom of contract, and the language of contracts must be enforced and upheld unless in contravention of public policy.
- Finally, Hard Hat would draw the court's attention to two very scholarly and thoughtful cases from other jurisdictions. In each case the surety attempted to argue that a statute effectively "trumped" the written terms of the bond it issued and that the broader coverage and language of its bonds became circumscribed by statutory amendments and changes. In both cases which involved private bonds as in this case, the courts held that the sureties could have easily written the additional limitations in their bonds by reference to the statutes or otherwise, yet chose not to. Consequently, the bonds afforded coverage according to the plain terms of the bonds. SCACCI v. Hartford Insurance, 628 N.Y.S. 2d 746 (N.Y. 1995) see also Sims Crane v. Reliance Insurance Co. 514 F.Supp. 1033 (D. Ga. 1981).

III. If the Court Elects to Ignore the Terms and Conditions of the Contract and Construe Title 29 as Destroying the Freedom of Contract in South Carolina Thereby Adopting the Legal Position of Great American, Such an Interpretation Renders §29-5-440 Unconstitutional by Creating Disparate Treatment and Remedies Amongst Equally Situated Remote Tier Claimant Without Any Rational Basis and Destroys Freedom of Contracts.

The biggest practical flaw in GAIC's argument is that it requires and constitutionally defective result. Initially, it requires this court to eliminate the freedom of contracts. Perhaps more importantly, it compels an arbitrary and disparate treatment between remote tier bond claimants as follows:

Disparate Treatment of Remote Bond Claimant to GC Bond- where First Tier Sub is Paid in Full and there is No Notice of Project Commencement

Owner

Principal

Surety

First Tier Sub

Second Tier Sub

Has a Claim on Bond

(In this instance the second or remote tier sub has a valid bond claim and the General failed to file a NOC).

Disparate Treatment of Remote Bond Claimant to Sub's Bond- where First Tier Sub is Paid in Full and there is No Notice of Project Commencement

GC

Principal

Surety

First Tier Sub

[REDACTED]

[REDACTED]

(In this instance the second or remote tier sub does not have a valid bond claim and the General failed to file a NOC).

The only distinction is that the first case is the bond of a general contractor principal and the second case is the bond of a first tier sub. In other words, under GAIC's argument, GC bonds have greater coverage than sub payment bonds notwithstanding the language of the bonds. Second tier subs, may or may not have claims against theoretically identical bonds.

This type of disparate remedial treatment in the lien statute has previously been held unconstitutional with respect to the recovery of fees. *Southeastern Home v. Platt*, 325 S.E. 2d 328 (S.C. 1984) and the court is cautioned that GAIC's argument leads to the identical results.

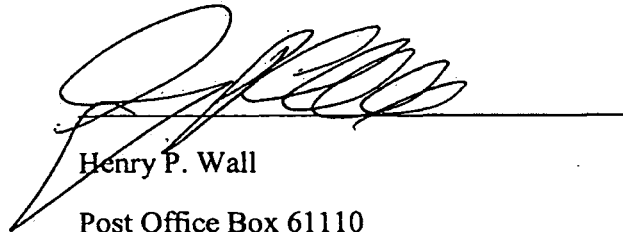
IV. There are Genuine Issues of Fact As to Whether Walker White Paid MHS in Full.

Finally, GAIC has not established that Walker White paid MHS in full. Much of the alleged claim is based upon back-charges and cover damages, moreover, it is unclear whether or not all of MHS's claims and invoices were in fact paid in full and whether its change orders and/or time and materials invoices were paid in full. There was no lump sum contract between Walker White and MHS, therefore at the very least, issues of fact are present in the case as to the issue of payment in full.

For the foregoing reasons the motion should be denied.

BRUNER, POWELL, ROBBINS

WALL & MULLINS, LLC



Henry P. Wall

Post Office Box 61110

Columbia, SC 29260-1110

803.252.7693

Attorneys for Plaintiff

SPT 15, 2011
~~May 11, 2010~~

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

2010-CP-46-01951

Hard Hat Workforce Solutions, LLC))
Plaintiff,))
v.) Transcript of Record)
Mechanical HVAC Services, Inc.))
Defendant.))
_____))

September 15, 2011
York, South Carolina

B E F O R E:

The Honorable S. Jackson Kimball, Judge

A P P E A R A N C E S:

Henry Wall, Esquire
Attorney for the Plaintiff

Charles McDonald, Esquire
Attorney for the Defendant

Hilda M. Jordan, CVR
Circuit Court Reporter

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I N D E X

WITNESS/DESCRIPTION PAGE NO.

Motions Hearing

EXHIBITS:

No exhibits were marked to this proceeding.

Certificate of Court Reporter 39

1 THE COURT: Case number 2010-CP-46-1951, Hard Hat
2 Workforce Solutions, LLC, Mechanical Services, Inc., and
3 others.

4 Mr. McDonald this is your motion for Summary Judgment?

5 MR. MCDONALD: Yes, it is, Your Honor.

6 THE COURT: All right.

7 MR. MCDONALD: May it please the Court. If I may
8 approach. You may have the file there, but, Your Honor,
9 I've got a file with all the affidavits and filings and
10 statutes in there.

11 Your Honor, we bring a mess before you this morning,
12 but we need some help from the court.

13 THE COURT: What if I need help; who do I go to?

14 MR. MCDONALD: If there's one thing we can agree on is
15 the bad guy in this whole situation is the Mechanical HVAC
16 Services is unfortunately down in Georgia that Hard Hat has
17 and victimized both of the parties here. But while the main
18 client is Great American Insurance Company, my real client
19 is Walter White. They were the -- they were -- just to give
20 you a little background. We're here on a bond claim by Hard
21 Hat on the bond that Walker White furnished on the big York
22 High School project out here.

23 THE COURT: Right.

24 MR. MCDONALD: And Edifice out of Charlotte was the GC,
25 Walker White was the sub to Edifice, big school, big

1 contract. They were the HVAC mechanical sub. Edifice
2 required Walker White to furnish a payment bond for the
3 project, which they did. Great American is the insurer.
4 Walker White subcontracted the installation of the duct work
5 to Mechanical HVAC Services, Inc., also known as Willie.
6 Everybody called him Willie, so if I lapse into Willie --

7 THE COURT: Willie Carver?

8 MR. MCDONALD: Willie Carver. Yes, sir. And then
9 Willie Carver and his company in turn entered into agreement
10 with Hard Hat Workforce Solutions, which is a provider of
11 skilled labor. They, in essence, provided his labor on the
12 project, and for purposes of this motion today, they are a
13 remote claimant on the payment bond, as the statute that
14 we're going to be dealing with primarily, 29-5-440 --

15 THE COURT: Right.

16 MR. MCDONALD: -- has in the definitions remote
17 claimant, and Walker White would be the bonded contractor.
18 So, again, while Great American is the named party, Walker
19 White is for all intents and purposes the defendant. They
20 have accepted the tender of defense from Great American and
21 they obviously have indemnity obligations under the bonding
22 relationship.

23 Some of the players, Your Honor, for Walker White, Amy
24 Miller was the project manager. And Amy Miller worked back
25 and forth between Walker White's home office in Columbia and

1 their job site office at the high school. JTE is going to
2 be a prominent name today was an assistant project manager
3 at Walker White who worked exclusively at the job site
4 trailer at the job site here in York County. Linda
5 Shilling, is the controller of Walker White who works at the
6 home office in Columbia, and Robert White, Bob White, is an
7 officer and the registered agent of Walker White, who is at
8 their home office. So that's the --

9 And for Hard Hat, some of the names you'll hear. Eric
10 Bird is the regional manager, Terry Schmidt is the
11 territorial manager, Mark Holcomb is a vice-president. So
12 that's sort of the cast of characters and roster, if you
13 will, Your Honor.

14 The crux of the motion here, Your Honor, is whether or
15 not certain emails sent by Mr. Eric Schmidt at Hard Hat to
16 J.T. East at Walker White meet the requirements set forth in
17 29-5-440 for a notice of furnishing.

18 Now --

19 THE COURT: So it's to stop payment.

20 MR. MCDONALD: So as to invoke payment defense --

21 THE COURT: Allow claim made after that time.

22 MR. MCDONALD: Exactly, Your Honor. If it were only
23 that simple. Mr. Wall has brought up and will argue that --

24 THE COURT: Well, let's let him argue what he wants.

25 MR. MCDONALD: Okay.

1 THE COURT: I want to hear what your argument is.

2 MR. MCDONALD: Well, my argument is that the emails fail
3 because, for a number of reasons. Let me back up a second.
4 There's three emails that are in the record from Eric
5 Schmidt to J.T. East. I think the best copies of them are
6 in Mr. Schmidt's affidavit. As Exhibits A, B, and C. This
7 is what --

8 THE COURT: Schmidt, not East?

9 MR. MCDONALD: Schmidt. They're also attached to East,
10 but they're --

11 THE COURT: Right.

12 MR. MCDONALD: -- not as good, but I think you can read
13 them.

14 So those are the -- that's the meat of this motion. Do
15 these emails meet the requirement set forth in this statute
16 for a Notice of Furnishing. And, Your Honor, we submit --

17 THE COURT: So you're acknowledging that if they -- if
18 they do, then Walker White is still on the hook for whatever
19 the balance was at that time?

20 MR. MCDONALD: If they do, then Walker White does not
21 have the payment defense that's set forth in here.

22 THE COURT: Which is another way of saying the same
23 thing.

24 MR. MCDONALD: Well, we have an issue with their claim.

25 THE COURT: Oh, all right.

1 MR. MCDONALD: It's not as simple as if that's the case,
2 you're owed what you say. We've got other issues with that.

3 THE COURT: But if they were owed what they say they're
4 owed then the cut off and the emails were sufficient at that
5 time we'd be dealing with what was paid after the emails?

6 MR. MCDONALD: That's right.

7 THE COURT: That may be available to Hard Hat?

8 MR. MCDONALD: Right.

9 THE COURT: Okay.

10 MR. MCDONALD: Right. We would be dealing with whether
11 or not they're entitled to the amount of their claim, not
12 whether or not we can say we don't owe you any money because
13 we already paid out --

14 THE COURT: Correct.

15 MR. MCDONALD: -- the money.

16 THE COURT: Correct.

17 MR. MCDONALD: So, Your Honor, the reasons why these
18 emails, and if you look at them, and they need to be looked
19 at carefully, they are clearly in the nature of
20 solicitations. The first one, August 4, 2009, is clearly an
21 email that is soliciting business from Mr. East.

22 THE COURT: August 4, 2009.

23 MR. MCDONALD: Yes, sir. And the statute requires four
24 things, Your Honor, for a Notice of Furnishing. It requires
25 that you give written notice, that's one. To the bonded

1 contractor, that's two. Three gives you four ways to give
2 that notice; you can personally serve it, you can send it by
3 fax, you can send it by email, which is the particular one
4 that's at issue here.

5 THE COURT: All right. Let me limit my thought process.
6 There is no -- is it undisputed that there is no personal
7 service or fax?

8 MR. MCDONALD: It is undisputed.

9 THE COURT: All right. We're only dealing with email?

10 MR. MCDONALD: We're only dealing with email.

11 THE COURT: There's no registered or certified mail?

12 MR. MCDONALD: That is correct.

13 THE COURT: All right.

14 MR. MCDONALD: Then it requires that it be given to the
15 bonded contractor at a particular place. At the place where
16 the bonded contractor maintains a permanent office for the
17 conduct of his business or at the current address shown at
18 the records at the Department of Labor, License, and
19 Regulation. There is no dispute that Walker White's
20 permanent office is in Columbia, South Carolina.

21 THE COURT: Okay.

22 MR. MCDONALD: There is no dispute that Mr. J.T. East
23 was at all times for this project working at the job site
24 trailer. Mr. East says that in his affidavit. Both of the
25 affidavits from the Hard Hat folks say that's where we

1 always met Mr. East and developed a relationship with Mr.
2 East.

3 So, Your Honor, if this wasn't -- there's a fair amount
4 of money at issue here. The claim is over \$100,000 and so,
5 you know, if it was a couple thousand dollars we wouldn't be
6 here, obviously. We might not be arguing over these things,
7 but the statute was passed in 2000. I think that was
8 important to keep in mind. What was the legislature
9 intending, which is, as Your Honor knows, is the rule of
10 statutory construction, and it's clear what the legislature
11 was intending was when you're going to give a Notice of
12 Furnishing, you've got to give it to -- you've got to put it
13 in writing, you've got to give it to a responsible person,
14 the bonded contractor. It doesn't say who, it says bonded
15 contractor. And then it says a contractor or sub-
16 contractor. I would submit to the Court that it means, it
17 has to mean a person of suitable responsibility. I would
18 submit the registered agent or an officer of the company
19 would be appropriate. In this case, Hard Hat's position is
20 we sent an email to the assistant project manager who works
21 at the job site, not at the home office.

22 THE COURT: Mr. East.

23 MR. MCDONALD: Mr. East. So Mr. East got these emails
24 as he says in his affidavit and at his computer at the job
25 site trailer. So the intent of this statute when it was

1 passed, I submit, was that you've -- remote claim that
2 you've got to give Notice of Furnishing to the bonded
3 contractor at their permanent place of business, and it
4 simply does not meet the statute to send an email, which is
5 a stretch, for sure, to conclude their Notice of Furnishing
6 materials when they are clearly more sales pitches to an
7 assistant project manager at the job site where he received
8 it. It just doesn't meet -- it doesn't meet any of them --

9 THE COURT: Is the permanent office for the conduct of
10 business the same as the address shown on the LLR records?

11 MR. MCDONALD: It is. It's Shakespeare Road in
12 Columbia.

13 THE COURT: It's not two different addresses?

14 MR. MCDONALD: No, sir. Now, -- and what's interesting
15 in this case is, you've got two notice forms in this
16 statute. You've got your Notice of Furnishing, which
17 presumably you do before you provide your labor, and then
18 you've got your Notice of Claim once you are owed money.

19 THE COURT: Yeah.

20 MR. MCDONALD: And that's a little better because it
21 says you give it by certified or registered mail. But,
22 again, it says to the bonded contractor, the same term that
23 uses here. Well, what's interesting in this case is that
24 Hard Hat want to say --

25 THE COURT: All right. Hang on one second. Hang on one

1 second. This just -- that statute just deals with the
2 Notice of Furnishing.

3 MR. MCDONALD: No, sir. It's two-prongs --

4 THE COURT: I've got a copy of it in front of me, and
5 I'm trying to look at yours, too.

6 MR. MCDONALD: The Notice of Furnishing --

7 THE COURT: Where is the Notice of Claim in there --

8 MR. MCDONALD: It's right here.

9 THE COURT: There it is.

10 MR. MCDONALD: -- giving notice by certified or
11 registered mail to the bonding contractor within 90 from the
12 last date they worked on the job.

13 THE COURT: Okay.

14 MR. MCDONALD: And there's no dispute that Hard Hat --

15 THE COURT: Right.

16 MR. MCDONALD: They did this and the writ is attached to
17 the affidavit of Bob White, but what's interesting is they
18 knew when they gave that notice, they sent it to Bob White
19 by certified mail, they knew how to find the registered
20 agent for Walker White. Not only that, they gave the surety
21 notice --

22 THE COURT: I'm sorry. Start the Notice of Claim part
23 over again.

24 MR. MCDONALD: Okay.

25 THE COURT: They gave the Notice of Claim and how?

1 MR. MCDONALD: They gave the Notice of Claim by
2 certified mail to Bob White, who is the registered agent and
3 an officer of Walker White by certified mail.

4 THE COURT: At where?

5 MR. MCDONALD: At their -- at their principle address in
6 Columbia, the home office.

7 THE COURT: So they would meet the standards.

8 MR. MCDONALD: So they met that standard.

9 THE COURT: All right.

10 MR. MCDONALD: But the point is they want to come in
11 this Court and say, well, we met this standard of Notice of
12 Furnishing --

13 THE COURT: By email.

14 MR. MCDONALD: -- by email to an assistant project
15 manager at the job site. And I point out that's it's clear
16 that Hard Hat knew how to give notice and who to give notice
17 to because they did when it was time for a claim on the
18 money.

19 So they did not meet -- they simply did not meet the
20 statutory requirement for a Notice of Furnishing material
21 and the emails do not meet it, so, therefore, as a matter of
22 law, Walker White is entitled to this defense and the issue
23 is whether or not whether we owned Willie or Mechanical HVAC
24 any money when we got notice, and in the affidavit of Amy
25 Miller, which we submitted, she sets for they did not. They

1 paid Mr. Miller -- Mr. Carver every week. When they got
2 notice that Hard Hat was owed money they quit sending Mr.
3 Carver labor, he couldn't do any more work, he was
4 terminated.

5 Now, one interesting piece of background is that after
6 Hard Hat sent these emails, they sent three, a total of
7 three and --

8 THE COURT: Let me stop you to get my facts straight.

9 MR. MCDONALD: Yes, sir.

10 THE COURT: Notice -- you've acknowledged that notice of
11 the claim was properly made.

12 MR. MCDONALD: Yes, sir.

13 THE COURT: And -- but you're telling me that at that
14 time there was no money owed Mr. Carver?

15 MR. DONALD: That is correct, sir.

16 THE COURT: According to the statute --

17 MR. MCDONALD: Yes.

18 THE COURT: All right.

19 MR. MCDONALD: We -- we -- our positions's there's no
20 factual dispute --

21 THE COURT: All right.

22 MR. MCDONALD: -- that we don't owe them any money.

23 Now, after Hard Hat gave some emails in September and
24 October of 2009, they worked and sent labor to Mechanical
25 for about four months and during that four month period of

1 time they got five bad check totally \$60,000.

2 THE COURT: Bring that statute back up here, please.

3 MR. MCDONALD: Yes, sir.

4 THE COURT: It's easier for me to read yours than it is
5 mine.

6 MR. MCDONALD: They got five bad checks from Mr. Carver,
7 over \$60,000 and some no paid, so that's why we're dealing
8 with a \$100,000 issue, which was first brought to Walker
9 White's attention much later in January, 2010. So --

10 THE COURT: Can I stop you?

11 MR. MCDONALD: Yes, sir.

12 THE COURT: I'm still trying to get my head on straight.

13 MR. MCDONALD: Okay.

14 THE COURT: The email of August 4th, doesn't say
15 anything about furnishing labor and materials; August 4,
16 2009, is that right?

17 MR. MCDONALD: That's our position. It does not.

18 THE COURT: All right. The email of August 25th.

19 MR. MCDONALD: I believe it's September.

20 THE COURT: I've got another one, August 25th. It
21 doesn't appear to reference the actual furnishing of labor
22 and materials. Email September 29th -- he says they have
23 sent general laborers reporting to the GC. October 22nd,
24 sent two laborers and if you need clean-up guys, I have two
25 more.

1 Okay. Are those the only emails at issue?

2 MR. MCDONALD: Those are the only emails --

3 THE COURT: All right.

4 MR. MCDONALD: -- that we have. Again, I submit that
5 they do not meet -- the only thing is there an email, but
6 the rest of the thing -- they don't give sufficient Notice
7 of Furnishing. They aren't to the bonded contractor in
8 respect they aren't sent to a person of suitable
9 responsibility. They aren't to a person -- to the home
10 office.

11 THE COURT: Right.

12 MR. MCDONALD: And the problem is, Your Honor, you know,
13 now you can get an email riding in your car down the road.
14 2000, what was the intent? An email sent to the home --
15 intent is clear that you're supposed to give notice to a
16 suitable person at the home office, and there is no dispute
17 here that that was not done. So that's certainly the
18 primary position, that these emails do not meet the
19 statutory requirement of the Notice of Furnishing.

20 THE COURT: All right.

21 Mr. WALL.

22 MR. WALL: Thank you, Judge.

23 I've handed Mr. McDonald a memorandum, and I'm going to
24 hand you ours, as well.

25 I think at the outset that it's important for the Court

1 to engage in a little bit of close reading of not just one
2 provision of the mechanics lien law, not just 29-5-40, but
3 the totality, and there's a more subsections of the
4 mechanics lien law. So we've got to engage in a little
5 close reading of the statute, and we also have to engage in
6 a little close reading of the bond itself in this case.

7 THE COURT: Well, the statute -- and the case is under
8 the statute requires pretty strict compliance.

9 MR. WALL: Well, Your Honor, I want to point you to a
10 couple of things, if you'll --

11 THE COURT: Sure.

12 MR. WALL: -- because there's more than 29-5-40.

13 THE COURT: That's right.

14 MR. WALL: There's way more than that. And the first
15 thing I want to point to Your Honor, and it's cited here in
16 our brief, and it's at 29-5-23; it's over on Page 4 of our
17 brief.

18 THE COURT: All right.

19 MR. WALL: That statute is called Notice of Project
20 Commencement. Do you see that?

21 THE COURT: I see it.

22 MR. WALL: Now, you're not entitled to assert this
23 defense, Your Honor, unless you have filed a Notice of
24 Project Commencement, and the authority for that is in the
25 middle part of the section there underlined.

1 THE COURT: All right. Hold on.

2 MR. WALL: The failure, the failure -- The failure to
3 file a Notice of Project Commencement shall render the
4 provisions of 29-5-40, this one, inapplicable.

5 THE COURT: Well, wouldn't that relate to --

6 MR. WALL: I --

7 THE COURT: -- not from the top down, but from the
8 bottom up?

9 MR. WALL: No, sir. If you look at the top of the
10 statute there, and it says -- and this is just a threshold
11 issues as to whether or not they can assert this --

12 THE COURT: Well, let me ask you a question and get it
13 straight in my head.

14 MR. WALL: All right.

15 THE COURT: It seems to me that reading that, would mean
16 -- would mean the application of that would mean that Walker
17 White couldn't -- couldn't collect for non-payment against
18 the bond of the owner, the performance bond of the owner
19 unless Walker White gave Notice of Commencement.

20 MR. WALL: No, sir.

21 THE COURT: Not that Walker White would be required to
22 pay --

23 MR. WALL: No, sir.

24 THE COURT: -- anybody below them if they don't give
25 Notice of Commencement?

1 MR. WALL: No, sir. I don't believe that's correct.

2 THE COURT: Why not?

3 MR. WALL: The way the -- the way the statute is
4 supposed to work, I believe, Your Honor, is --

5 THE COURT: Well, tell me how it does work.

6 MR. WALL: -- the general contractor --

7 THE COURT: Right.

8 MR. WALL: Files a Notice of Project Commencement.

9 THE COURT: Certainly.

10 MR. WALL: And when he files a Notice of Project
11 Commencement that puts the whole world on notice --

12 THE COURT: Sure it does.

13 MR. WALL: -- that we're under a different set of rules
14 here than the old mechanics lien law, and we've got this
15 derivative defense and same for bonds.

16 THE COURT: Well, okay, that would apply to the --

17 MR. WALL: Right, and what my point to Your Honor is,
18 Walker White did not file a Notice of Project Commencement
19 either. If you look at 29-5-23, if you look at the first
20 line, Judge, it's also highlighted.

21 THE COURT: I understand.

22 MR. WALL: Who can file one of these. Any person
23 entering into a direct contract with the owner or with the
24 consent of the owner. So it's not just frivolity, not just
25 first year frivolity to be eligible. Now, it's undisputed,

1 in this case, Your Honor, it's undisputed, they didn't file
2 a Notice of Commencement. So they're asserting this
3 statute, and there's a question as to whether or not they're
4 even entitled to assert it for their lack of filing a Notice
5 of Project Commencement.

6 But moving beyond that permit, moving beyond that
7 permit, Judge, I want to point Your Honor to a couple of
8 things about the lien law. There's three different notices
9 here in the lien law. There's the notice under 29-5-20, if
10 you look over on Page 3. That notice, and I've highlighted
11 that. That's very specific for a Notice of Furnishing.

12 THE COURT: Right. So what case it is interpreting?

13 MR. WALL: Correct. But we're on a bond here. We're
14 not on a lien. We're on a public -- we're on a private bond
15 issue.

16 THE COURT: So the same chapter?

17 MR. WALL: Correct. You look, and you see here 29-5-20,
18 in no event shall it exceed unless there's been a Notice of
19 Furnishing, and there's six bullet points, and specifically
20 on this Notice of Furnishing, this particular Notice of
21 Furnishing under the lien law can only be sent by certified
22 or registered mail. There's no facsimile, there's no
23 electronic notice. There's six things that are specified.
24 So that's one kind of notice, but that's not the kind we're
25 dealing with in this case.

1 THE COURT: Yes, sir.

2 MR. WALL: We're dealing with notice of the bond
3 statute.

4 THE COURT: All right.

5 MR. WALL: If you look at 29-5-40, which I've also cited
6 on my brief on Page 4, you'll see there's another kind of
7 notice, and this is the notice to the owner before the lien
8 attaches, before you have to file your affidavit of
9 statement of account. That's when a lien attaches. And it
10 says; shall in writing notify the owner of the furnishing of
11 such labor and materials. A very casual notice, just in
12 writing. Doesn't say certified. Doesn't say electronic.
13 It's just a general notice provision under 29-5-40. There's
14 another notice provision in the mechanics lien law. There
15 it is. It's very informal. Then we have 29-5-440, which is
16 the statute that they rely on.

17 Now, Judge, here the General Assembly has given us --
18 we've entered the electronic age.

19 THE COURT: Do you contend that the school site is the
20 permanent office of the --

21 MR. WALL: No, sir. And I don't believe it has to be
22 electronically -- and I want to point it out to you.

23 THE COURT: All right.

24 MR. WALL: I want you to read the statute closely.

25 THE COURT: I have.

1 MR. WALL: Electronic mail or sent by registered or
2 certified mail, or sent by registered or certified mail,
3 postage pre-paid to the bonded contractor at any place he
4 maintains a permanent office for the conduct of his
5 business.

6 Judge, fax or electronic mail or certified registered.
7 Judge, I maintain that this to the permanent place is a
8 qualifier to certified or registered mail or postage pre-
9 paid.

10 THE COURT: I disagree with that.

11 MR. WALL: Electronic mail goes to cyberspace, Your
12 Honor.

13 THE COURT: I disagree with that.

14 MR. WALL: I understand.

15 THE COURT: If that's the basis of your position I rule
16 against you.

17 MR. WALL: Well, well -- I hope you'll hear the --

18 THE COURT: Well, you can't just send a fax anywhere and
19 say that's proper notice.

20 MR. WALL: Judge, Judge --

21 THE COURT: Because the statute doesn't provide --

22 MR. WALL: Judge, Judge, we've got 29-5-40, which seems
23 to suggest that under the lien law that's -- that's -- that
24 initial notice --

25 THE COURT: Go ahead.

1 MR. WALL: -- notice to the owner.

2 THE COURT: Go ahead.

3 MR. WALL: Actual notice. So Judge, I understand your
4 position on that. I'll move on.

5 I want to talk to you, if you disagree with me on the
6 lien law and you want to impose a very strict requirement on
7 electronic mail only to home offices --

8 THE COURT: What I'm saying to you is that the case is
9 construing the mechanics lien law as a whole, and for
10 decades have construed the filing requirements strictly, as
11 far as I know.

12 MR. WALL: You are absolutely correct on the filing of a
13 Notice of Lis Pendis and mechanics liens, you're absolutely
14 correct. With respect to initial Notice of Furnishing, I'm
15 point to you, 29-5-40 that says notice to the owner is
16 notice, and then your lien lapses if you don't give the
17 formal notice, and that's the way the statute works, Judge,
18 and you may disagree with me on that, but that's in the lien
19 law. That's when the lien arises, that's when the claim
20 arises, that's when the owner is in the position to protect
21 the lien claimer. But I don't believe they are eligible to
22 assert this defense because they didn't file a Notice of
23 Project Commencement.

24 But moving beyond that to the electronic notices --

25 THE COURT: Well, let's get the record straight. I rule

1 against you on that, too.

2 MR. WALL: All right. All right. On the electronic
3 notices, on the electronic notices.

4 THE COURT: Yes.

5 MR. WALL: The -- you asked Mr. McDonald a while ago
6 whether we gave proper electronic notice. This statute says
7 you've got to give notice to the person to whom supplied
8 labor and materials, unless so forth and so on. Okay. And
9 these notices do that that. The notice of August 4th, says
10 we have -- we are working with MHS. Okay. Now, MHS is
11 Willie Carver Mechanical HVAC Systems. So Judge, we gave
12 notice there of who we were working with. We gave it --

13 THE COURT: I'm sorry. August 4th?

14 MR. WALL: Yes, sir.

15 THE COURT: All right.

16 MR. WALL: We gave it to Walker White dot com, and we
17 gave it electronically, and I realize you don't agree with
18 me on that, but we sent it to the Walker White dot com
19 address, which, I believe goes to their home office and is
20 circulated through that router. In our affidavits, we've
21 set forth that Mr. Schmidt, who we sent it to, was the
22 assistant project manager and held him out, held himself out
23 as having authority to bind Walker White, at least you can
24 infer from that. But Judge, let's move on, if you don't
25 like our electronic notice argument. I've made the record

1 on that.

2 I want to talk to Your Honor about bonds, because bonds
3 are still contracts, Judge. They're still contracts and
4 they're much more creations of contracts than they are
5 statute.

6 Now, in this situation, Judge, we are dealing with a
7 private bond. We are dealing with a private bond. The bond
8 that Great American Insurance posted from Walker White --

9 THE COURT: In other words, you're not dealing with York
10 High School --

11 MR. WALL: No, sir. The bond --

12 THE COURT: I understand.

13 MR. WALL: -- that Walker White posted --

14 THE COURT: I understand.

15 MR. WALL: -- is not a statutory bond. Now, in South
16 Carolina, if you look over at Page 8 of my brief I cite a
17 long list of cases, and I have copies of those for you, and
18 I've given Mr. McDonald copies, about common law bonds. And
19 I want to point a couple of things out to you about common
20 law bonds. The terms and conditions of the bond always,
21 always govern the coverage. Always.

22 THE COURT: I don't disagree with that.

23 MR. WALL: If you look at the terms and conditions of
24 this bond, which is attached to Mr. White's affidavit.

25 THE COURT: Do I have that somewhere?

1 MR. WALL: Yes, sir.

2 THE COURT: Where do I have that?

3 MR. WALL: In the submission from Mr. McDonald --

4 MR. MCDONALD: It's the affidavit of Robert White.

5 MR. WALL: It's Exhibit --

6 MR. MCDONALD: It's the bulldog clip.

7 MR. WALL: -- No. 1.

8 THE COURT: All right.

9 MR. WALL: Actually, Your Honor, it's probably easier to
10 find it from the back. If you go back past the last page
11 it's the next two documents, next two or three documents.
12 Actually, Exhibit No. 1 to the affidavit of Mr. White.

13 THE COURT: I see it.

14 MR. WALL: There's the payment bond. You'll note, Your
15 Honor, a couple of things about this bond. It doesn't have
16 an affidavit of claimant, it doesn't have a notice
17 provision. It doesn't refer to any statute. It doesn't
18 refer to any notice of any kind. It's a form written by the
19 insurance company, Great American. It says, the condition
20 of this bond is such that if principal, Walker White, shall
21 promptly make payment to all person supplying labor and
22 material in the prosecution of the work provided for in the
23 sub-contract --

24 THE COURT: Where are you reading, Mr. Wall?

25 MR. WALL: Page one on the bond down at the bottom,

1 Judge.

2 THE COURT: All right.

3 MR. WALL: Now, therefore the conditions.

4 THE COURT: Yes, sir.

5 MR. WALL: So it doesn't define, it doesn't cut off --
6 it simply says it's for the protection of persons supplying
7 labor and material in the prosecution of the work of which
8 we are undisputedly one. And over on this next page it says
9 in the second to the last paragraph in the middle there,
10 Your Honor. This bond shall insure to the benefit of all
11 persons supplying labor and material in the prosecution of
12 the work.

13 Now, Judge, this statute --

14 THE COURT: Well, wouldn't it be fair to say, though,
15 this bond -- the only person that Walker White owes in this
16 fact situation was Mr. Carver's business?

17 MR. WALL: No, sir, because there's no -- there's --
18 there's ambiguities involved.

19 THE COURT: Except for the provisions for liens and
20 whatnot.

21 MR. WALL: I disagree with that, Your Honor. I've cited
22 some cases that talk about that and in particular the
23 Georgia case and the New York case I cited and then the
24 South Carolina case. It says, it's Rish verses Theo
25 Brothers, (sp) and the SoCar case (sp) that says these

1 ambiguities in terms of coverage have to be construed in a
2 bond like an insurance policy in favor of coverage --

3 THE COURT: I understand that.

4 MR. WALL: And, Your Honor, they wrote the bond. They
5 wrote the bond.

6 Now, I want to point out that they -- they -- this is,
7 again, a private bond, and the terms and conditions of the
8 bond mean something. There is no question but that we are a
9 covered contractor under -- we're a person who supplied
10 labor and materials. There's no doubt about that. They
11 haven't defined claimant. Normally in a bond, Judge, that's
12 where you define claimant. A claimant is one who has a
13 contract with the principal or a sub-contractor to the
14 principal. That language is not here, Judge. That
15 limitation, that modifying language is not here. We have to
16 construe this bond in accordance the law of South Carolina,
17 which is to construe it broadly.

18 Now, I've cited --

19 THE COURT: But -- listen to me a minute, Mr. Wall.

20 MR. WALL: Yes, sir. Sure.

21 THE COURT: Are referring to the sentence immediately
22 above in witness whereof?

23 MR. WALL: In witness whereof --

24 THE COURT: Above that. Bond shall inure to the benefit
25 of all persons supply labor and material in the prosecution

1 of the work?

2 MR. WALL: Yes, sir. I'm referring to that and I'm also
3 referring to the bottom of Page 1.

4 THE COURT: All right.

5 MR. WALL: Both situations and I'm arguing, Your Honor,
6 that it broadly covers. There's no just first tier
7 limitations here. For that matter there's no second tier
8 limitation. It covers all persons. That's the language
9 that they employ. That's their language.

10 Now, in the Hemphill decision I cited for Your Honor.
11 Wheeling verses Algernon Blair case. The court was dealing
12 with a sub-contractor's bond, which had a four year notice
13 provision written into it and did at all comport -- it was a
14 sub-contractors bond on the Miller Act project and the Court
15 said that -- I'm not going to overlay this statutory
16 framework, I'm -- we have freedom of contract in South
17 Carolina, and if the surety writes a broad coverage bond
18 without reference to the limitations in the statute, then
19 the terms and the conditions of the bond are what cover
20 folks. It's like insurance, Your Honor. It's construed --

21 THE COURT: So you're telling me I can just dismiss
22 claim against Walker White, but not against American --

23 MR. WALL: Oh, I'm not suing Walker White, Judge. I'm
24 just suing on the bond.

25 THE COURT: All right.

1 MR. WALL: I'm just suing on the bond.

2 THE COURT: Great American?

3 MR. WALL: I'm just suing on the private bond. And my
4 point on the insurance, Judge, it's like minimum coverage.
5 It's like minimum coverage. An insurance company can write
6 in their policy less than that legal minimum coverage, but
7 they can certainly give more coverage. And what I'm saying
8 to you, Your Honor, is when the General Assembly in the year
9 2000, in the year 2000, and this is a case of first
10 impression. That's what we've got here. There's no case
11 like this in South Carolina. When the General Assembly
12 passed this law in 2000, they did not alter the rights of
13 every contract bond in the state of South Carolina. These
14 are the minimum requirements, like insurance, and they were
15 familiar, Judge, they were familiar with all this long line
16 of cases since 1923, that I cite in my brief that say the
17 terms and conditions of the bond govern the liability of the
18 surety.

19 Mr. McDonald argues the statute that he's just out, but
20 he doesn't look at his own bond.

21 THE COURT: All right. Stop for a second. What about
22 the language in the statute that says a remote claimant
23 shall have a right of action on the payment bond only upon
24 giving written notice by certified or registered mail and
25 the rest is in bold.

1 MR. WALL: Well, Judge, that's the crux of it. If you
2 -- if you were to determine that all bonds in South Carolina
3 are henceforth statutory bonds, you would be right.

4 THE COURT: I'm not. I'm saying the statute says you
5 can't bring an action on it --

6 MR. WALL: Judge, and I've cited cases, I've cited cases
7 for you where the bond was the statute of play, i.e. the
8 Miller Act, i.e. the Lindler Act, the Highway Department
9 bond, where the bond was actually issued and it was broader
10 in coverage like an insurance policy. It was broader, it
11 had a four year period of limitation. It had more than 90
12 days. It covered rental equipment. It's for coke and fuel.
13 It covered things beyond, but beyond the statute -- and the
14 court said, hum, how do we -- we've got a bond statute --
15 even a public bond statute -- we've got a bond statute that
16 says thou shall issue this bond and it shall be
17 circumscribed to these terms and conditions, but the terms
18 and conditions of the bond are broader, who wins. And Your
19 Honor, every case in South Carolina, every case that I've
20 cited you, and this is the law. The bond wins. The
21 language of the bond.

22 Here's my point, Judge, 2000, the General Assembly was
23 aware of these cases. They were aware -- the surety could
24 have said in the bond, the term and conditions of this bond
25 are that thou shall sent electronic mail pursuant to 29-5-

1 40. They wrote the bond. This is a 19 -- this is a 2008
2 bond.

3 THE COURT: Are you telling me that they didn't have a
4 right -- when they wrote this after those cases were
5 decided, you're telling me that you didn't have a right to
6 rely on the fact that the statute says that the bond -- that
7 the claimant only has a right of action on the payment bond
8 if he gives -- meets the requisite notice requirement?

9 MR. WALL: I'm telling you is that the surety, if he
10 wants to condition his obligations, needs to put the terms
11 and condition of those obligations into his bond,
12 particularly if it's a non-statutory bond.

13 THE COURT: So that's the nut of your argument?

14 MR. WALL: Well, there's two more pieces to it, Judge.
15 I know I've gone on a long time, but I have two more parts
16 to it. But these cases are lined up. There's no cases that
17 I've been able to find where they've said we're going to
18 modify a common law, a private bond because of -- and impose
19 language that's not in that bond based on a statutory
20 change. It's not happened.

21 THE COURT: Let's move on.

22 MR. WALL: It's not in the law. And I think you'd be --

23 THE COURT: Let's move on.

24 MR. WALL: Judge, I wanted to say finally, the argument
25 that they raise, and this, again, is in my brief. The reason

1 this can't be so, the reason that this can't be so is that
2 it ends up being disparate treatment for second tier sub-
3 contractors. There's a diagram and this is in my brief.
4 And this is a hypothetical situation under their
5 interpretation, Judge, it would lead to this kind of result
6 where if the owner -- excuse me -- where if the principal
7 has filed a Notice of Commencement, and thereby entitled to
8 the protection, he files a Notice of Commencement. He's not
9 entitled to the protection.

10 THE COURT: Okay.

11 MR. WALL: And this person does not give -- excuse me --
12 this person has -- let me back up. Where the first tier sub
13 has been paid in full, okay, and there's no Notice of
14 Project Commencement, he would have a claim on the bond,
15 okay. Under Mr. McDonald's interpretation where the
16 principle on the bond is at the next tier down, it's not --
17 it's me -- I don't have a claim on the bond. He didn't file
18 the Notice of Project Commencement. I'm down here. I don't
19 have a claim on the bond. So what we have here is a
20 situation --

21 THE COURT: No, the bond says it covers anybody who
22 furnishes labor and materials and depending on whether I
23 agree with you or Mr. McDonald, if that person complies with
24 the statute.

25 MR. WALL: That's if you adopt his or --

1 THE COURT: He is protected. Assuming that he complied
2 with the statute in full, Mr. McDonald would have -- would
3 agree that you have to be paid under the bond.

4 MR. WALL: Yes. Assuming -- assuming that you're right,
5 but my point to you is his interpretation leads to a
6 situation where a remote tier claim where there's been no
7 Notice of Commencement filed, a remote tier claimant to a
8 general has a bond claim, but a remote tier claimant to a
9 first tier sub does not have a bond claim because -- because
10 the -- there was -- he's cut off. He's cut off.

11 THE COURT: Well, the statute is to protect the remote
12 claim.

13 MR. WALL: Well, that's precisely my point, Judge.
14 That's precisely my point.

15 THE COURT: Well, that seems to me to be sort of
16 circular, doesn't it?

17 MR. WALL: My point is his argument leads to very narrow
18 coverages where the subcontractor who posts a bond has
19 automatically (inaudible) less coverage on his bond than the
20 general who posts the bond under an analogous situation.
21 That's where his argument leads and I -- I'd have to let
22 Your Honor, study it, perhaps a little more, but that's
23 where his argument leads. My point on that, Judge, is
24 leading back to that South Carolina case where you --
25 remember when the statute used to allow only one side

1 attorneys fees and not the other side?

2 THE COURT: Right.

3 MR. WALL: That was unconstitutional --

4 THE COURT: I'm that old.

5 MR. WALL: -- found to be unconstitutional because it
6 created disparate treatment among claimants and I suggest to
7 Your Honor that that interpretation would be the same.

8 Finally, finally, Judge, we don't agree. We don't
9 agree that Walker -- that there are no issues of fact that
10 Walker White paid these guys in full. Their own affidavit
11 shows that there was conceivably some balance due; they
12 didn't pay the full amount under their own affidavit. They
13 rely on back-charges. There are issues of fact as to these
14 back-charges that they assessed against them in order to
15 wipe out our claim, so we don't agree there either, but it's
16 an important legal question, Your Honor, and if you're
17 inclined to agree with -- if you're inclined to agree with
18 Mr. McDonald on this I'd like -- of course, you would enter
19 judgment and, you know, we could get it sorted out, but
20 Judge, the statute we find ourselves wrestling with is far
21 from simple at all.

22 THE COURT: I didn't say it was clear or simple.

23 MR. WALL: I --

24 THE COURT: I've just got to rule on it.

25 MR. WALL: I understand. I understand, but I would urge

1 Your Honor to not throw out 60 years of common law
2 construing bonds --

3 THE COURT: All right.

4 MR. WALL: -- in terms of coverage.

5 THE COURT: Briefly, Mr. McDonald, briefly.

6 MR. MCDONALD: Briefly, Your Honor.

7 THE COURT: First thing I want to ask you is what -- a
8 ruling in your favor what do I need to do about any
9 undermined amount, any factual dispute over whether or not
10 all the money was paid?

11 MR. MCDONALD: Well, Your Honor, we have put forth in
12 the record evidence paid in full. They have brought forth
13 nothing to contest that.

14 THE COURT: All right.

15 MR. MCDONALD: End of story. Mr. Wall says it, but
16 there's nothing -- they've brought nothing to oppose that.

17 THE COURT: No affidavits?

18 MR. MCDONALD: No affidavits, nothing to speak to that.

19 THE COURT: No affidavits opposing --

20 MR. MCDONALD: No, sir.

21 THE COURT: All right.

22 MR. MCDONALD: They just hadn't put up any factual
23 issues, and Mr. Wall forgot to point out something to the
24 Court about the Notice of Project Commencement that is
25 critical, and that is this part that's in bold. The reason

1 we don't have to -- the reason it doesn't apply is because
2 the statute very clearly says it doesn't apply. It says the
3 failure to file a notice of project commencement shall also
4 render the provisions of 29-5-440, is what we're dealing
5 with --

6 THE COURT: Right.

7 MR. MCDONALD: -- inapplicable for a claim against a
8 payment bond furnished by a contractor holding a direct
9 contractual agreement with an owner.

10 THE COURT: Well, that's essentially what I said.

11 MR. MCDONALD: Right. That would be on the Edifice, not
12 Walker White.

13 THE COURT: Would it be what, Edifice had to furnish it
14 --

15 MR. MCDONALD: Right.

16 THE COURT: -- the school district.

17 MR. MCDONALD: We don't have to file one. The statute
18 makes it clear that it doesn't effect us whatsoever. It has
19 no bearing on 29-5-40 and I made my arguments. I don't need
20 to make any more of that other than to say Mr. Wall's
21 argument would be to ignore this, go with the bond, and
22 that's simply not the case. As the Court knows the law of
23 South Carolina is part of every contract and you can't
24 ignore the statute. It's part of the bond and it gives
25 rights to the bond, you know, sort of curiously, I'm not

1 even sure that the bond extends to them on its face, but
2 this statute does, and we don't dispute that.

3 I made my argument as to why there's no notice. Thank
4 you, Your Honor.

5 THE COURT: All right. I find that the -- that the
6 defendants -- you're just representing -- when you started
7 out, when I got all this material you were representing
8 American, Great American. Who are you representing now?

9 MR. MCDONALD: I'm still representing Great American.
10 At one time Edifice (inaudible) was in the case, too. They
11 have been dismissed.

12 THE COURT: All right. I find that Great American is
13 entitled to summary judgment. I think the notice and the
14 statute requires that any of those enumerated means of
15 notice be sent to the designated addresses in the statute.
16 Further find that the mechanics lien framework and the
17 similar provisions that have been plugged in as amendments
18 to that statute for public works have historically been
19 construed strictly because of the remote nature of various
20 labors and material men to the job and to the contractor and
21 the subcontractor, and that that notice is required and
22 failure to make that notice is fatal.

23 If you will email me an order, please.

24 MR. MCDONALD: I will do that. Thank you, Your Honor.

25 THE COURT: And email it in an editable form.

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MR. MCDONALD: Yes, sir.

MR. WALL: Do I take your ruling effective today or when we get the signed --

THE COURT: You can take it right now. I just ruled.

MR. WALL: All right.

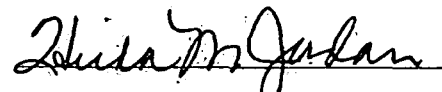
(This proceeding was concluded.)

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C-E-R-T-I-F-I-C-A-T-E

I, THE UNDERSIGNED HILDA M. JORDAN, CVR, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE MOTIONS HEARING OF THE CAPTIONED CAUSE, IN THE COURT OF THE MASTER IN EQUITY FOR YORK COUNTY, SOUTH CAROLINA, ON THE 15TH OF SEPTEMBER 2011.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.


Hilda M. Jordan, CVR

January 20, 2012

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
Hard Hat Workforce Solutions, LLC,	)	Case No.: 2010-CP-46-01951
)	
Plaintiff,)	
)	
v.	)	AFFIDAVIT OF AMY MILLER
)	
Mechanical HVAC Services, Inc.,)	
Great American Insurance)	
Company, and Liberty Mutual)	
Insurance Company,)	
)	
Defendant.)	

Personally appeared before me, the undersigned, who does state the following under oath:

1. My name is Amy Miller. I am over the age of 18 years old. I am employed by Walker White, Inc. as project manager.
2. I make this affidavit in my capacity as a project manager with Walker White and based upon my own personal knowledge.
3. Walker White acted as a subcontractor to Edifice, Inc. on a large school project in York County (the "Project"). I was the project manager for Walker White on this Project.
4. As project manager, my duties include coordinating the work of Walker White's own forces and managing and coordinating the work of any of Walker White's subcontractors.
5. Walker White entered into a labor only subcontract with Mechancial HVAC Services, Inc. on the Project for the installation of ductwork. The original subcontract amount was \$383,000.00.



**MECHANICAL HVAC PAYMENT
SUMMARY**

DATE	AMOUNT	CHECK NO.
5/21/2009	\$9,575.04	22242
5/29/2009	\$9,992.20	22291
6/4/2009	\$10,771.92	22371
6/18/2009	\$14,271.92	22468
6/26/2009	\$17,500.00	22542
7/2/2009	\$22,559.42	22495
7/10/2009	\$24,354.70	ELEC.TR.
7/16/2009	\$22,559.40	ELEC.TR.
7/23/2009	\$22,650.00	ELEC.TR.
7/30/2009	\$20,854.70	ELEC.TR.
8/6/2009	\$21,453.30	ELEC.TR.
8/13/2009	\$17,793.00	ELEC.TR.
8/20/2009	\$19,229.50	ELEC.TR.
8/27/2009	\$16,066.97	ELEC.TR.
9/3/2009	\$13,847.22	ELEC.TR.
9/10/2009	\$13,037.67	ELEC.TR.
9/17/2009	\$18,156.20	ELEC.TR.
9/24/2009	\$23,937.45	ELEC.TR.
10/1/2009	\$21,499.90	ELEC.TR.
10/8/2009	\$20,740.20	ELEC.TR.
10/15/2009	\$15,798.65	ELEC.TR.
10/22/2009	\$17,952.95	ELEC.TR.
10/29/2009	\$16,277.49	ELEC.TR.
11/5/2009	\$16,166.00	ELEC.TR.
10/10/2009	\$16,712.50	ELEC.TR.
11/19/2009	\$14,320.30	ELEC.TR.
12/4/2009	\$6,143.76	ELEC.TR.
12/10/2009	\$10,412.60	ELEC.TR.
12/17/2009	\$11,534.55	ELEC.TR.
12/23/2009	\$8,302.54	ELEC.TR.
12/30/2009	\$9,370.60	ELEC.TR.
1/7/2010	\$11,382.18	ELEC.TR.
1/14/2010	\$8,471.55	ELEC.TR.
1/21/2010	\$4,856.68	ELEC.TR.
1/28/2010	\$6,804.00	ELEC.TR.
2/4/2010	\$4,731.78	UNPAID
TOTAL	\$540,088.84	

Amy Miller

From: Marc Holcomb [mholcomb@callhardhat.com]
Sent: Monday, February 08, 2010 1:12 PM
To: amiller@walker-white.com; lschilling@walker-white.com
Cc: 'ROCKY HARTMAN'; 'Eric Schmidt'
Subject: Mechanical HVAC update
Attachments: MHVAC-Columbia-InvTime.pdf; MHVAC-York-InvTime.pdf

Good afternoon!

I just got off the phone with Willie concerning the open balance that we have been discussing. Willie has agreed to meet with us Monday, February 15th when he returns from Denver. Our corporate office received another check this morning from Mechanical HVAC that Willie instructed me not to deposit. Between the Columbia job & York High School job that we provided labor to, the latest balance owed is over \$101,000 which does not include last week's billing that is currently being processed. We now have 5 checks that are NSF totaling over \$60,000 and 1 check for \$8,000 that is not to be deposited due to a lack of funds.

Please understand our concern with this matter. We appreciate your cooperation in holding any money due to Mechanical HVAC depending upon the outcome of our meeting next Monday. I look forward to passing on positive news next week.

I have also attached an updated version of the invoices and timecards for each job

Thank you for your assistance.

Marc Holcomb
Senior Vice President
HardHat Workforce Solutions
704-239-7144 cell

times during my work on the Project, I worked out of a jobsite trailer in York County and not the principal office of Walker White in Columbia.

5. It was not until on or about January 18, 2010 that I was made aware that Hard Hat claimed it was owed money by Walker White's subcontractor, Mechanical HVAC Services, Inc. I was made aware of this claim when I received a phone call from Hard Hat at the jobsite trailer on or about this date.

6. My duties as assistant project manager did not involve coordinating, processing or handling payment to any suppliers or subcontractors of Walker White. Because of this, I reported the call from Hard Hat to my immediate supervisor, Amy Miller, for any appropriate follow-up and action.

7. From time to time, I received e-mails from Hard Hat which were received by me at the jobsite trailer in York County. These e-mails are attached hereto as Exhibit 1. I have searched my e-mail records on my company computer and have no record of receiving any other e-mails from Hard Hat.

8. I understand the e-mails from Hard Hat to be in the nature of an attempt to have me use their temporary labor services. However, I was not authorized to contract with any temporary labor services on the project and I did not represent to Hard Hat that I was so authorized.

9. With respect to the receipt of any legal notices from third parties, I am not a person within Walker White to whom such notices would be given. I am not involved in any way in procuring bonds or dealing with claims on bonds procured by Walker White nor have I ever held myself out as a person authorized to do so.

FURTHER AFFIANT SAYETH NOT.



J.T. East

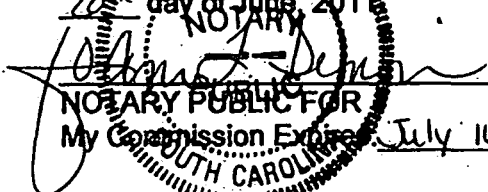
SWORN ~~(over)~~ before me this
20~~th~~ day of June, 201~~1~~
 (L.S.)
NOTARY PUBLIC FOR
My Commission Expires July 16, 2012
SOUTH CAROLINA

Exhibit 1 to East Affidavit

From: Eric Schmidt [mailto:eschmidt@callhardhat.com]

Sent: Thursday, October 22, 2009 11:18 AM

To: jeast@walker.white.com

Subject: Clean-up

JT,

Bo informed me that clean up is back on for full time down on that project. I send Bo 2 laborers and if you need clean up guys I can have 2 more sent down your way. Bill out rate is \$11.25 an hour and that covers all workers comp and all other burden costs. They come with all their PPE also. If you need anything feel free to contact me at anytime.

Thanks,

Eric Schmidt
Territory Manager
HardHat Workforce Solutions
(704) 332-6455 office
(704) 332-6475 fax
(704) 622-7068 cell

From: Eric Schmidt [mailto:eschmidt@callhardhat.com]

Sent: Tuesday, September 29, 2009, 10:06 AM

To: jeast@walker-white.com

Subject: General Labor

JT,

Along with helping out on the skilled end we have sent MHS general laborers who have been reporting to the general contractor. The bill out rate for these men is \$11.25 an hour. We pick up all workers comp and all other burden cost. All these men come drug tested and have all their PPE. If you need anything please feel free to contact me at anytime.

Thanks,

Eric Schmidt
Territory Manager
HardHat Workforce Solutions
(704) 332 6455 office
(704) 332 6475 fax
(704) 622 7068 cell

From: Eric Schmidt, [mailto:eschmidt@callhardhat.com]
Sent: Tuesday, August 25, 2009 3:31 PM
To: jeast@walker-white.com
Subject: Manpower

JT

I just wanted to shoot you over a copy of my most current available list. If you are in a pinch and need an operator, plumber or just a helper give me a call and let me know. As always we cover all workers comp, all taxes and all other burden costs. I hope all is well.

HardHat Workforce Solutions
8/25/2009

1.42

Name	Trade	Skill	Pay	Bill Out
Cordell, Lucas	Plumbing	Journeyman	17.00	24.15
Welch, Kelly	Plumbing	Journeyman	17.00	24.15
Vera, Ed	Plumbing	Journeyman	18.00	25.55
Murphy, Dino	Plumbing	Mechanic	15.00	21.30
Blake, Daniel	Plumbing	Top Helper	12.00	17.05
Gaudin, Rick	Plumbing	Top Helper	12.00	17.05

Thanks,

Eric Schmidt

Territory Manager
HardHat Workforce Solutions
(704) 332-6455 office
(704) 332-6475 fax
(704) 622-7068 cell

From: Eric Schmidt [mailto:eschmidt@callhardhat.com]
Sent: Tuesday, August 04, 2009 5:10 PM
To: least@walker-white.com
Subject: Manpower

JT,

Thanks for taking a couple minutes for me this afternoon. I will keep this as brief as possible. We are working with MHS and helping them set up some of the walk-ups that you guys have and want to try. If you have a few people that you are unsure of you can have them fill out my paperwork and run them through my payroll at a **1.36** bill out rate. Most of the time this comes very close to your actual burden cost. If you guys run into a snag and need additional skilled plumbers on your jobsite, you can call me anytime and the bill out rate to you will be **1.42**. All of my men come drug tested and have all basic hand tools and transportation. I have attached a copy of my most current available list. If you need anything please feel free to contact me at anytime.

HardHat Workforce Solutions

1.42

8/4/2009

Name	Trade	Skill	Pay	Bill Out
Gleason, Kevin	Plumbing	Journeyman	18.00	25.55
Filistovich, Mike	Plumbing	Journeyman	17.00	24.14
Dölford, Jack	Plumbing	Journeyman	17.00	24.14
Reters, Rene	Plumbing	Journeyman	16.50	23.43

Murphy, Dino	Plumbing	Mechanic	15:00	21:30
Blake, Daniel	Plumbing	Top Helper	12:00	17:04
Gaudin, Rick	Plumbing	Top Helper	12:00	17:04

Thanks,

Eric Schmidt
Territory Manager
HardHat Workforce Solutions
(704) 332 6455 office
(704) 332 6475 fax
(704) 622 7068 cell

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
Hard Hat Workforce Solutions, LLC,	)	Case No.: 2010-CP-46-01951
)	
Plaintiff,)	
)	
v.	)	AFFIDAVIT OF LINDA SCHILLING
)	
Mechanical HVAC Services, Inc.,)	
Great American Insurance)	
Company, and Liberty Mutual)	
Insurance Company,)	
)	
<u>Defendant.</u>)	

Personally appeared before me, the undersigned, who does state the following under oath:

1. My name is Linda Schilling. I am over the age of 18 years old. I make this affidavit based upon my own personal knowledge.
2. I am employed by Walker White, Inc. in the position of controller. An essential part of my job duties involves reviewing bills and invoices from Walker White's suppliers and subcontractors and coordinating the payment of same.
3. I work in Walker White's principal office on Shakespeare Road in Columbia, South Carolina.
4. I received an e-mail from Hard Hat Workforce Solutions on February 8, 2010. A true and correct copy of this e-mail is attached hereto as Exhibit 1.
5. I have searched my e-mail records on my company computer and have no record of receiving any e-mails from Hard Hat prior to the e-mail attached as Exhibit 1.

6. Prior to receiving this e-mail, I had no knowledge of what services that Hard Hat provided to the York County School project. I further had no knowledge of the status of payments to Hard Hat from Walker White's subcontractor, Mechanical HVAC Services, Inc.

FURTHER AFFIANT SAYETH NOT.

Linda Schilling

Linda Schilling

SWORN to before me this
20 day of June, 2011.
Karen A. Hill (L.S.)
NOTARY PUBLIC FOR
My Commission Expires 12/7/15

Exhibit 1 to Schilling Affidavit

Amy Miller

From: Marc Holcomb [mholcomb@callhardhat.com]
Sent: Monday, February 08, 2010 1:12 PM
To: amiller@walker-white.com; lschilling@walker-white.com
Cc: 'ROCKY HARTMAN'; Eric Schmidt
Subject: Mechanical HVAC update
Attachments: MHVAC-Columbia-InvTime.pdf; MHVAC-York-InvTime.pdf

Good afternoon!

I just got off the phone with Willie concerning the open balance that we have been discussing. Willie has agreed to meet with us Monday, February 15th when he returns from Denver. Our corporate office received another check this morning from Mechanical HVAC that Willie instructed me not to deposit. Between the Columbia job & York High School job that we provided labor to, the latest balance owed is over \$101,000 which does not include last week's billing that is currently being processed. We now have 5 checks that are NSF totaling over \$60,000 and 1 check for \$8,000 that is not to be deposited due to a lack of funds.

Please understand our concern with this matter. We appreciate your cooperation in holding any money due to Mechanical HVAC depending upon the outcome of our meeting next Monday. I look forward to passing on positive news next week.

I have also attached an updated version of the invoices and timecards for each job

Thank you for your assistance.

Marc Holcomb
Senior Vice President
HardHat Workforce Solutions
704-239-7144 cell

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
Hard Hat Workforce Solutions, LLC,	)	Case No.: 2010-CP-46-01951
)	
Plaintiff,)	
)	
v.	)	AFFIDAVIT OF ROBERT WHITE
)	
Mechanical HVAC Services, Inc.,)	
Great American Insurance)	
Company, and Liberty Mutual)	
Insurance Company,)	
)	
<u>Defendant.</u>)	

Personally appeared before me, the undersigned, who does state the following under oath:

1. My name is J. Robert White. I am over the age of 18 years old. I am an officer with Walker White, Inc.
2. I make this affidavit in my capacity as an officer of Walker White and based upon my own personal knowledge.
3. Walker White is a South Carolina corporation headquartered in Columbia, South Carolina. Walker White is a licensed mechanical contractor in South Carolina.
4. Walker White acted as a subcontractor to Edifice, Inc. on a large school project in York County.
5. Walker White maintained a temporary jobsite office for this project. Walker White has only one permanent office for the conduct of its business which is located at 5728 Shakespeare Road, Columbia, S.C. 29223. This is the same address shown on the

records of the Department of Labor Licensing and Regulation relating to Walker White, Inc.

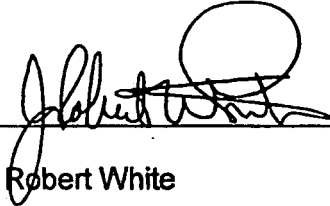
6. As part of its subcontract requirements, Walker White furnished a payment bond. Walker White is the principal on the bond, Great American Insurance Company is the surety, and Edifice, Inc. is the obligee. A true and correct copy of the bond is attached hereto as Exhibit 1.

7. The corporate records of Walker White reflect that the first written notice by certified mail that Walker White received from Hard Hat Workforce Solutions is the letter dated March 5, 2010 attached hereto as Exhibit 2.

8. The corporate records of Walker White do not reflect that Hard Hat Workforce Solutions, LLC ever provided notice of furnishing labor to Walker White at its permanent office located at 5728 Shakespeare Road, Columbia, S.C. 29223.

9. I am the officer with Walker White primarily responsible for the financial management of the company as well as the legal affairs of the corporation. The company policy and directive is that any legal notices provided to Walker White are quickly brought to my attention. Until shortly after March 5, 2010, I knew nothing about Hard Hat or its claim for payment for labor provided to Walker White's subcontractor, Mechanical HVAC Services, Inc.

FURTHER AFFIANT SAYETH NOT.



J. Robert White

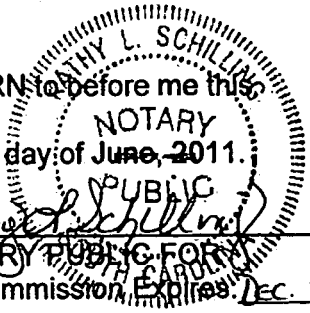
SWORN to before me this
20 day of June, 2011.

Anthony L. Schilling (L.S.)
NOTARY PUBLIC FOR
My Commission Expires: Dec. 7, 2015

Exhibit 1 to White Affidavit

Attachment "G"

PAYMENT BOND
(Subcontract)

Bond No. 545-51-52

KNOW ALL BY THESE PRESENTS, That Walker White, Inc., 5728 Shakespeare Road, Columbia,
SC 29223

(hereinafter called the "Principal"), as Principal and Great American Insurance Company, 580 Walnut Street
Cincinnati, OH 45202

a corporation organized and existing under the laws of the State of Ohio

(hereinafter called the "Surety"), as Surety, are held and firmly bound onto Edifice, Inc., P.O. Box 36349
Charlotte, NC 28236

Seventeen Million Three Hundred Fifty-Eight
(hereinafter called the "Obligee"), in the sum of Thousand Forty-three Dollars and Zero Cents Dollars

(\$ 17,358,043.00***), for the payment of which sum well and truly to be made, the said Principal and Surety bind themselves, and their respective heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents

WHEREAS, the Obligee has been awarded a contract (hereinafter called the "Prime Contract"), by York School District 1, 1475 East Liberty Street, York, SC 29745

for York Comprehensive High School and Floyd D. Johnson Tech Center
York, SC and;

WHEREAS, the Principal has entered into a written Subcontract with the Obligee, dated October 21, 2008 to perform, as Subcontractor, certain portions of the work in connection with said Prime Contract, consisting of HVAC and Plumbing

which Subcontractor is hereby referred to and made a part hereof

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said Subcontract and any and all modifications of said Subcontract that may hereafter be made, then this obligation shall be null and void otherwise it shall remain in full force and effect.

Attachment "G"

Bond No. 545-51-52

The said Surety agrees that no change, extension of time, alteration, additional, omission, or other modification of the terms of either the said Subcontract or the Prime Contract, or both, or in the said work to be performed, or in the specifications, or in the plans, shall in anywise affect its obligation on this Bond, and it does hereby waive notice of any such changes, extensions of time, alterations, additions, omissions, and other modifications

There said Principal and the said Surety agree that this Bond shall inure to the benefit of all persons supplying labor and material in the prosecution of the work provided for in said Subcontract, as well as to the Obligee, and that such persons may maintain independent actions upon this Bond in their own names

IN WITNESS WHEREOF, the above bounden parties have executed this instrument under their several seals this 3rd day of February, 2009, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

Walker White, Inc. (Seal)
(Principal)
5728 Shakespeare Road
Columbia, SC 29223
(Business Address)

Witness.

Or Secretary's Attest

By: _____
(Signature and Title)

Great American Insurance Company (Seal)
(Surety)
580 Walnut Street
Cincinnati, OH 45202
(Business Address)

Witness.

Or Secretary's Attest

By: J. M. M., Attorney-in-fact
(Signature and Title)

Exhibit 2 to White Affidavit



Workforce Solutions, Inc.

March 5, 2010

By Certified Mail – Return Receipt Requested

Bond Claims
Great American Insurance Company
PO Box 2119
Cincinnati, OH 45201

Re: HardHat Workforce Solutions, LLC Notice of Claim Being Made Pursuant
to Performance Bond No. 545-51-52.

Claimant:	HardHat Workforce Solutions, LLC
General Contractor:	Edifice, Inc.
Sub Contractor:	Walker White, Inc.
Last Day Worked:	February 5, 2010
Surety:	Great American Insurance Company
Performance Bond No:	545-51-52
Amount Claimed:	\$108,337.68
Project:	York Comprehensive High School and Floyd D. Johnson Tech Center, York, South Carolina, Contract consisting of HVAC and Plumbing.

Dear Sir or Madam:

This letter shall serve as written notice as is required by the bond noted above that HardHat Workforce Solutions, LLC hereby makes a claim against the bond for Walker White, Inc., in an amount in excess of \$108,337.68 for the project noted above. Claimant HardHat Workforce Solutions, LLC (HardHat) a construction labor contractor, contracted with Mechanical HVAC Services, Inc., a Subcontractor for Walker White, Inc., to furnish labor on the project noted above.

A copy of all unpaid invoices and corresponding time cards are attached hereto and incorporated by reference as if fully set forth herein.

Sincerely,

Marc Holcomb
Senior Vice President
HardHat Workforce Solutions

1373 E. Morehead St., Suite 210 • Charlotte, NC 28204
(704) 332-6455 • Fax (704) 332-6475

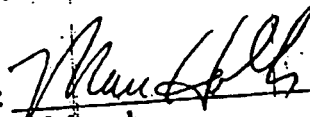
Via Certified Mail Return Receipt Requested
York School District No 1
ATTN: Matt Brown
PO Box 770
York, South Carolina 29754

Via Certified Mail Return Receipt Requested
Edifice, Inc.
ATTN: Eric N. Laster, Registered Agent
PO Box 36349
Charlotte, North Carolina 28236

Via Certified Mail Return Receipt Requested
Walker White, Inc.
ATTN: J. Robert White, Registered Agent
635 Elmwood Avenue
Columbia, South Carolina 29201

Via Certified Mail Return Receipt Requested
Mechanical HVAC Services, Inc.
Attn: Willie Carver, Registered Agent
200 West 12th Street, Suite D
Tifton, Georgia 31794

HardHat Workforce Solutions, LLC

By: 
Marc Holcomb
Senior Vice President
HardHat Workforce Solutions

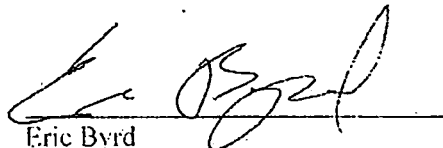
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK	)	Civil Action No.: 2010-CP-46-1951
)	
Hard Hat Workforce Solutions, LLC.)	
)	
Plaintiff.	)	AFFIDAVIT OF ERIC BYRD
)	
v.)	
)	
Mechanical HVAC Services, Inc., &)	
Great American Insurance Company &)	
Liberty Mutual Insurance Company)	
)	
Defendants.)	
_____)	

Personally appeared before me Eric Byrd, who after being duly sworn states under oath:

1. My name is Eric Byrd. I am over the age of 21 and competent to make this affidavit.
2. In 2009, I served as the Regional Manager for Hard Hat Workforce Solutions ("Hard Hat"). During this time our company was engaged to provide labor to Mechanical HVAC Services, Inc. ("MHIS") in connection with certain mechanical contracting work at the New York Comprehensive High School and Floyd D. Johnson Tech Center ("the Project"). MHIS was a subcontractor to Walker White Mechanical ("Walker White") who was a subcontractor to Edifice, Inc., the general contractor for the Project.
3. During our time on the Project, I communicated on occasion with agents and employees of Walker White. With respect to Walker White, my primary point of contact was with Mr. J.T. East who held himself out to be a project manager and or a person with managerial capacity for Walker White. Mr. East was thoroughly aware of the nature of Hard Hat's work on the Project. I visited his jobsite office on at least one occasion and introduced myself to Walker White employees on the Project, including Mr. East. I

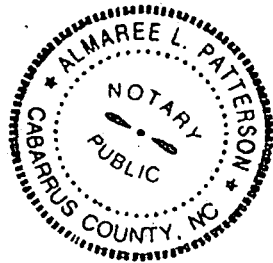
advised Mr. East of the nature of services we were providing to the Project in the Fall of 2009. I am certain it was the Fall of 2009, because I can vividly remember a friendly conversation I had with Mr. East about the football season. On this occasion, I visited the Project and conducted a safety briefing of our employees who were working on the Project. Mr. East allowed our company to use his trailer to host this event and he was aware by observing the number of persons attending the meeting of the considerable involvement of Hard Hat personnel engaged on his jobsite. He was also made aware by me that Hard Hat was not an affiliate, but rather under contract with MHS as an independent contractor and Hard Hat was available to assist Walker White directly in the event they required any temporary skilled labor.

4. Walker White was aware of Hard Hat's presence, scope of work, involvement, and role as a subcontractor to MHS and Walker White's project management was aware of our participation on the Project and had actual notice as early as the Fall of 2009.


Eric Byrd

Sworn and subscribed before me this
12 day of September, 2011.

Notary Public: Almarea L. Patterson
My Commission Expires: 12/13/2015



STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 Hard Hat Workforce Solutions, I.L.C.)
)
 Plaintiff:)
)
 v.)
)
 Mechanical HVAC Services, Inc., &)
 Great American Insurance Company &)
 Liberty Mutual Insurance Company)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 Civil Action No.: 2010-CP-46-1951

AFFIDAVIT OF ERIC SCHMIDT

Personally appeared before me Eric Schmidt, who after being duly sworn states under oath:

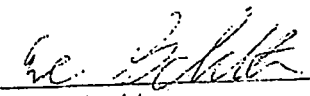
1. My name is Eric Schmidt, I am over the age of 21, and competent to make this affidavit.
2. In 2009, I served as the Territory Manager for Hard Hat Workforce Solutions ("Hard Hat"). During this time our company was engaged to provide labor to Mechanical HVAC Services, Inc. ("MHS") in connection with certain mechanical contracting work at the new York Comprehensive High School and Floyd D. Johnson Tech Center ("the Project"). MHS was a subcontractor to Walker White Mechanical ("Walker White") who was a subcontractor to Edifice, Inc., the general contractor for the Project.
3. During our time on the Project, I communicated frequently with MHS, and regularly with agents and employees of Walker White. With respect to Walker White, my primary point of contact was with Mr. J.T. East who held himself out to be a project manager and/or a person with managerial capacity for Walker White. Mr. East was thoroughly aware of the nature of Hard Hat's work on the Project. I occasionally visited his jobsite office and, on occasion, he allowed Hard Hat to use his office to conduct safety briefings and meetings

and conduct routine office work such as sending and receiving faxes, when required. Mr. East was made aware Hard Hat's involvement on the project, our scope of services to MHS, and also advised that we could provide temporary labor to assist Walker White, if needed. Mr. East provided me with his corporate business email address and I contacted him at this company electronic web address on numerous occasions during the course of the Project.

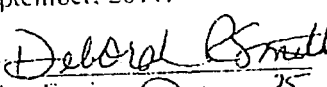
4. The earliest electronic notice to Walker White's electronic domain occurred on August 4, 2009 at 5:10 p.m. A true copy of this electronic notice is attached hereto as **exhibit A**. In this notice, I advised Walker White that Hard Hat was "working with MHS and helping them set up some of the walk ups that you guys have and want to try...". Hard Hat is in the business of providing temporary skilled mechanical workers to contractors. A "walk up" is a person who ordinarily inquires as to the possibility of work at a project; they "walk up" to the jobsite trailer and apply. Often contractors will use a service like ours when they want to try out an employee on a temporary basis rather than making a direct job offer, and we are able to serve as an intermediary. The purpose of this email was to provide Walker White with the nature of the services we were providing to MHS, and were available to provide to Walker White. I also advised Mr. East that we had other skilled labor available to assist them on an "as needed" basis. There is no doubt in my mind that Mr. East was well-aware of our presence on the project, the scope of our work and the sub to whom we were working as early as August 4, 2009.
5. On September 29, 2009, I sent Walker White another electronic notice attached at **exhibit B**. This electronic communication stated: "...we have sent MHS general laborers who

have been reporting to the general contractor...". This was, to my knowledge, the second electronic notice of furnishing we provided to the management of Walker White.

6. Finally, On October 22, 2009, I sent Walker White a third electronic message establishing our involvement and presence on the job which is attached at exhibit C. I informed Walker White that "I send [sic] Bo (an employee of MHS) 2 laborers and if you need clean up guys I can have 2 more sent down your way..."
7. The purpose of these notices was three-fold: 1) we wanted to ensure that Walker White was aware that we had provided and were providing labor MHS, 2) we wanted to offer additional services to Walker White directly, and 3) we wanted to ensure that Walker White was aware of our scope and had full notice of our continuing involvement in the Project so that in the event that Walker White had any objections or problems with our participation, they could contact me for resolution.
8. Walker White was clearly provided electronic notice of Hard Hat's presence, scope of work, involvement, and role as a subcontractor to MHS and Walker White's project management was aware of our participation on the Project and provided with electronic notices to this effect on the dates indicated.


Eric Schmidt

Sworn and subscribed before me this
24th day of September, 2011.

Notary Public  Deborah R. Smith
My Commission Expires: June 25, 2012

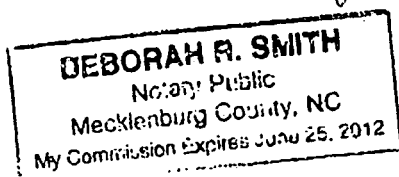


EXHIBIT A

From: Eric Schmidt [<mailto:eschmidt@callhardhat.com>]
Sent: Tuesday, August 04, 2009 5:10 PM
To: jeast@walker-white.com
Subject: Manpower

JT,

Thanks for taking a couple minutes for me this afternoon. I will keep this as brief as possible. We are working with MHS and helping them set up some of the walk ups that you guys have and want to try. If you have a few people that you are unsure of you can have them fill out my paperwork and run them through my payroll at a **1.36** bill out rate. Most of the time this comes very close to your actual burden cost. If you guys run into a snag and need additional skilled plumbers on your jobsite, you can call me anytime and the bill out rate to you will be **1.42**. All of my men come drug tested and have all basic hand tools and transportation. I have attached a copy of my most current available list. If you need anything please feel free to contact me at anytime.

HardHat Workforce Solutions
8/4/2009

1.42

Name	Trade	Skill	Pay	Bill Out
Gleason, Kevin	Plumbing	Journeyman	18.00	25.55
Filistovich, Mike	Plumbing	Journeyman	17.00	24.14
Dolford, Jack	Plumbing	Journeyman	17.00	24.14
Peters, Rene	Plumbing	Journeyman	16.50	23.43

Murphy, Dino	Plumbing	Mechanic	15.00	21.30
Blake, Daniel	Plumbing	Top Helper	12.00	17.04
Gaudin, Rick	Plumbing	Top Helper	12.00	17.04

Thanks,

Eric Schmidt
Territory Manager
HardHat Workforce Solutions
(704) 332 6455 office
(704) 332 6475 fax
(704) 622 7068 cell

EXHIBIT B

From: Eric Schmidt [<mailto:eschmidt@callhardhat.com>]
Sent: Tuesday, September 29, 2009 10:06 AM
To: jeast@walker-white.com
Subject: General Labor

JT,

Along with helping out on the skilled end we have sent MHS general laborers who have been reporting to the general contractor. The bill out rate for these men is \$11.25 an hour. We pick up all workers comp and all other burden cost. All these men come drug tested and have all their PPE. If you need anything please feel free to contact me at anytime.

Thanks,

Eric Schmidt
Territory Manager
HardHat Workforce Solutions
(704) 332 6455 office
(704) 332 6475 fax
(704) 622 7068 cell

EXHIBIT C

From: Eric Schmidt [<mailto:eschmidt@callhardhat.com>]
Sent: Thursday, October 22, 2009 11:18 AM
To: jeast@walker-white.com
Subject: Clean up

JT,

Bo informed me that clean up is back on for full time down on that project. I send Bo 2 laborers and if you need clean up guys I can have 2 more sent down your way. Bill out rate is \$11.25 an hour and that covers all workers comp and all other burden costs. They come with all their PPE also. If you need anything feel free to contact me at anytime.

Thanks,

Eric Schmidt
Territory Manager
HardHat Workforce Solutions
(704) 332 6455 office
(704) 332 6475 fax
(704) 622 7068 cell

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball, III, Circuit Court Judge

Case No. 2010-CP-46-1951

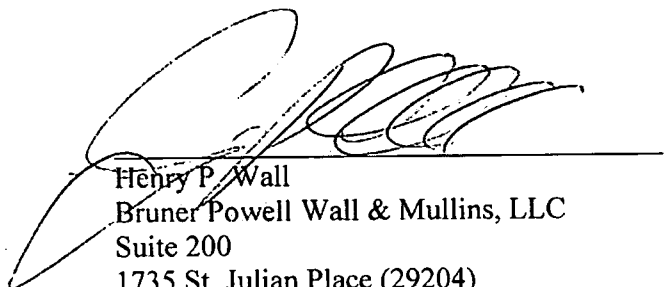
Hard Hat Workforce
Solutions LLC.....Appellant

v.

Mechanical HVAC
Services INC.....Respondent

CERTIFICATE OF COUNSEL

I, Henry P. Wall, do hereby certify that the *Record on Appeal* is in compliance with Rule (10)(g) and The Supreme Court Order dated June 5, 2012



Henry P. Wall
Bruner Powell Wall & Mullins, LLC
Suite 200
1735 St. Julian Place (29204)
Post Office Box 61110
Columbia, South Carolina 29260-1110
Phone: 803-252-7693
Attorneys for Appellant