

## **How Can A Second-tier Subcontractor Get Paid?** ***Bring Suit Against the General Contractor On the Payment Bond***

In April, the Supreme Court of Virginia rejected a second-tier subcontractor's attempt to sue the general contractor as a third-party beneficiary of the general's contract with the property developer. In a footnote, however, the Court pointed the way to a familiar lifeline for subcontractors: a suit against the general contractor as the principal on a payment bond.

In *Environmental Staffing Acquisition Corp v. B&R Construction Management*, \_\_\_ Va. \_\_\_, 725 S.E.2d 550 (2012), an asbestos abatement sub-subcontractor – ESA – submitted a claim for payment on the general contractor's payment. The trail was a dead-end, however, because the bonding company was defunct and hadn't been authorized to conduct business in Virginia anyway. Seeking another avenue for payment, ESA filed suit against the general contractor claiming that ESA was an intended third-party beneficiary of the general's contract with the developer. The general's contract required bonds for the protection of downstream contractors and so, ESA argued, the requirement was sufficient to grant ESA the right to bring a breach of contract claim against the general contractor.

The trial court dismissed ESA's suit, finding that the general's contract obligations to the developer could not be enforced for the benefit of ESA. The Supreme Court agreed, finding that there was no provision in the general contractor-developer agreement that expressly stated that the bonding requirement was put in place for the benefit of ESA. To the contrary, the Supreme Court held that ESA, as a subcontractor, was just an incidental beneficiary of the requirement as were all other subcontractors. Not even the Public Procurement Act's requirement to provide bonds on public projects was sufficient to raise ESA to the level of a party intended to have enforcement rights under the general-developer agreement.

A footnote by the Supreme Court, however, points out an avenue ESA could have taken to recover payment from the General Contractor. The Court takes pains to point out that the general was the principal on the payment bond issued by the defunct surety -- and that the bond made both the general and the surety "jointly and severally liable" to make payments to subcontractors under the bond. ESA, the Court notes, could have sued the general contractor for payment under the bond itself.

The take-away is that subcontractors and second-tier subcontractors do not have to rely on the solvency of the bonding company alone when an upstream contractor fails to pay. As a principal on a payment bond, the general contractor also is a viable avenue for recovery of unpaid sums through an action under the bond. Additional information may be obtained by contacting **Chandra Lantz** at [clantz@hf-law.com](mailto:clantz@hf-law.com) or 804.771.9586.