IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, for the use and benefit of SHEET METAL ENGINEERING, INC., Plaintiff, vs. JOB SHOPS CO. and UNITED STATES FIDELITY AND GUARANTY CO., Defendants.	NO. 4:05-cv-00080-RAW (Lead)
UNITED STATES OF AMERICA, for the use and benefit of TAYLOR INDUSTRIES, INC., and TAYLOR INDUSTRIES, INC., Plaintiff, vs. UNITED STATES FIDELITY AND GUARANTY COMPANY and JOB SHOPS COMPANY, Defendants.	RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND ORDER FOR JUDGMENT NO. 4:05-cv-183-RAW
UNITED STATES OF AMERICA for the use and benefit of WOLIN AND ASSOCIATES, INC., and WOLIN AND ASSOCIATES, INC., Plaintiff, vs. JOB SHOPS, CO.; UNITED STATES FIDELITY AND GUARANTY COMPANY; and FIDELITY AND GUARANTY INSURANCE COMPANY, Defendants.	NO. 4:05-cv-503

Before the Court following hearing are the cross-motions for summary judgment filed by plaintiff Taylor Industries, Inc. ("Taylor") [51], defendants United States Fidelity and Guaranty Company ("USF&G") and Fidelity and Guaranty Insurance Company ("FGIC") [52], and plaintiff Sheet Metal Engineering, Inc. ("Sheet Metal") [54]. These consolidated lawsuits under the Miller Act, 40 U.S.C. § 3131, *et seq.*, arise out of the construction of a veterinary services laboratory for the United States Department of Agriculture in Ames, Iowa beginning in 2002. Defendant Job Shops, Inc. ("Job Shops") was the general contractor for the project. Plaintiffs Taylor, Sheet Metal and Wolin and Associates, Inc. ("Wolin") had subcontracts with Job Shops to complete various portions of the project. They allege they were not paid in full for the work completed. These lawsuits for amounts due under the subcontracts were commenced February 15, 2005; March 28, 2005; and September 1, 2005, respectively. Default judgment has been entered in favor of plaintiffs against Job Shops in all of the captioned cases. Defendants USF&G and FGIC (affiliated companies hereinafter referred to collectively as "the Surety" unless otherwise indicated) each issued a payment bond associated with the project. They have denied liability to the plaintiff subcontractors on the basis that the scope of the payment bonds did not include the work performed by plaintiffs and, in addition, Wolin's claim is barred by the statute of limitations.

The Court has general federal question jurisdiction, 28 U.S.C. § 1331, and specific statutory jurisdiction under the Miller Act, 40 U.S.C. § 3133(b). The cases were consolidated for all purposes, the first two by order entered September 23, 2005, the last by order entered February 1, 2006. The case is before me pursuant to 28 U.S.C. § 636(c).

I.

SUMMARY JUDGMENT

A party is entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Erenberg v. Methodist Hospital, 357 F.3d 787, 791 (8th Cir. 2004)(quoting Fed. R. Civ. P. 56(c)). The Court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them, "that is, those inferences which may be drawn without resorting to speculation." Mathes v. Furniture Brands Int'l, Inc., 266 F.3d 884, 885-86 (8th Cir. 2001)(citing Sprenger v. Federal Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001)); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Reasonover v. St. Louis County, Mo., 447 F.3d 569, 578 (8th Cir. 2006); Erenberg, 357 F.3d at 791; Tademe v. St. Cloud State University, 328 F.3d 982, 987 (8th Cir. 2003). The moving party

must first inform the court of the basis for the motion and identify the portions of the summary judgment record which the movant contends demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Robinson v. White County, Ark., 459 F.3d 900, 902 (8th Cir. 2006). The non-moving party must then "go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue of material fact." Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita, 475 U.S. at 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Hartnagel, 953 F. 2d at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); see Ohio Cas. Ins. Co. v. Union Pacific Railroad Co., __ F.3d ___, 2006 WL 3476477, *3 (8th Cir. Dec. 4, 2006)("A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party."); Hitt v. Harsco Corp., 356 F.3d 920, 923 (8th Cir. 2004); Rouse, 193 F.3d at 939.

II.

FACTUAL BACKGROUND

On July 16, 2001, defendant Job Shops, as general contractor, was awarded a contract (the "construction contract") by the United States Department of Agriculture, Animal and Plant Health Inspection Service ("USDA"), for the design and construction of the "Bio-Hazard Level 2 and 3 Laboratories/APHIS National Veterinary Services Laboratory" located in Ames, Iowa (the "project"). (Taylor App. at 1-67). The construction contract bore a "Solicitation" number of APHIS 1-009 and a "Contract" number of 53-32KW-1-009. "APHIS 1-009" and "53-32KW-1-009" were used interchangeably to refer to the contract for the project. (Id. at 1). As the design/builder, Job Shops was responsible for providing both design and construction services to complete the project. (Id. at 1, 5-8). The original price of the construction contract was $2,005,601 - $243,901 for the design services and $1,761,700 for the construction services. (Id. at 2, 6, 8). The price was later raised to $3,577,515 to include additional square footage. (Surety App. at 172).

As generally required by the Miller Act, 40 U.S.C. § 3131(b)(2), the construction contract obligated Job Shops to furnish performance and payment bonds before beginning construction in amounts which were one hundred percent of the original contract price. (Taylor App. at 1, 33; Surety App. at 105, 136). In December

2001, Job Shops as principal obtained FGIC payment bond #400SD4209 in the amount of $68,135. (Surety App. at 175-179). A second payment bond #400SR3738 in the amount of $192,000 was obtained by Job Shops as principal from USF&G in June 2002. (Id. at 192-195).[1] Each identifies the construction contract as the source of the payment obligation to which the Surety is bound. The bonds (which are on government forms) contain identical descriptions of the bond conditions:

> The above [penal sum] obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

(Id. at 176, 195).

The penal sums of the bonds -- $68,135 and $192,000 -- were equal to the contract price to perform, respectively, the foundation and structural steel "packages" of the construction contract. (Surety App. at 173-74, 190-91). That Job Shops phased the construction contract for price and bonding purposes seems evident from April 9, 2002 correspondence and a May 1, 2002 e-mail exchange between Job Shops project manager, Roger Foster, and USDA contracting officer, Crystalynn Rudisaile. On April 9, 2002 Foster

[1] A signed copy of the bond may be found in Taylor's Appendix at page 68.

wrote that the structural steel was to be erected early in July 2002 and said he would "go ahead and start on getting the performance/payment bond and insurance in place for this work." (Surety Second Supp. App. at 394). This was followed by the May 1 e-mail in which Foster asked: "[F]or structural steel package pricing, do you want to handle it like a separate contract with a separate invoice? I have assumed we would since we are obtaining separate bonding." (Surety App. at 185). Rudisaile responded: "This approach is fine with me. The structural steel package pricing should be a separate package. This will help track costs and work." (Id.)

The construction project architect/engineer, Shive-Hattery, Inc., provided Job Shops with separate specification packages for "Foundations" and "Structural Steel." (Surety App. at 234-64, 265-307). An undated "Schedule of Values" shows the project split into three packages, the last and most expensive of which ($2,733,331) is described in the schedule as "Building package Phase 3," (id. at 350), or as Job Shops described it in a request for payment, the "Building Completion" package. (Id. at 224).

Apparently no payment bond was ever issued for the amount payable under the building completion package of the construction contract. Why is not completely clear, but the summary judgment record indicates work on that package was relatively far along when USDA noted Job Shops had not provided the remainder of the payment

bond. (Surety App. at 88, 100C, 366). Job Shops then attempted to obtain a payment bond from the Surety for the contract price to complete the contract, but because of Job Shops' financial position at the time the Surety declined to issue the larger bond. (Id. at 88, 231, 366-67).

On July 22, 2002 Job Shops entered into a "Subcontract Agreement" with Wolin to complete the "Mechanical Package" of the construction contract. (Surety App. at 308-320). On August 2, 2002 Job Shops entered into a "Subcontract Agreement" with Taylor under which Taylor was to complete the "Walk-in Cooler Package" of the construction contract. (Taylor App. at 91-106).On August 14, 2002 Job Shops entered into a "Subcontract Agreement" with Sheet Metal under which Sheet Metal was to complete the "Sheet Metal Package" of the construction contract. (Surety App. at 321-334).

None of the work performed by Wolin, Taylor and Sheet Metal involved the foundation or structural steel. The plaintiff subcontractors have not been paid. There does not appear to be any dispute that the following principal amounts are due and owing to them for labor and material furnished in carrying out the work performed by them under their subcontracts as evidenced by the default judgments against Job Shops in their favor: Wolin $151,642.36; Taylor $51,344; and Sheet Metal $96,135.

III.

DISCUSSION

The Scope of the Bonded Work

The disputed merits issue on the cross-motions is whether the labor and materials furnished by the plaintiff subcontractors was for work within the scope of the payment bonds. If the work was outside the scope of the bonds the Surety is entitled to summary judgment; if it was not outside the scope the subcontractors are entitled to summary judgment subject to the limitations defense to Wolin's claims. The Court concludes, and at argument the parties appeared to agree, there is no genuine issue of material fact on the scope issue and that it may be resolved as a matter of law.

It is appropriate to approach the issue from the Surety's point of view. Its argument is straightforward. The USDA contracting officer authorized Job Shops to obtain payment bonds for separate packages of the overall contract work. The contracting officer had the authority to modify the construction contract in this regard.[2] Payment bonds were obtained only for work performed

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[2] The plaintiff subcontractors argue much of the evidence concerning the alleged limited scope of the bonds should be precluded by the parol evidence rule. Bonds are contractual undertakings and contract principles govern their construction and interpretation.

> Under the parol evidence rule, extrinsic evidence is inadmissible to vary, contradict, or add to a written contract which is unambiguous, and in the absence of fraud,

(continued...)

on the foundation and structural steel packages, none of the plaintiff subcontractors worked on those packages, accordingly their claims are for work beyond the scope of the bonds.

The facts recited previously indicate there is substantial evidence to support the conclusion that the contracting officer implicitly authorized the separation of the construction contract packages for pricing and bonding purposes, or at least

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[2](...continued)

> mistake, or accident, the written contract will be viewed as expressing the final intention of the parties upon the subject of the contract.

United States v. Light, 766 F.2d 394, 396 (8th Cir. 1985); see Mid-America Real Estate Co. v. Iowa Realty Co., Inc., 406 F.3d 969, 972 (8th Cir. 2005)(applying Iowa law). The Surety responds the rule does not exclude extrinsic evidence offered to show a subsequent modification of a written contract. See Ralph's Distributing Co. v. AMF, Inc., 667 F.2d 670, 674 (8th Cir. 1981); Bennett v. First Nat. Bank of Humboldt, 443 F.2d 518, 521 (8th Cir. 1971); Whalen v. Connelly, 545 N.W.2d 284, 291 (Iowa 1996). The Surety's limited scope argument is founded on an asserted modification of the construction contract to permit separate bonding of work packages. The Court agrees with the Surety that the communications between the project manager and USDA contracting officer on which the alleged modification is based are not precluded by the parol evidence rule. Further, this evidence is relevant to showing how it came to be that a payment bond or bonds was not obtained for the entire contract price. However, in view of the Court's conclusion that the payment bonds unambiguously incorporate the work of the entire construction contract, infra at 10-12, the affidavit and testimony of the Surety's representatives that the payment bonds were limited to the foundation and structural steel work and included none of the other project work are properly barred by the parol evidence rule. (See Surety App. at 88-89, 365, 367; Supp. App. at 392). See National Surety Co. v. McGreevy, 64 F.2d 899, 900-01 (8th Cir. 1933). However, in connection with the present motions the Court has considered contemporaneous evidence indicating the Surety's understanding of the purpose of the bonds.

acquiesced in the separation. For present purposes the Court assumes the contracting officer had the authority to approve staged bonding in this fashion under her general authority to administer a government contract. See Thomas Creek Lumber and Log Co. v. United States, 36 Fed. Cl. 220, 238-39, 243 (1996).

The purpose the Miller Act is evident from its text. A payment bond required by the Act is for "the protection of all persons supplying labor and material in carrying out work provided for in [a] contract . . . " for the construction of federal public buildings or works. 40 U.S.C. § 3131(b)(2). The statute is remedial in nature and "to be construed broadly." Consolidated Elec. & Mechanicals, Inc. v. Biggs General Contracting, Inc., 167 F.3d 432, 434-35 (8th Cir. 1999). "It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." Aetna Cas. & Surety Co. v. United States f/u/o R. J. Studer & Sons, 365 F.2d 997, 1000 (8th Cir. 1966)(quoting Clifford F. MacEvoy Co. v. United States f/u/o and Benefit of Calvin Tomkins Co., 322 U.S. 102, 107 (1944)). See United States f/u/o Olson v. W. H. Cates Construction Co., Inc., 972 F.2d 987, 990 (8th Cir. 1992).

The conditions of each bond here unambiguously incorporate all work provided for in the construction contract. All persons furnishing labor and materials "in the prosecution of the work provided in the contract identified" on the bonds are

protected. The "contract identified" on the bonds is the entire contract. As a general principle, "where the language and the conditions of the bond are clear, definite, and unambiguous, the liability of the surety will not be extended beyond or altered from that clearly expressed in the language used." 12 Am. Jur. 2d Bonds § 24 at 383 (hereinafter "Am. Jur. 2d"). It is also generally true, as the Surety points out, that "a surety's obligation should be construed by reading together all instruments, statutes, and regulations underlying the transaction." St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp., 474 F.2d 192, 199 (5th Cir. 1973)(citing St. Paul Fire & Marine Ins. Co. v. Tennefos Const. Co., 396 F.2d 623, 628 (8th Cir. 1968)). Here the written construction contract required a payment bond of 100% of the contract price before construction began. Nothing was said about separate bonds for separate work packages. The Surety contends the communications between Job Shops' project manager and the USDA contracting officer in April and May 2002 modified the construction contract to authorize separate payment bonds for the various work packages and the modification should be read into the bonds. The difficulty with this argument is that any such modification was *sub silentio*, dependent on inference from correspondence and course of conduct rather than express. Moreover, as the Surety says, the e-mail exchange was ambiguous with respect to Job Shops' payment bond obligations. (Surety's Reply to Pl. Resistance at 5).

As the Surety was no doubt aware, the bonds were required by statute. "[A] statutory bond should be liberally construed by the interpreting court in light of the purpose for which it was created." First American State Bank v. Continental Ins. Co., 897 F.2d 319, 325 (8th Cir. 1990)(citing American Trust & Sav. Bank v. United States Fidelity & Guaranty Co., 418 N.W.2d 853, 854 (Iowa 1988)); see Am. Jur.2d § 25 at 384. This takes the analysis back to the "highly remedial" purpose of the Miller Act. Calvin Tomkins Co., 322 U.S. at 107. By their terms the bonds unambiguously covered all the project work and the written construction contract gave no indication otherwise. To construe the informal communications between the project manager and the contracting officer about separate payment bonds so as to deny the plaintiff subcontractors the protection the clear terms of the bonds would otherwise afford seems the antithesis of a liberal construction of the bonds and at odds with their statutory purpose. In the Court's judgment, there is no basis to alter the terms of the bonds based on communications of this kind not reflected in the contract documents. Thus, while the USDA contracting officer may have authorized Job Shops to obtain separate bonds for the foundation and structural steel work, the bonds actually issued were not limited and should be enforced according to their terms. Had the Surety intended to limit the payment bonds to the foundation and

structural steel packages, it could have done so by noting the limitation on the bonds.

The Surety argues this case is much like United States f/u/o Modern Electric Inc. v. Ideal Electronic Security Co., Inc., 868 F. Supp. 10 (D.D.C. 1994). Modern Electric proves too much for the Surety. The case involved a multi-year contract with a base year and two option years. The contract solicitation, which like the solicitation in this case was a part of the contract, was amended by written amendment to provide that the performance and payment bonds would be separate for the base and each option year, with the option year bonds to be provided at the time the option was exercised. Id at 11-12. The surety issued a payment bond for the first year. The bond did not recite an expiration date. A second payment bond was not obtained for the option year in which the subcontractor had provided work. Id. at 12, 14. Viewing together the bond and the written contract with its amendment requiring separate payment bonds for each contract year, the court held the bond unambiguously provided coverage only for the first year. Id. at 13-14. Indeed, the contract between Modern Electric and the general contractor contained the identical specification for separate performance and payment bonds in each year as in the prime contract. Modern Electric stands for the proposition that it is appropriate to construe a payment bond consistent with bond specifications clearly stated in the contract documents on which

the obligation is based. Here the payment bonds and written construction contract, viewed together, do not limit the scope of the work covered by the bonds or give those furnishing labor and materials to the project notice to that effect.

Apart from the asserted modification of the construction contract, the Surety argues the USDA contracting officer, pursuant to 40 U.S.C. § 3131(b)(2), waived the statutory obligation of Job Shops to obtain a payment bond for the entire contract, a waiver which estops the plaintiff subcontractors from enforcing the obligation of Job Shops to obtain a payment bond for the whole project. (Surety Reply Brief at 6; Resistance to Cross-Motions Brief at 11). Section 3131(b)(2) requires the payment bond be in the total amount payable by the terms of the contract "unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond." The only thing before the Court in writing from the contracting officer pertaining to the separate bonding of work packages was her May 1, 2002 e-mail reply to the project manager's question about handling structural steel pricing with its reference to separate bonding for the structural steel work. The contracting officer said simply: "This approach is fine with me. The structural steel package pricing should be a separate package. This will help keep track of costs and work." This

statement cannot reasonably be viewed as a determination supported by "specific findings" that a payment bond in the total amount of the contract was impractical. The contracting officer made no written findings and said nothing about the amount of the payment bond. Indeed, Job Shops' belated efforts to obtain a payment bond for the price to complete the work is probative of just the opposite, Job Shops was expected to secure a payment bond for the entire contract amount payable.

The failure to obtain a payment bond or bonds for the entire amount of the contract may have been due to oversight or neglect by Job Shops and/or the contracting officer, but not waiver. Moreover, it is not accurate to characterize the plaintiff subcontractors as attempting to enforce Job Shops' obligation to obtain a payment bond for all of the project work. The subcontractors are merely attempting to recover what they can under the payment bonds which were issued.

For the reasons indicated the Court concludes the claims of the plaintiff subcontractors are not beyond the scope of the bonds.

Statute of Limitations - Wolin

Under the Miller Act, a civil action on a payment bond "must be brought no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action." 40 U.S.C. § 3133(b)(4). In its

Complaint Wolin alleges it "has performed its obligations" under the subcontract and is owed the principal amount of $151,642.36 plus interest from January 2004. (Complaint ¶ 11). The Surety argues this is tantamount to an allegation Wolin completed its work on the project on or before January 2004. (Surety Brief at 18). From the arguments at hearing it is apparent Wolin's principal work on the project was complete by that time. The Complaint was filed September 1, 2005, more than a year later. In response, Wolin's president, David Stroh, states by affidavit that the last date Wolin was on the project was April 12, 2005. He attaches an April 12, 2005 "Service Order" which describes the work performed. (Stroh Aff., ¶ 2, attch. to Wolin's Response to Surety's Statement of Facts).

The April 12, 2005 Service Order states Wolin was "[c]alled in to replace seals on pumps and clean the strainers." The seals had been leaking. The Wolin representative replaced the seals with seals the USDA had on hand and checked and cleaned the strainers. The majority of circuits follow the rule that remedial or corrective work or materials, or inspection of completed work, falls outside the scope of the "last of the labor . . . or material" trigger in § 3133(b)(4), the so-called "correction-or-repair versus original-contract test." See United States v. International Fidelity Ins. Co., 200 F.3d 456, 460 (6th Cir. 2000)(citing cases, including U.S. f/u/o General Elec. Co. v.

Gunnar I. Johnson & Son, Inc., 310 F.2d 899, 903 (8th Cir. 1962)). This test has the advantage of articulating a relatively bright-line rule which affords all interested parties a measure of certainty about the beginning of the limitations period. International Fidelity Ins. Co., 200 F.3d at 460. The test is consistent with the approach taken by the Eighth Circuit and the Court will employ it in this case. See United States f/u/o Hussman Corp. v. Fidelity and Deposit Co. of Md., 999 F. Supp. 734, 743 (D.N.J. 1998)(citing Gunnar I. Johnson, 310 F.2d at 903 and W.H. Gates Const., 972 F.2d at 991).[3]

From the description in the Service Order, the work performed on April 12, 2005 appears to have been for a correction or repair. That the Service Order work was performed some fifteen months or so after the subcontract work for which Wolin claims payment lends inferential support to this conclusion. Wolin has not come forward with evidence from which the Court could conclude there is a genuine issue about whether the April 12, 2005 Service Order work was part of the original contract. It follows Wolin's action was filed beyond the limitations period.

Alternatively, Wolin argues that even if its complaint is untimely, the Surety should be equitably estopped from asserting the statute of limitations defense based on representations by the

[3] The minority "substantial completion" rule would not be of any help to Wolin. See Hussman, 999 F. Supp. at 744 (citing cases).

replacement contracting officer on the USDA project, Kathryn Schmidt. In his affidavit Mr. Stroh states that "throughout our work on the job" Schmidt told him "we would be paid for our work and not to file a lawsuit. She also told me the bonding company would cover our claim for payment." (Stroh Aff., ¶ 3). The doctrine of equitable estoppel has been applied in Miller Act cases. See U.S. f/u/o Humble Oil & Refining Co. v. Fidelity & Cas. Co. of N.Y., 402 F.2d 893, 897-98 (4th Cir. 1968). "Estoppel arises where one, by his conduct, lulls another into a false security, and into a position he would not take only because of such conduct. Id. (quoting McWaters and Bartlett v. United States f/u/o Wilson, 272 F.2d 291, 296 (10th Cir. 1959)); see Markey v. Carney, 705 N.W.2d 13, 21 (Iowa 2005).

The threshold problem with Wolin's equitable estoppel argument is that the statements on which the estoppel is based were made by the government contracting officer, not the Surety. Generally, "equitable estoppel applies only to parties to a transaction and those in privity with them." 28 Am. Jur. 2d Estoppel and Waiver § 129 at 549; see also Cunningham v. Iowa Dept. of Job Service, 319 N.W.2d 202, 204 (Iowa 1982). The Surety was not in privity with the government, nor has Wolin come forward with evidence that the assurances allegedly given by the contracting officer were given indirectly by the Surety through the officer, or that the Surety had knowledge of Schmidt's assurances. There is

also no evidence the Surety itself ever represented that it would cover Wolin's claim for payment.[4]

Wolin's lawsuit on the bonds is time-barred and the Surety is not equitably estopped from asserting the defense.

IV.

RULINGS AND ORDER

There are no genuine issues of material fact on the cross-motions for summary judgment and the parties are entitled to judgment as a matter of law as follows: the summary judgment motions of plaintiffs Sheet Metal [54] and Taylor [51] are **granted** and judgment will be entered accordingly; the Surety's summary judgment motion [52] is **granted** with respect to Wolin's claims and judgment will be entered accordingly, but is **denied** with respect to the claims of Sheet Metal and Taylor.

The parties agreed at argument that the Surety's liability on the bonds is limited to the penal sums specified. One payment bond was issued by USF&G and the other by FGIC. For summary judgment purposes these affiliated sureties have been referred to collectively, however, the named defendant in the Sheet Metal and

[4] If, as Mr. Stroh's affidavit indicates, Schmidt's representations were made while Wolin was working on the job, the representations would have occurred before the limitations period began to run, a fact which calls into the question the reasonableness of any reliance on the representations. The record is insufficient, however, to resolve the equitable estoppel issue on the reliance element.

Taylor actions is USF&G. USF&G's payment bond is the larger of the two and is in an amount sufficient to satisfy the principal amounts claimed by Sheet Metal and Taylor. Accordingly, the Court will enter judgment on that bond.

The actions by plaintiffs against defendant Job Shops having previously been resolved by default judgment, the judgment entered below resolves all remaining claims and causes of action in this case.

The Clerk of Court shall enter judgment substantially as follows:

> IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiff Taylor Industries, Inc. and against defendant United States Fidelity & Guaranty Co. on its payment bond #400SR3738 in the amount of Fifty-one Thousand Three Hundred Forty-four Dollars and No Cents ($51,344.00) plus interest as provided by law;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiff Sheet Metal Engineering, Inc. and against defendant United States Fidelity & Guaranty Co. on its payment bond #400SR3738 in the amount of Ninety-six Thousand One Hundred Thirty-five Dollars and No Cents ($96,135) plus interest as provided by law;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED the judgment is entered in favor of defendants United States Fidelity & Guaranty Co. and Fidelity and Guaranty Insurance Company and against plaintiff Wolin & Associates, Inc. and the complaint of Wolin & Associates, Inc. is dismissed.

IT IS SO ORDERED.

Dated this 15th day of December, 2006.

ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE