

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

PIASA COMMERCIAL INTERIORS, INC.)	
)	
Plaintiff,)	
)	Case No. 3:07-CV-617-DRH
vs.)	
)	CJRA Track: B
J.P. MURRAY COMPANY, INC. d/b/a)	
MURRAY COMPANY)	Judge David R. Herndon
)	
and)	
)	
FIDELITY AND DEPOSIT COMPANY OF)	PLAINTIFF DEMANDS TRIAL
MARYLAND)	BY A JURY ON ALL CLAIMS
)	AND ISSUES.
and)	
)	
PATRIOT ENGINEERING AND)	
ENVIRONMENTAL, INC.)	
)	
Defendants.)	

SECOND AMENDED COMPLAINT

COMES NOW Plaintiff, Piasa Commercial Interiors, Inc., and for its Second Amended Complaint against Defendants, J.P. Murray Company, Inc. d/b/a Murray Company, Fidelity and Deposit Company of Maryland and Patriot Engineering and Environmental, Inc., and states:

A. INTRODUCTORY STATEMENT

This Second Amended Complaint is filed pursuant to the Court’s Order of September 30, 2008 (Doc. No. 80), and amends only Count III pursuant to that Order. Amended Count III in the current pleading is also directed against both Defendants, Fidelity and Deposit Company of Maryland and J.P. Murray Company, Inc., whereas the original Count III was directed against only Fidelity and Deposit Company of Maryland under the Insurance Code. On September 30, 2008 (Doc. No. 80) the Court ruled that the relationship between Plaintiff and Fidelity and

Deposit Company of Maryland is not that of an insured and an insurer and that 215 ILCS 5/155 therefore does not apply.

I. PARTIES

1. Plaintiff, Piasa Commercial Interiors, Inc. (hereinafter “Piasa”), is a corporation existing under and by virtue of the laws of the state of Illinois, which maintains its principal office and place of business in Collinsville, Illinois. It is a citizen of the state of Illinois.

2. Defendant, J.P. Murray Company, Inc. d/b/a Murray Company (hereinafter “Murray Co.”), is a corporation organized and existing under and by virtue of the laws of the state of Missouri, where it maintains its principal office and place of business. It is a citizen of the state of Missouri.

3. Defendant, Fidelity and Deposit Company of Maryland (hereinafter “F & D”), is an insurance company incorporated under the laws of either Maryland or Delaware, which maintains its principal office and place of business in Baltimore, Maryland. It is a citizen of the state of Maryland. It might also be a citizen of the state of Delaware. It is not a citizen of the state of Illinois.

4. Defendant, Patriot Engineering and Environmental, Inc., is a corporation that performs inspections, testing and engineering work. It is incorporated under the laws of the state of Indiana. It maintains its principal office and place of business in Indianapolis, Indiana. It is a citizen of the state of Indiana.

II. GENERAL ALLEGATIONS

5. On or about April 14, 2006, Plaintiff entered into a subcontract agreement with Defendant, Murray. Copies of portions of the subcontract agreement are attached to the original Complaint (Doc. No. 2) as Exhibit A and to Plaintiff’s Answer to the Counterclaim of J.P.

Murray Company, Inc., (Doc. No. 19) as Exhibits G and H, which are incorporated herein by reference.

6. On or before April 14, 2006, Defendant, Murray Co., entered into a contract with Richland Memorial Hospital, Inc., an Illinois not-for-profit corporation to construct, as a general contractor, and to provide construction management services for the construction of the Richland Memorial Hospital in Olney, Richland County, Illinois. Plaintiff then entered a subcontract with Defendant, Murray Co., to perform the drywall frame and board, spray-on fireproofing, acoustical and E.I.F.S. work which Murray Co. was obligated to perform for, or provide to, Richland Memorial Hospital, Inc. under the terms of its general contract and/or construction management agreement. The subcontract originally provided for payment to Piasa in the amount of \$446,713.00. Change orders were issued in the additional sum of \$26,401.00, making the total subcontract amount \$473,114.00. Plaintiff has repeatedly demanded a copy of the complete project manual, including the general contract, but Defendant, Murray Co. has failed and refused to provide a copy of the same.

7. Richland Memorial Hospital, Inc. borrowed \$4,000,000.00 from the United States of America, United States Department of Agriculture, for the project described above, and executed a real estate mortgage in favor of the United States of America, which was recorded with the Recorder of Deeds in Richland County, Illinois on about January 18, 2005. As part of the financing for said project, pursuant to statute, the United States of America, Department of Agriculture required Richland Memorial Hospital, Inc. to obtain payment and performance bonds for the project, on which Murray Co. is the bond principal.

8. On or about December 29, 2005, Murray Co. as principal and F & D as surety executed a payment bond and separately a performance bond for the project described above. A

copy of the payment bond is marked as Exhibit B to the original Complaint (Doc. No. 2), which is incorporated herein by reference.

9. Defendant, Patriot Engineering and Environmental, Inc., entered into a purchase order agreement with J.P. Murray Company, Inc. to provide the inspection and testing of the spray-on fireproofing material as it was installed. At all times herein relevant, Patriot Engineering and Environmental, Inc. was in the business of inspecting and testing building materials during construction, including but not limited to fireproofing materials, and was in the business of then furnishing reports of its inspections and tests to the parties involved in construction of the building it tested and inspected.

10. Plaintiff demands trial by a jury on all claims and all issues.

III. JURISDICTION

11. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) because this is a civil action between citizens of different states where the amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interests and costs. This Court also has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1352 in that the bond described as Exhibit B was required under a United States statute governing the financing of the Richland Memorial Hospital.

IV. VENUE

12. This Court has venue pursuant to 28 U.S.C. § 1391(a)(2) in that it is a civil action in which a substantial part of the events giving rise to the claim occurred at the Richland Memorial Hospital project in Olney, Richland County, Illinois, which is part of this district.

COUNT I (BREACH OF THE SUBCONTRACT)

13. Plaintiff performed its subcontract with Defendant, Murray Co., on its part, to the extent that performance of the overall project by Defendant, Murray Co., permitted Plaintiff to perform its subcontract work.

14. As of May 18, 2007, Plaintiff had completed work and stored materials on the project with a value in the total sum of \$463,359.00.

15. Plaintiff has been paid the total sum of \$379,285.20. After deducting amounts withheld pursuant to the ten percent retainage clause in the subcontract, Plaintiff is owed the sum of \$25,982.10 under its May, 2007 billing and is also owed \$11,755.80 for work performed in May and billed in June, 2007.

16. As of May 18, 2007, Plaintiff had not performed the remaining, small amount, of its subcontract work because Murray Co. had not completed construction of the other parts of the building required before Plaintiff could complete the balance of its work.

17. Before installing the spray-on fireproofing material on the roof deck, Plaintiff notified Murray Co. that the fireproofing material should not be applied until after all work on the roof was completed, because substantial roof traffic could affect the finished product as specified in the manufacturer's recommendations. Defendant, Murray Co., was notified of the manufacturer's recommendations in the shop drawings that were submitted by Plaintiff and approved by Murray Co., as well as on numerous other occasions before this work was performed.

18. After the spray-on fireproofing material was applied by Plaintiff to the metal roof deck, the roofing subcontractor of Murray Co. performed extensive work on the roof resulting in extensive foot traffic above the sprayed-on fireproofing, and work on the rooftop HVAC unit

continued which resulted in a water leak which also adversely affected the sprayed-on fireproofing material.

19. In addition to performing extensive work on the roof after the spray-on fireproofing material was added to the metal roof deck, Murray Co. and its roofing subcontractor and HAVC subcontractor failed to place roof padding or plywood sheets, on the roof, or to take other protective measures while the HAVC work and extensive roof traffic was occurring, which caused some of the spray-on fireproofing material on the roof deck to become dislodged and fall.

20. Plaintiff initially installed the spray-on fireproofing on the roof deck, as well as the columns, beams, joists and other parts of the project during December 2006 and early January 2007. Plaintiff performed patching work on the spray-on fireproofing in areas that had been damaged by other trades, after initial installation, during about March 2007. After the spray-on fireproofing was initially installed, and again after it was patched, it was tested by Defendant, Patriot Engineering and Environmental, Inc., which reported that, with one minor exception, the spray-on fireproofing passed all tests, and Plaintiff immediately repaired that small area which had allegedly failed a test.

21. Prior to June 21, 2007, Plaintiff repaired those parts of the spray-on fireproofing on the roof deck, which had fallen, while advising Murray Co. that Plaintiff would warranty the spray-on fireproofing material for the columns, beams, joists and other parts of the project, but would not warranty the spray-on fireproofing material for the metal roof deck because of the above described conduct by Murray Co. and its subcontractors, which were acting under its supervision and direction.

22. Plaintiff last performed work on the project on about May 18, 2007. The building was not yet ready for Plaintiff to perform its additional work. Defendant, Murray Company, had

suspended work on the new part of the building beginning around May 2, 2007, and that suspension was still in place when Plaintiff's subcontract was terminated on about June 21, 2007. By May 18, 2007 Plaintiff had completed almost all of its work on the project.

23. On June 21, 2007, Defendant, Murray Co., issued a notice of termination, terminating Plaintiff's subcontract with Murray Co. A copy of that notice of termination is attached to the original Complaint (Doc. No. 2, as Exhibit C) and is incorporated herein by reference.

24. On June 22, 2007, Plaintiff responded to the termination notice with a facsimile letter offering to complete the balance of its work beginning on June 25, 2007, even though the balance of the project was not yet ready to receive the remainder of Plaintiff's work. A copy of that facsimile letter is attached to the original Complaint (Doc. No. 2) as Exhibit D, and is incorporated herein by reference.

25. Defendant then responded with a letter stated that the subcontract had been terminated and that if Plaintiff returned to the project, the Hospital would ask Plaintiff's employees to leave. A copy of that letter/facsimile memo is attached to the original Complaint (Doc. No. 2) as Exhibit E and is incorporated herein by reference.

26. The subcontract between Plaintiff and J.P. Murray Co, Inc. includes AIA Document A201, 1997 Edition, as set forth in Exhibits A, G and H described above, and requires that J.P. Murray Company, Inc. provide Plaintiff with seven days notice before termination and requires J.P. Murray Company, Inc. to obtain written certification from the architect, ACI Boland, that good cause exists for termination, before terminating the subcontract. J.P. Murray Company, Inc. breached the subcontract by terminating it without providing seven days advance

written notice and without first obtaining written certification from the architect that good cause existed for the termination.

27. Defendant, Murray Co., breached the subcontract by (a) failing to pay amounts due, when due and (b) by wrongfully terminating the subcontract agreement in violation of its terms and/or without justification. These breaches of contract, described in ¶¶ 24-30, were substantial and material, thereby relieving Plaintiff from any obligation to perform any further requirements of the subcontract agreement.

28. Defendant, Murray Co., terminated the subcontract as a pretext to avoid responsibility for its failure to perform its work, and the work of its other subcontractors, on a timely basis and in an attempt to avoid responsibility for any damage that may have been done to the sprayed-on fireproofing on the metal roof deck by it and by its other subcontractors.

29. Defendant, J.P. Murray Company, Inc., suspended construction on the new building part of the project (comprising most of the construction work) on approximately May 2, 2007. Thereafter it arranged for Charles Campisi to test the spray-on fireproofing. Charles Campisi conducted an in-person inspection of the building on May 19, 2007. He issued a report of that inspection shortly thereafter and a follow up report on about July 27, 2007. At the request of Murray Company, Patriot Engineering and Environmental, Inc. also performed additional tests and inspections of the spray-on fireproofing on the roof deck. Between May 2, 2007 and the date of termination, June 21, 2007, Murray Company failed and refused to provide copies of any and all inspection reports from Charles Campisi and Patriot Engineering to the Plaintiff, and failed and refused to advise the Plaintiff of any deficiencies which J.P. Murray Company, Inc. contended to exist in the spray-on fireproofing, and from the date of the termination, June 21, 2007, onward, J.P. Murray Company refused to allow Plaintiff on the premises and refused to

provide Plaintiff with any inspection reports or any description of any deficiencies in the fireproofing which J.P. Murray Company, Inc. contended to exist. Between June 21, 2007, the day of termination, and September 30, 2007, J.P. Murray Company arranged for the removal of all spray-on fireproofing on the roof deck without providing Plaintiff with any inspection reports, with any notice of any specific claimed deficiencies in the fireproofing, while simultaneously barring Plaintiff from the project site. J.P. Murray Company, Inc. also breached the subcontract agreement in the manner. Plaintiff did not obtain copies of the inspection reports described in this paragraph until December 2008, during discovery, after it was too late to test the spray-on fireproofing on the roof deck to determine the validity of Murray Company's current claims. That is also a breach of the subcontract agreement.

30. As a result of the breaches of the subcontract by Defendant, Murray Co., Plaintiff is entitled to recover from the Murray Co. the full amount due Plaintiff under the subcontract, including amounts previously held for retainage, in the sum of \$84,073.80.

COUNT II (BREACH OF THE PAYMENT BOND)

31. Defendants F & D and Murray Co. are jointly and severally liable, as surety and principal, for the amounts due Plaintiff from Defendant, Murray Co., under the terms of the payment bond.

32. During May and June 2007, Plaintiff demanded but Defendant, Murray Co., as well as the project architect and Richland Memorial Hospital refused and continued to refuse to identify the surety on the payment and performance bonds and refused to provide copies of the payment and performance bonds.

33. After many demands by Plaintiff, Defendant, Murray Co., finally delivered copies of the payment and performance bonds to Plaintiff's attorney on about July 7, 2007.

34. On July 9, 2007, Plaintiff provided Defendant, F & D, with notice of its claim pursuant to Section 4.1 of the payment bond. A copy of that notice is attached hereto as Exhibit F and incorporated herein by reference.

35. During August, 2007, Defendant, F & D rejected Plaintiff's claim and refused to pay any amount to Plaintiff.

36. Defendants, Murray Co. and F & D, and each of them, breached the payment bond by failing to pay Plaintiff the amount due it, \$84,073.80.

COUNT III (CONVERSION AGAINST J.P. MURRAY COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND)

37. Prior to June 21, 2007, Defendant, J.P. Murray Company, Inc., was paid by the hospital owner for work performed by Piasa and billed to Murray Company under pay applications in the respective sums of \$25,982.10 and \$11,755.80 and Defendant, Fidelity and Deposit Company of Maryland, knew (before rejecting Plaintiff's demand for payment) that Murray Company had been paid these amounts by the owner for work performed by Piasa and was refusing to pay the same amounts to Piasa. Under these circumstances a constructive trust was imposed upon the money Murray Company received from the project owner for work performed by Piasa requiring that money to be paid to Piasa and not used for any other purpose, and Murray Company was also required to pay those sums to Piasa, prior to June 21, 2007, under the terms of the subcontract and the incorporated project manual and AIA201, 1997 Edition.

38. Fidelity and Deposit Company of Maryland executed a payment bond as surety on which Murray Company was bond principal which, in essence, guaranteed that Fidelity and Deposit Company of Maryland would pay the monies due Piasa from Murray Company, in the event Murray Company refused or failed to pay, and Piasa demanded payment from both Murray

Company and from Fidelity and Deposit Company of Maryland for the amounts described in the preceding paragraph (\$25,982.10 and \$11,755.80).

39. At all times herein relevant, Murray Company and Fidelity and Deposit Company of Maryland acted in concert in jointly refusing to pay said sums (\$25,982.10 and \$11,755.80) to Plaintiff, contrary to the terms of the subcontract, contrary to the terms of the payment bond and in violation of the constructive trust, notwithstanding Piasa's demands for payment of the exact same sums, thereby converting said sums (\$25,982.10 and \$11,755.80) by the unauthorized and wrongful assumption of control, dominion and ownership over said sums by Murray Company, acting jointly and in concert with Defendant, Fidelity and Deposit Company of Maryland, under circumstances where Piasa had the absolute and unconditional right of immediate possession of said sums, after Piasa had demanded payment of said sums from both Murray Company and Fidelity and Deposit Company of Maryland under circumstances where Murray Company's assertion and continued assertion of control, dominion and ownership over said sums was unauthorized and wrongful; all to Piasa's damages in the sum of \$25,982.10 plus \$11,755.80 for a total of \$37,737.90.

40. At all times herein relevant the conduct of Defendants, Murray Company and Fidelity and Deposit Company of Maryland, was intentional, outrageous, malicious, willful and wanton and unjustified, warranting imposition of punitive damages against Murray Company in the sum of \$300,000.00 and warranting the imposition of additional punitive damages separately against Defendant, Fidelity and Deposit Company of Maryland, in the sum of \$300,000.00.

COUNT IV (NEGLIGENT REPRESENTATION)

41. Defendant, Patriot Engineering and Environmental, Inc., was retained by Defendant, J.P. Murray, Inc., to inspect and test the spray-on fireproofing as it was installed and

to report the results of those inspections and tests to it, and through it to Plaintiff while the spray-on fireproofing was being installed. The allegations of ¶ 9 are incorporated herein by reference.

42. Both J.P. Murray Company, Inc. and Plaintiff, Piasa Commercial Interiors, Inc., reasonably relied upon the test reports for the spray-on fireproofing provided by Patriot Engineering and Environmental, Inc. during construction and after parts of the initial installation were damaged by other trades and subsequently patched by Plaintiff pursuant to extra work orders issued to it by J.P. Murray Company, Inc.

43. J.P. Murray Company, Inc. alleges, in its Counterclaim, that Piasa Commercial Interiors, Inc. used improper installation methods for the spray-on fireproofing on the roof deck, and that as a result, some of the spray-on fireproofing on the roof deck was defective and failed. Piasa Commercial Interiors, Inc. denies those allegations.

44. If there were any areas of the spray-on fireproofing material on the roof deck which were deficient (which Piasa Commercial Interiors, Inc. denies) those deficiencies resulted from excessive roof traffic on the roof by J.P. Murray Company, Inc. and its subcontractors, other than Piasa Commercial Interiors, Inc., in violation of the manufacturers recommendation, the contract documents, the plans and the specifications.

45. In the event it is determined that all, or portions, of the spray-on fireproofing applied to the roof deck was defective, either because of improper installation techniques by Plaintiff, and/or because of excessive roof and foot traffic by Defendant, J.P. Murray Company, Inc., Patriot Engineering and Environmental, Inc. should have detected any such, alleged, deficiencies while installation was under way, when remedial action could have been promptly taken, and when the installation of additional fireproofing materials on the roof deck with similar, alleged, defects, could have been avoided.

46. During the initial installation period, from December 2006 through about January 12, 2007, Patriot Engineering and Environmental, Inc. tested the spray-on fireproofing material and reported no deficiencies.

47. After J.P. Murray Company, Inc. retained Plaintiff, under extra work-orders, to patch the spray-on fireproofing where it had been damaged by other trades, during about early March 2007, Patriot Engineering and Environmental, Inc. again tested the spray-on fireproofing material and reported no significant deficiencies. The only minor deficiency reported was immediately repaired.

48. If it is determined that all or portions of the spray-on fireproofing on the roof deck were deficient because of improper installation techniques, as alleged by J.P. Murray Company, Inc. in its counterclaim, then, and in that event, Patriot Engineering and Environmental, Inc. was negligent in failing to detect the alleged deficiencies during installation in December 2006 and early January 2007 and was negligent in reporting to J.P. Murray Company, Inc. and through it to Plaintiff that there were no deficiencies.

49. If there were deficiencies in the initially installed spray-on fireproofing on the roof deck, during December 2006 and early January 2007, and if there were any deficiencies in the patching work performed by Plaintiff during about early March 2007, either because of improper installation techniques used by Plaintiff, or because of excessive foot traffic and roof traffic by J.P. Murray Company, Inc. and its subcontractors other than Plaintiff, Patriot Engineering and Environmental, Inc. was negligent in failing to detect any such deficiencies and was negligent in reporting that it found no significant deficiencies.

50. If it is determined that the spray-on fireproofing on the roof deck was defective because of excess roof traffic and foot traffic by J.P. Murray Company, Inc. and its

subcontractors, other than the Plaintiff, Plaintiff has been damaged by the negligence of Patriot Engineering and Environmental, Inc. in failing to detect and report such alleged deficiencies because, as a result, Plaintiff was wrongfully terminated, Plaintiff was not paid and Plaintiff has been required to respond to the Counterclaim of J.P. Murray Company, Inc., incurring lost time, litigation expenses and attorneys' fees all to Plaintiff's damages in a sum in excess of \$150,000.00.

51. If it is determined that the spray-on fireproofing on the roof deck was defective, and if Plaintiff is found liable to J.P. Murray Company, Inc. under the claims in its Counterclaim, as a result, then and in that event, Plaintiff will be entitled to a judgment in its favor and against Defendant, Patriot Engineering and Environmental, Inc. for all, or almost all of the amount of any judgment entered in favor of J.P. Murray Company, Inc. and against Piasa Commercial Interiors, Inc. pursuant to the allegations of the Counterclaim, because Patriot Engineering and Environmental, Inc. negligently failed to detect any such, alleged, deficiencies, during construction, and thereafter, and because Patriot Engineering and Environmental, Inc. negligently represented, in its reports, that there were no significant deficiencies in the spray-on fireproofing on the roof deck during construction, and during patching, when any repairs or other remedial work could have been performed efficiently, inexpensively and the additional installation of, alleged, defective fireproofing would have been avoided, entitling Plaintiff to recover, from Patriot Engineering and Environmental, Inc., all or almost all, of any amount, if any, awarded against Plaintiff and in favor of J.P. Murray Company, Inc. under the allegations of the Counterclaim.

WHEREFORE, Plaintiff, Piasa Commercial Interiors, Inc., prays for judgment against Defendants, J.P. Murray Company, Inc. d/b/a Murray Company and Fidelity and Deposit

Company of Maryland, jointly and severally, in the sum of \$84,073.80 (which includes the \$25,982.10 and \$11,755.80 amounts due under the last two progress payments), plus an additional sum against Defendant, Fidelity and Deposit Company of Maryland in the sum of \$300,000.00 for punitive damages, plus the additional sum of \$300,000.00 against Defendant J.P. Murray Company, Inc., for punitive damages; and Plaintiff prays for judgment in its favor and against Patriot Engineering and Environmental, Inc. for a sum in excess of \$150,000.00, plus the amount of any judgment, if any, entered in favor of J.P. Murray Company, Inc. and against Piasa Commercial Interiors, Inc., under the allegations of the Counterclaim, plus court costs.

/s/ David M. Duree

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by the Court's ECF filing system this 7th day of October 2008, addressed as follows:

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