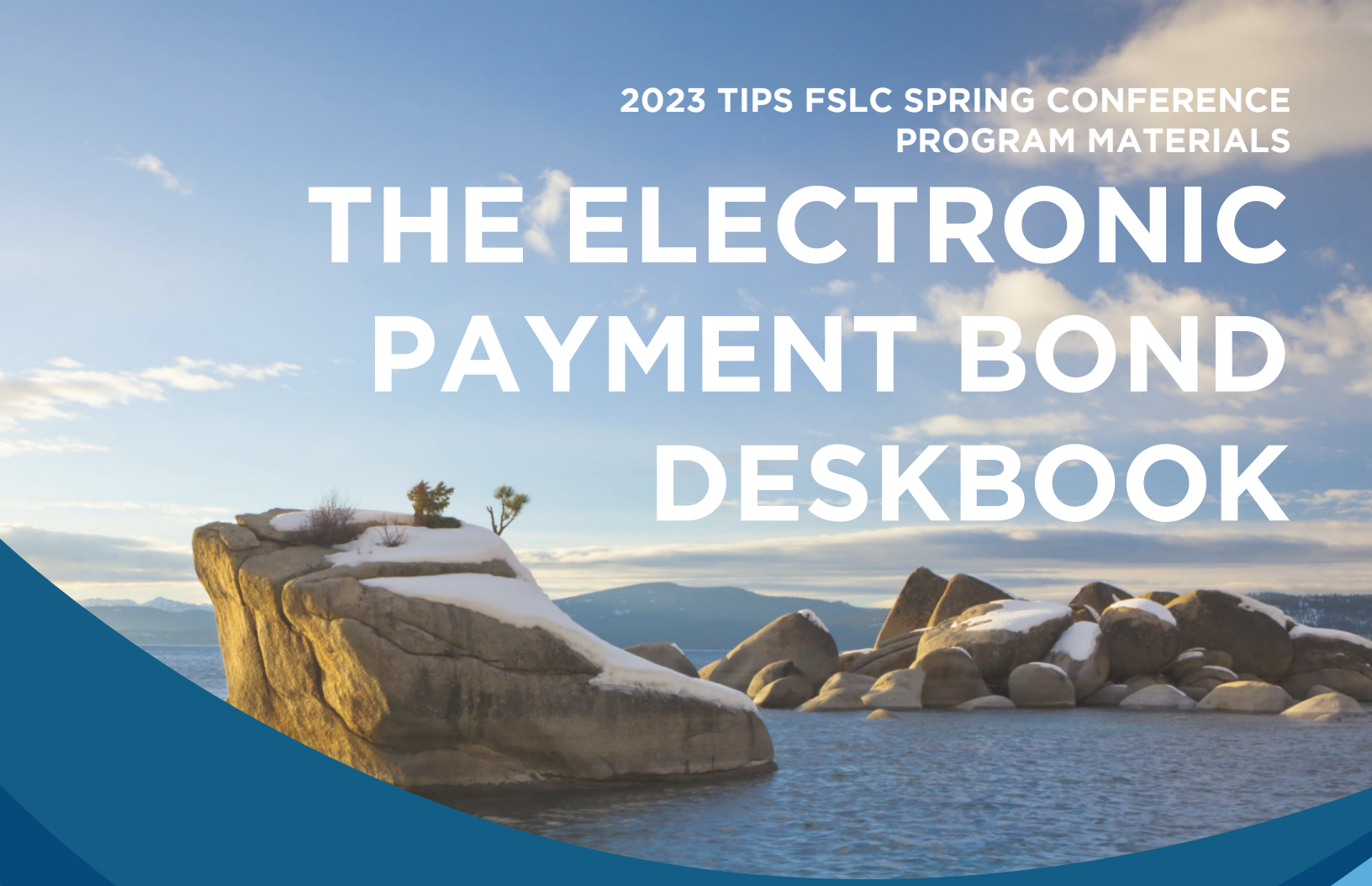
2023 TIPS FSLC SPRING CONFERENCE
PROGRAM MATERIALS

THE ELECTRONIC PAYMENT BOND DESKBOOK



2023
May 10–12
Hyatt Regency Lake
Tahoe Resort
Incline, Nevada

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Law Committee

EDITORS
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Ryan J. Springer

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Practice Section

Preface

This publication has been prepared for the Spring Meeting of the Fidelity & Surety Law Committee (FSLC) of the Tort Trial and Insurance Practice Section of the American Bar Association, held in Incline, Nevada, on May 10–12, 2023.

The title rather gives it away. THE ELECTRONIC PAYMENT BOND DESKBOOK was never intended to be a traditional, bound book. Instead, feedback from FSLC members and Past Chairs over the last half-decade sparked the idea of an "all-electronic" guide to federal, state, and U.S.-territory payment bond law: a hyperlinked, searchable, portable-document-format (.pdf) volume to be freely shared and readily accessed by surety professionals.

The DESKBOOK would not exist without the vision and support of Past Chairs Darrell Leonard, Chad L. Schexnayder, and Jeffrey S. Price, to whom the editors offer their gratitude. Of course, the editors' special thanks go to FSLC Chair Carol Z. Smith, who embraced this project and—with very little to go on in the way of proof-of-concept, we might add—made this project a priority and the cornerstone of the 2023 Spring Meeting.

Most importantly, the editors' deepest thanks and appreciation go to the contributing authors. It is their commitment of time and legal expertise that has taken the DESKBOOK from mere idea to fifty-four chapters' worth of detailed, well-researched pages presenting the jurisdictional nuances of public and private payment bond law. To the authors: Thank you for giving selflessly of your time to further the work of the surety industry.

The DESKBOOK's chapters cover each of the fifty states, the District of Columbia, the territories of Guam and Puerto Rico, as well as the Federal Miller Act. Each chapter largely follows the same template of topics, in the same order. The template thus offers the user a substantive table of contents for each chapter. If a jurisdiction does not have law on a particular topic, or if that jurisdiction has no special authority of note, the heading will appear without discussion.

Wherever possible, hyperlinks to statute, code, or regulatory authority direct readers to public websites of the state/territorial legislature or Supreme Court. Cited case law is hyperlinked to both Westlaw (a Thomson Reuters® legal research tool) and LexisNexis® for ease of access.

Your comments and suggestions for additional areas to address in future updates are welcomed. We hope the DESKBOOK will serve our industry as a research resource with national coverage—one that makes relevant cases and statutes accessible with just a click of the mouse (or several). We likewise hope that providing hyperlinked author biographies and contact information will prove an effective way for inquiring readers to engage directly with the authors who have so generously shared their scholarship and expertise.

Alana L. Porrazzo
Ryan J. Springer
May 2023

About the Editors

Alana L. Porrazzo is a partner in the Phoenix, Arizona office of Jennings Haug Keleher McLeod LLP and licensed to practice in the state and federal courts of Arizona, New Mexico, and Louisiana. She is a co-chair of the FSLC Law Division Bankruptcy Subcommittee and a member of the Arizona State Bar Association Construction Section Executive counsel. Ms. Porrazzo's practice emphasizes defending bond claims and bad faith allegations, litigating performance defaults, prosecuting subrogation and indemnity claims, and representing sureties in principal and indemnitor bankruptcies. She studied at Yale University (B.A., 2009) and Tulane University School of Law (J.D., *cum laude*, 2016).

Ryan J. Springer (JD, AFSB, CPCU) joined EMC in May 2013 as Bond Claims Attorney and served as Bond Claims Manager in the EMC Corporate Office Bond Department from April 2016 to June 2022. In July 2022, Mr. Springer was promoted to Vice President/Bond. In this role, Mr. Springer oversees all Bond operations for EMC Insurance. Mr. Springer received his B.S. (Psychology) from Iowa State University in 2004 and J.D. from The University of Kansas in 2007. Prior to joining EMC, Mr. Springer was an associate in a general practice firm in Kansas City, Missouri, where he handled litigation and appellate matters in both Missouri and Kansas. Mr. Springer continues to hold bar licenses in Kansas, Missouri, and Iowa.

Chapter Template

TITLE

Author(s) [hyperlinked]
Firm [hyperlinked]

§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Sets forth statutory or regulatory requirements for public payment by hyperlinked citation and discusses bond amount required (whether full prime contract amount or some percentage thereof).

B. Tiers Covered

Sets forth what parties are afforded rights as claimants against the bond, with hyperlinked reference to statute(s)/code(s)/regulation(s) and pertinent case law.

C. Notice Required

Describes the notice requirements that a claimant under the bond must satisfy in order to preserve its claim rights, with hyperlinked reference to statute(s)/code(s)/regulation(s) and pertinent case law.

D. Coverage

Discusses what labor and materials are covered by the bond, and specifically addressing, by way of hyperlinked statutory, code, or case authority:

1. Labor

a. Professional Services

b. Union Benefits

2. Material

Discusses any limitations on compensable materials (*e.g.*, whether materials must be delivered to the jobsite or reasonably intended for use at the jobsite, and/or whether claimant may assert claim for diverted materials).

3. Equipment

a. Repairs

b. Rentals

4. Other

a. Attorneys' Fees

b. Interest

c. Financing Charges

d. Insurance Premiums

e. Loans

f. Delay Damages

g. Profits

h. Extracontractual

E. Contracts Excluded

Identifies all contracts that are specifically excluded from bond coverage, by hyperlinked citation to relevant authority.

F. Time for Suit

Provides the limitation period(s) that a claimant must satisfy in order to timely bring suit against the bond by hyperlinked citation to relevant authority.

G. Remarks

Discusses in narrative form (with citation to hyperlinked authority) any nuances not addressed by previous sections, including jurisdictional nuances unrelated to notice, limitations, and bond coverage.

H. Case Annotations

Provides hyperlinked case citations and case summaries helpful to explain key decisional law on public payment bonds in this jurisdiction.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

By reference to hyperlinked cases, provides interpretative principles governing the construction of private payment bonds in this jurisdiction.

B. Time for Suit

Provides the limitation period(s) that a claimant must satisfy in order to timely bring suit against the bond, with hyperlinked citation to relevant authority.

C. Case Annotations

Provides hyperlinked case citations and case summaries helpful to explain key decisional law on private payment bonds in this jurisdiction.

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Alabama's Little Miller Act establishes the statutory regime under which payment bonds required for public projects in Alabama are issued. Ala. Code § 39-1-1 [Westlaw]. Alabama's Little Miller Act requires that before commencing work, any person entering into a contract with the state for any public work must provide a payment bond of at least 50% of the contract price. A bond is not required to secure contracts of less than $50,000.

B. Tiers Covered

Unlike its federal counterpart, Alabama's Little Miller Act does not make a distinction between first and second tier subcontractors or suppliers. Courts have interpreted Alabama's Little Miller Act to afford protection to *all* persons providing labor, supplies, and materials used in connection with a public works project. The statute does not require that a materialman be in privity of contract with any particular tier of subcontractor. *Sumlin v. Hagan Storm Fence Co. of Mobile*, 409 So. 2d 818 (Ala. 1982) [Lexis].

In *Sumlin v. Hagan Storm Fence Co. of Mobile*, *supra*, the Alabama Supreme Court reiterated its liberal construction of the statute. The defendant, Hagan, was a supplier to a subcontractor on a public works project. Hagan had several dealings with the subcontractor on various jobs. The subcontractor made several payments to Hagan but did not specify the jobs to which the payments should be credited. Hagan applied the payments to the oldest outstanding jobs. The general contractor fully paid the subcontractor on the job at issue but Hagan's books reflected an additional $9,000.00 due on that particular job. The court allowed recovery on the bond, noting that to do otherwise would "ignore the underlying purpose of… § 39-1-1(b): to insure that a materialman receives full payment for labor or materials which he supplies to a public; works project." *Id.* at 820.

C. Notice Required

Alabama's Little Miller Act requires a claimant to provide written notice to the surety of the amount claimed to be due and the nature of the claim. Ala. Code § 39-1-1(b) [Westlaw]. Notice to the surety must be sent via registered or certified mail, postage prepaid, addressed to any of the surety's places of business or offices. *Id.*

D. Coverage

The Alabama Little Miller Act is to be liberally construed to effect the purpose of the statute. *Sparks Constr. Co. v. Newman Bros.*, 51 Ala. App. 690, 288 So. 2d 749 (1974) [Lexis].

Alabama courts have broadly defined the Alabama Little Miller Act's purpose as providing security for those who furnish labor and material in performance of government contracts as a substitute for unavailable lien rights. *Headley v. Hous. Auth. of Prattville*, 347 So. 2d 532 (Ala. Civ. App. 1977) [Lexis]; *Johnson Controls, Inc. v. Liberty Mut. Ins. Co.*, 160 So. 3d 249 (Ala. 2014) [Lexis], *reh'g denied*.

1. Labor

a. Professional Services

Unless deemed part of the cost of "labor or materials" supplied "in the prosecution of the work," professional services are not allowed under a statutory payment bond. Ala. Code § 39-1-1 [Westlaw].

b. Union Benefits

Unless deemed part of the cost of "labor or materials" supplied "in the prosecution of the work," union benefits are not allowed under a statutory payment bond. Ala. Code § 39-1-1 [Westlaw].

2. Material

Alabama's Little Miller Act allows for a supplier to recover under the payment bond any materials "furnished" for the job. *Riley-Stabler Constr. Co. v. Westinghouse Elec. Corp.*, 396 F.2d 274 (5th Cir. 1968) [Lexis], *rehearing denied* 401 F.2d 526. Additionally, Alabama's Little Miller Act covers materials furnished for the project even when diverted to other uses. *Id.*

3. Equipment

a. Repairs

Repairs incidental in nature and made necessary by the prosecution of the work are protected by Alabama's Little Miller Act. *U. S. Fid. & Guar. Co. v. Benson Hardware Co.*, 222 Ala. 429, 132 So. 622 (1931) [Lexis].

b. Rentals

Alabama's Little Miller Act covers the costs of the rental of necessary equipment. *John E. Ballenger Constr. Co. v. Joe F. Walter Constr. Co.*, 236 Ala. 548, 184 So. 275 (1938) [Lexis].

4. Other

a. Attorneys' Fees

Alabama's Little Miller Act bonds include coverage for reasonable attorneys' fees incurred by successful claimants in civil actions on the bond. Ala. Code § 39-1-1 [Westlaw]. To recover

attorneys' fees, the claimant must ultimately be found entitled to substantially the same amount claimed in his notice to the surety. *Columbus Rock Co. v. Alabama Gen. Ins. Co.*, 153 F. Supp. 827 (M.D. Ala. 1957) [Lexis].

b. Interest

Alabama's Little Miller Act provides coverage for a claimant to recover contractual interest on the unpaid principal amount, from the date of the notice sent to the surety. Ala. Code § 39-1-1(b) [Westlaw]; *Cincinnati Ins. Co. v. City of Talladega*, 342 So. 2d 331 (Ala. 1977) [Lexis].

c. Financing Charges

It is unlikely that Alabama's Little Miller Act would cover financing charges; however, there is no express authority. The touchstone is whether financing charges would be deemed part of the cost of "labor or materials" supplied "in the prosecution of the work." Ala. Code § 39-1-1 [Westlaw].

d. Insurance Premiums

It is unlikely that Alabama's Little Miller Act would cover insurance premiums; however, there is no express authority on point. The touchstone is whether insurance premiums would be deemed part of the cost of "labor or materials" supplied "in the prosecution of the work." Ala. Code § 39-1-1 [Westlaw].

e. Loans

It is unlikely that Alabama's Little Miller Act would cover loans; however, there is no express authority on point. The touchstone is whether loans would be deemed part of the cost of "labor or materials" supplied "in the prosecution of the work." Ala. Code § 39-1-1 [Westlaw].

f. Delay Damages

Unless deemed part of the cost of "labor or materials" supplied "in the prosecution of the work," delay damages are not allowed under a statutory payment bond. Ala. Code § 39-1-1 [Westlaw].

g. Profits

Alabama courts have interpreted the language of Ala. Code § 39-1-1 [Westlaw] to include coverage for the contract sum, which would inherently allow the recovery of profits. *John E. Ballenger Constr. Co. v. Joe F. Walters Constr. Co.*, 236 Ala. 548, 550, 184 So. 275, 276 (1938) [Lexis] (note that this case interprets an earlier Alabama statute, whose provisions were comparable to the present version of Alabama's Little Miller Act).

h. Extracontractual

In Alabama, there is no statutory provision or common law precedent that allows a cause of action for bad faith against a surety. R. Cooper Shattuck, *Bad Faith: Does It Apply to Sureties in Alabama?*, 57 ALA. LAW. 241 (July 1996) [Westlaw]; Hightower & Co. v. United States Fid. & Guar. Co., 527 So. 2d 698 (Ala. 1988) [Lexis]; *Goudy Constr., Inc. v. Raks Fire Sprinkler, LLC*, Civ. No. 2:19-CV-1303-RDP, 2019 WL 6841067, 2019 U.S. Dist. LEXIS 215707 (N.D. Ala. Dec. 16, 2019) [Lexis]. Courts have routinely differentiated suretyship from insurance and dismissed claims for bad faith. *See, e.g.*, *Old House Specialists, LLC v. Guar. Ins. of N. Am USA*, 541 F. Supp. 3d 1325, 1329 (M.D. Ala. 2021) [Lexis] (granting surety's motion to dismiss bad-faith tort claims asserted by payment bond claimant on private project and reasoning that "[a] payment bond, which is a type of surety bond, does not resemble a typical insurance contract.").

E. Contracts Excluded

Alabama's Little Miller Act requires the posting of a payment bond for any public works project if the contract is in an amount less than $50,000. Ala. Code § 39-1-1(e) [Westlaw]. Any contract for public work less than this amount does not require the furnishing of a payment bond.

F. Time for Suit

No action can be instituted on a bond until 45 days after providing written notice to the surety of the amount and the nature of the claim. This notice is a condition precedent to the bringing of an action. Ala. Code § 39-1-1 (b) [Westlaw]; *see also Lloyd Wood Constr. Co. v. Con-Serve, Inc.*, 285 Ala. 409, 232 So. 2d 649 (1970) [Lexis].

A civil action on an Alabama Little Miller Act bond may be brought in the county where the work is performed, or in any county where the contractor or his surety does business. Ala. Code § 39-1-1(c) [Westlaw].The claim can be prosecuted against both the contractor and its surety, or either of them. *Id.* All actions under the Alabama Little Miller Act must be instituted within one year of the date of final settlement of the general contract. Ala. Code § 39-1-1(b) [Westlaw].

Alabama's Little Miller Act defines "final settlement" for contracts valued over $50,000, as the "completion of the contract" and the posting of a notice of completion in an advertisement in a newspaper published within the city or county in which the work was completed. Ala. Code § 39-1-1(f) [Westlaw]. This advertisement must be run for four consecutive weeks. *Id.* For contractors performing work less than $50,000, the notice of final completion of the contract only needs to be published in a newspaper for one week. Ala. Code § 39-1-1(g) [Westlaw].

G. Remarks

Alabama case law generally provides that if a government contract bond falls within the scope of Alabama's Little Miller Act, then certain provisions such as notice provisions, should be read into a government contract bond. In *Stewart v. Continental Casualty Co.*, the payment bond at issue stated that it was "furnished to comply with Ala. Code § 39-1-1, and all provisions shall be applicable to civil actions upon this bond." No. CIV.A. 12-0532-KD-B, 2014 WL 2568979, 2014 U.S. Dist. LEXIS 77808 (S.D. Ala. June 9, 2014) [Lexis]. The court held that even if the

statutory provision had not been specifically incorporated into the bond, the notice provision, as a matter of law, was a condition precedent to the right of recovery. *Id.* at *5.

H. Case Annotations

Effect of Conditional Payment Clause

In *Keller Constr. Co. of Nw. Fla., Inc. v. Hartford Fire Ins. Co.*, the Alabama Court of Civil Appeals affirmed the trial court's decision and held that a surety could rely upon the "pay-if paid" defense. 279 So. 3d 579, 591 (Ala. Civ. App. 2018) [Lexis]. At trial, the subcontractor admitted that the subcontract contained a pay-if-paid clause. However, the subcontractor argued the surety could not rely on that provision and must pay the subcontractor. The trial court rejected that argument and held that the payment bond surety's liability is coextensive with the prime contractor and is thus liable only if the prime contractor is liable to the subcontractor under the terms of the subcontract. The appeals court rejected the rationale of several recent federal court decisions holding a surety cannot assert a conditional-payment clause in a subcontract as a defense to avoid liability. Rather, the appeals court reasoned that "allowing [the subcontractor] to recover from [surety] under the bond when [subcontractor] has no right to recover . . . from [the prime] under the subcontract would violate the . . . principle of surety law that a surety under a payment bond can be liable only to the extent that the principal is liable." *Id.* at 591.

Equitable Subrogation

Alabama recognizes the surety's equitable subrogation rights exist whether a surety steps in and physically completes the contract or whether it merely pays the laborers and suppliers under the contract. *See Maryland Cas. Co. v. Dupree*, 223 Ala. 420, 136 So. 811 (1931) [Lexis]; *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962). However, this issue has not been litigated recently.

Priority

Alabama caselaw establishes that the claims of laborers and suppliers against a subcontractor take precedence over a claim of the subcontractor against the contractor in chief with respect to obligations of bond. *U.S. Fid. & Guar. Co. v. Benson Hardware Co.*, 222 Ala. 429, 132 So. 622 (Ala.1931) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

On private projects, Alabama law does not require contractors to furnish payment bonds. Under Alabama law, common-law payment bonds are construed under general principles of contract interpretation, and the parties' intent controls. The surety has the right "to stand upon the agreement…and to exact compliance with its stipulations[.]" *Maryland Cas. Co. v. Cunningham*, 234 Ala. 80, 173 So. 506, 507 (1937) [Lexis]; *see also Hightower and Co. v. U.S. Fid. & Guar., Co.*, 527 So. 2d 698, 703 n.1 (Ala. 1988) [Lexis]; *Coltin Elec., Inc. v. Cont'l Cas. Co.*, No. CIV.A.

12-0532-KD-B, 2013 U.S. Dist. LEXIS 37923, 2013 WL 1150920, at *2 (S.D. Ala. Mar. 19, 2013) [Lexis].

B. Time for Suit

Pursuant to Ala. Code § 6-2-15 [Westlaw], "[e]xcept as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void." The time otherwise "prescribed by law" would oftentimes be six-years. *See* Ala. Code § 6-2-34 [Westlaw].

C. Case Annotations

Tort Claim for Bad Faith Inapplicable to Payment Bond Surety

In *Old House Specialists, LLC v. Guarantee Insurance of North America USA*, the United States District Court for the Middle District of Alabama examined the Alabama Supreme Court's application of the tort of bad faith and policy considerations, comprehensively distinguished contracts of insurance and suretyship, and held that the tort of bad faith was inapplicable in the payment bond context. 541 F. Supp. 3d 1325 (M.D. Ala. 2021) [Lexis].

ALASKA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Before a public works contract exceeding $100,000 is awarded to a contractor, the contractor must furnish to the state or political subdivision a payment bond which becomes binding upon the award of the contract. Alaska Stat. § 36.25.010(a). The payment bond must be posted by a surety qualified to do business in Alaska or at least two individual sureties who "shall each justify" in a sum equal to the amount of the bond for the protection of those who supply labor and material in the prosecution of the work provided for in the contract. Alaska Stat. § 36.25.010(a)(2). If the total contract price is less than $1,000,000, the payment bond will be 50% of the contract price. *Id*. If the contract price is more than $1,000,000 but no more than $5,000,000, then the payment bond shall be 40% of the contract price. *Id*. If the contract price is over $5,000,000, then the payment bond will be in the sum of $2,500,000. *Id*. The purpose of this statute is to protect those who furnish labor or material for a state public works project form the risks of nonpayment. *State ex rel. Palmer Supply Co. v. Walsh & Co.*, 575 P.2d 1213, 1218 (Alaska 1978) [Westlaw].

B. Tiers Covered

Those who provided labor and material furnished in the prosecution of the underlying contract work for which the public payment bond is posted may sue and make a claim against the public payment bond for the unpaid amount. Alaska Stat. § 36.25.020(a). Thus, both first-tier subcontractors and second-tier subcontractors may make a claim against the public payment bond; however, different notice requirements apply depending on their relationship with the prime contractor. *See infra* § 1.0(C).

C. Notice Required

Claimants who have a direct relationship with a subcontractor, but no express or implied contractual relationship with the contractor, must serve on the contractor a written notice of nonpayment within ninety (90) days from the last date on which the person performed labor or furnished material for which the claim is made. Alaska Stat. § 36.25.020(b). A claimant with a contractual relationship, express or implied, with the contractor does not need to give notice prior to filing a suit against the bond. *Id*.

The notice must state with substantial accuracy the amount claimed and the name of the person to whom the material was furnished or for whom the labor was performed. *Id*. The notice must be served by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where the contractor maintains an office or conducts business, the contractor's residence, or in any manner way a peace officer is authorized to serve summons. *Id*. The effective date of

notice is the date the notice is mailed, not the date the notice is received. *Dat Luong v. West Sur. Co.*, 485 P.3d 46, 56 (Alaska 2021) [Westlaw].

D. Coverage

Payment bonds obtained pursuant to Alaska's Little Miller Act cover labor and material furnished in the prosecution of the work provided for in the contract. Alaska Stat. § 36.25.020(a). Alaska's Little Miller Act is remedial in nature and is "liberally construed to effectuate its purposes." *State ex rel. Smith v. Tyonek Timber, Inc.*, 680 P.2d 1148, 1157 (Alaska 1984) [Westlaw]. As the Alaska Little Miller Act is modeled after the federal Miller Act, Alaska courts will give more weight to federal case law principles interpreting the Miller Act as opposed to general common law principles governing debtor-creditor relations. *State ex rel. Palmer Supply*, 575 P.2d 1213, 1218 (Alaska 1978) [Westlaw].

1. Labor

a. Professional Services

Alaska public payment bonds cover claimants who furnished "labor or material in the prosecution of the work[.]" Alaska Stat. § 36.25.020. Alaska's Little Miller Act defines "labor" as including all work that is "necessary to and forwards" the project. *Dat Luong*, 485 P.3d at 52 [Westlaw] (citing *Am. Sur. Co. v. United States*, 76 F.2d 67, 68 (5th Cir. 1935) [Westlaw]). Thus work such as inspections and supervisory services are compensable labor. *Id*. Further, work performed off-site may also be compensable. *Id*. In dicta, *Dat Luong* suggests professionals may bring a claim under the public payment bond so long as their work is "necessary to and forwards" the project. *Id.* at 52 n.34 (citing *Price v. H.L. Coble Constr. Co.*, 317 F.2d 312, 320 (5th Cir. 1963) [Westlaw] (interpreting labor in statutes like the Miller Act to include the work of supervisors, engineers, and architects)).

b. Union Benefits

There is no reported Alaska opinion interpreting whether union benefits are considered "labor and material" under Alaska's Little Miller Act and thus covered under public payment bonds.

2. Material

Suppliers who furnished material pursuant to a contract for the "construction, alteration, or repair of a public building or public work" may bring a claim under the public payment bond. Alaska Stat. § 36.25.010. Yet, the materials furnished must be used for the "construction, alteration, or repair of a public building or public work." *Anchorage v. Tatco, Inc.*, 774 P.2d 207, 211 (Alaska 1989) [Westlaw] (holding a contract to supply cover material for a solid refuse landfill did not constitute the "construction, alteration or repair" of a public work, and thus a public payment bond was not required).

3. Equipment

a. Repair

Repairs for incidental damages and ordinary wear and tear are covered by Alaska's Little Miller Act payment bonds; however, the public payment bond will not protect against expenditures which are beyond the degree of "expected consumption." *McGee Steel Co. v. State ex rel. McDonald Indus. Alaska*, 723 P.2d 611, 618 (Alaska 1986) [Westlaw] (quoting *United States ex rel. J.P. Byrne & Co. v. Fire Ass'n of Philadelphia*, 260 F.2d 541, 544 (2d Cir. 1958) [Westlaw]). For instance, the negligence of a subcontractor resulting in damage to a major piece of equipment was not an expense that a surety should have expected, and thus the surety was not held liable for those repair costs. *McGee Steel Co.*, 723 P.2d at 618 [Westlaw].

b. Rentals

Suppliers of rental equipment used in the prosecution of the work may bring a claim against the public payment bond for the time the rented equipment was actually used or "substantially consumed" on the project. *McGee Steel Co.*, 723 P.2d at 617 [Westlaw]. Note, the surety's liability is a factual issue, and only extends to the amount the equipment was "substantially consumed" on the project. *Id*. Thus, in certain cases, the surety's liability to rental suppliers may be less than that of the prime contractor.

Of course, the seller of equipment (as opposed to the supplier of rental equipment) may not bring a claim against the public payment bond. *Id*.

4. Other

a. Attorneys' Fees

Alaska allows for the awarding of attorneys' fees to the prevailing party in the absence of an agreement or statutory authority pursuant to a schedule as set forth in Alaska Civil Rule 82, including in the context of a public payment bond. *Safeco Ins. Co. v. Honeywell, Inc.*, 639 P.2d 996, 1002 (Alaska 1981) [Westlaw]. The award of attorneys' fees is within the trial courts discretion and will not be disturbed unless manifestly unreasonable. *Id*. (internal citations omitted).

b. Interest

There is no reported Alaska opinion analyzing whether a surety is liable to a claimant for pre-judgment interest. Courts in other jurisdictions hold a surety liable for interest if the claimant demands payment from the surety. *See Hartford Accident & Ind. Co. v. Arizona Dept. of Transp.*, 172 Ariz. 564, 838 P.2d 1325 (Ariz. Ct. App. 1992) [Westlaw]. If a surety is liable for prejudgment interest, Alaska's statutory interest rate is set at three (3) percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered. Alaska Stat. § 09.30.070(a). Prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification that an injury occurred and a claim may be brought for that injury—whichever is earlier. Alaska Stat. § 09.30.070(b).

Alaska has a Public Prompt Payment Act requiring Alaska or its political subdivisions to pay a prime contractor for satisfactory performance within thirty (30) days of receiving a pay request. Alaska Stat. § 36.90.200(a). If a political subdivision uses grant money to pay, the subdivision must pay the prime contractor for satisfactory performance within twenty-one (21) days from receipt of a payment request or of the grant money, whichever is later. *Id*. If Alaska uses federal money to pay, Alaska shall pay the prime contractor for satisfactory performance within twenty-one (21) days after receipt of the payment request or federal money, whichever is later. *Id*. If payment is not made, interest will accumulate on the unpaid amount from the twenty-first day after payment is due at the interest rate found in Alaska Stat. § 45.45.010(a) (10.5%).

Alaska or the political subdivision must provide written notice within eight (8) working days after receipt of the payment request if payment is withheld for unsatisfactory work or defective payment requests stating the reasons for withholding part or all of the payment and the actions the prime contractor may take to receive full payment. Alaska Stat. § 36.90.200(c). If the written notice does not comply with section (c), interest will accumulate on the amount withheld from the eighth working day after receipt of the payment request until complying notice is given. Alaska Stat. § 36.90.200(d). If the contractor completes the remedial actions, payment shall be made within twenty-one (21) days upon completion. Alaska Stat. § 36.90.200(e).

These payment requirements do not apply to political subdivisions with populations under 800. Alaska Stat. § 36.90.200(g).

Contractors must pay subcontractors within eight (8) working days of receiving payment from the project owner. Alaska Stat. § 36.90.210(a). Retainage must also be paid within eight (8) working days after final payment is received from the state or after the notice period prescribed in Alaska Stat. § 36.25.020(b) expires, whichever is later. Alaska Stat. § 36.90.210(a). If such amounts are not timely paid, the interest accumulates at the rate in Alaska Sat. § 45.45.010(a) (10.5%).

c. Financing Charges

Unless financing charges are determined to be part of the cost of "labor or material" furnished "in the prosecution of the work[,]" they would not be recoverable under the public payment bond. Alaska Stat. § 36.25.020(a).

d. Insurance Premiums

Unless insurance premiums are determined to be part of the cost of "labor or material" furnished "in the prosecution of the work[,]" they would not be recoverable under the public payment bond. Alaska Stat. § 36.25.020(a).

e. Loans

There is no reported Alaska opinion interpreting whether those who loan or advance money to a contractor or subcontractor provide "labor and material" under Alaska's Little Miller Act and thus covered under public payment bonds. Under most Little Miller Act payment bonds, claims by lenders against a public payment bond will not be allowed. *See e.g.*, *Primo Team, Inc. v. Blake Constr. Co., Inc.*, 4 Cal. Rptr. 2d 701, 707–08 (Cal. Ct. App. 1992) [Westlaw]; *Integon Indem. Corp. v. Bull*, 842 S.W.2d 1, 4 (Ark. 1992) [Westlaw].

f. Delay Damages

There is no reported Alaska opinion allowing delay damages as part of a public payment bond claim. Some jurisdictions hold delay damages are not part of the cost of materials and labor furnished, *see, e.g.*, *W.S.A., Inc. v. Stratton*, 680 F. Supp. 375, 377 (S.D. Fla. 1988) [Westlaw], while others hold the opposite. *See Mai Steel Serv., Inc. v. Blake Constr. Co.*, 981 F.2d 414, 420–21 (9th Cir. 1992) [Westlaw]. Under Alaska's Little Miller Act, a court could allow a claim against the public payment bond which includes the increased cost of the labor or materials because of a delay.

g. Profits

There is no reported Alaska opinion allowing lost profits as part of a public payment bond claim. If the lost profit regards work which was not performed, it will likely not be considered "labor or material" furnished under Alaska's Little Miller Act and thus unrecoverable. If the profits claimed are part of the contract price of work performed by the claimant, it seems likely that the claimant would be able to recover that amount against the public payment bond.

h. Extracontractual

Every public payment bond contains an implied covenant of good faith and fair dealing between a surety and its obligee. *Loyal Order of Moose, Lodge 1392 v. Int'l Fid. Ins. Co.*, 797 P.2d 622, 626 (Alaska 1990) [Westlaw]. If a surety fails to investigate its principal's alleged default, and the investigation would confirm the obligee's allegations, such actions may constitute bad faith and subject a surety to extracontractual damages and bad faith tort liability. *Id.* at 627. Note, sureties do not owe claimants a duty to investigate claims made against a contractor license bond. *O'Connor v. Star Ins. Co.*, 83 P.3d 1 (Alaska 2003) [Westlaw].

E. Contracts Excluded

If the governor proclaims that an area is impacted by an economic disaster, the requirement of a public payment bond may be waived if the contract amount does not exceed $100,000.00. Alaska Stat. § 44.33.300. Additionally, a municipality by ordinance may exempt contractors from posting a public payment bond if the estimated cost of the project does not exceed $400,000.00, the contractor is a licensed contractor with its principal office in the state from the two years preceding the award of the contract, the contractor certifies it has not defaulted on a contract awarded to it during the three years preceding the submittal of the bid, the contractor submits a financial statement certified by a public accountant or a certified public accountant licensed under Alaska Stat. § 08.04 prepared within nine months from submission of the bid which demonstrates the contractor's net worth is not less than 20% of the contract amount, and the total amount of all contracts the contractor anticipates performing during the term of the contract for which the bid is submitted does not exceed the net worth of the contractor by more than seven (7) times. Alaska Stat. § 36.25.025.

Except as stated above, all contractors must post a public payment bond before being awarded a contract exceeding $100,000.00 for the construction, alteration, or repair of a public building or public work of the state or a political subdivision of the state. Alaska Stat. § 36.25.010.

F. Time for Suit

A claimant upon a public payment bond who is not paid in full before the expiration of ninety (90) days from the last day on which the labor is performed or material is furnished, may sue on the public payment bond for the amount unpaid. Alaska Stat. § 36.25.020(a). The claimant must file suit within one (1) year from the "final settlement" of the contract. Alaska Stat. § 36.25.020(c). This statutory language derives from the Heard Act, the Miller Act's predecessor, which Alaska adopted but did not amend when Congress amended the Miller Act in 1959 to specify an action must be filed within one year after final work on the project.

"Final settlement" means that the contract has been completed and that there has been a specific administrative act authorizing payment. *Safeco Ins. Co. of Am. v. Honeywell, Inc.*, 639 P.2d 996, 1001 (Alaska 1981) [Westlaw]. Alaska looks to federal case law interpreting the previously similar Miller Act (prior to 1959) when interpreting "final settlement" as used in the statute. *Id.*

G. Remarks

In addition to the foregoing, to bring a claim against a public payment bond for work requiring registration under Chapter 18 of the Alaska Statutes, a claimant must be registered at the time of contracting. Alaska Stat. § 36.25.020(c) (citing Alaska Stat. § 08.18.151). Due to this harsh penalty, courts strictly interpret this statute and only require substantial compliance with the registration provisions. *Alaska Protection Servs. v. Frontier Colorcable*, 680 P.2d 1119, 1122 (Alaska 1984) [Westlaw]. Substantial compliance is met when a contractor sufficiently affords the other party the effective protection of the statute. *Id.* (finding substantial compliance with the statute when a registered, bonded, and insured contractor, acting under an unregistered name entered into a contract).

H. Case Annotations

No Implied Right of Action Against an Owner

In *Imperial Manufacturing Ice Cold Coolers, Inc. v. Shannon*, the court held Alaska's Little Miller Act did not contain an implied right of action in the favor of an unpaid subcontractor against an owner who did not require a public payment bond in violation of the statute. 101 P.3d 627 (Alaska 2004) [Westlaw]. First, the court concluded to accept an implied right of action in favor of the subcontractor against the government would contravene the premise of the Little Miller Act: that the government and government property may not be charged by those with which the government has no contractual relationship. *Id.* at 630. If the legislature intended a deviation from this premise, it would have been expressed in the statute. *Id*. Buttressing the court's conclusion is the prevailing rule found in federal case law under the Miller Act: that the government is not liable for a negligent failure to insist on the furnishment of public payment bonds. *Id*. In these instances, the subcontractor's sole remedy is to bring an action against the contractor.

Equitable Subrogation

A surety who completes a contract or satisfies the claims of laborers and suppliers establishes a subrogation right to all funds, progress payments or retained percentages in the possession of the obligee. *Reliance Ins. Co. v. Alaska State Hous. Auth.*, 323 F. Supp. 1370, 1373 (D. Alaska 1971) [Westlaw]. Further, a surety who completes a principal's contractual obligations and pays laborers and suppliers is not required to perfect the assignment of the principal's rights pursuant to an indemnity agreement under the U.C.C. *Alaska State Bank v. Gen. Ins. Co.*, 579 P.2d 1362, 1365–67 (Alaska 1978) [Westlaw]. Indeed, a surety's right of subrogation is not a security interest governed by the U.C.C. that must be perfected. *Id.* at 1368. Consequently, a surety's right to earned progress payments supersedes a bank's perfected security interest in the principal's contract rights. *Id*.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Alaska does not have a statute requiring or regulating payment bonds on private contracts. Instead, a common-law or private payment bond is a private contract and subject to the applicable contract law principles. Accordingly, subjects such as coverage, notice, time to commence, etc. will be provided by the bond itself, which will be interpreted as any other contract. *See generally Alaska Energy Auth. v. Fairmont Ins. Co.*, 845 P.2d 420, 423 (Alaska 1993) [Westlaw].

In a similar vein, a contractor who disputes the validity of a mechanics' lien may bond around the lien in an amount equal to 150% of the lien claim. Alaska Stat. § 34.35.072. No reported opinion has analyzed this statute.

B. Time for Suit

A provision which limits the commencement of a suit is only enforced when its application in a case will serve the primary purpose for its inclusion—to avoid prejudice. *Alaska Energy Auth.*, 845 P.2d at 423 [Westlaw] (citing *Estes v. Alaska Ins. Guar. Ass'n*, 774 P.2d 1315, 1320 (Alaska 1989) [Westlaw]). Because bond limitation periods exist to provide claimants time to file suit and provide notice to the surety of a principal's default, a surety will not prevail on a statute of limitations defense if the claimant provides notice of the claim within the bond's limitations period. *Id*. If the provision is not enforceable, Alaska Stat. § 09.10.053 provides a three (3) year limitations period for an action on a contract.

C. Case Annotations

Waiver of Sovereign Immunity

In *Hydaburg Cooperative Association v. Hydaburg Fisheries*, the court held an agreement to arbitrate is a waiver of sovereign immunity from jurisdiction in an action to compel arbitration or enforce an arbitration award. 826 P.2d 751, 754–55 (Alaska 1992) [Westlaw]. Otherwise, the arbitration clause would be meaningless. *Id*.

ARIZONA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Ariz. Rev. Stat. § 34-222, which is part of Arizona's Little Miller Act, establishes the payment bond form required for public projects in Arizona. (Arizona's Little Miller Act is codified at Ariz. Rev. Stat. §§ 34-221 through 34-227.) There are many other statutes regulating public works in Arizona, with each statute requiring a payment bond that conforms with Ariz. Rev. Stat. § 34-222. Other public works statutes incorporating the payment bond form found in Title 34 include:

Ariz. Rev. Stat.	Coverage
§ 11-254.01	county public works projects
§ 15-213	public school projects
§ 28-6713	county highway projects
§ 28-6748	county highway projects
§ 28-6923	state highway projects
§ 30-128	Arizona power authority projects
§ 41-2574	state's procurement code
§ 45-2261	county water projects
§ 48-282	special taxing districts
§ 48-587	municipal improvement districts
§ 48-952	county improvement districts
§ 48-1554	power districts
§ 48-2055	Collector sewer construction
§ 48-2665	drainage and flood protection districts
§ 48-2986	irrigation and water conservation districts
§ 48-4857	Active management area water districts

On projects regulated under Arizona's Little Miller Act—and on projects over $100,000.00 governed by Arizona's Procurement Code, Ariz. Rev. Stat. § 41-2574—the prime contractor is required to provide a payment bond in the full amount of the prime contract. Ariz. Rev. Stat. § 34-222. The bond is for the protection of claimants supplying labor or materials to the prime contractor or any of its subcontractors in the prosecution of the work provided for in the prime contract. *Id.*

B. Tiers Covered

The public works payment bond covers claims asserted by claimants providing labor or materials to the prime contractor or to any of its subcontractors performing work provided for in the prime contract—*i.e.*, first- and second-tier claimants. Ariz. Rev. Stat. § 34-222(F).

C. Notice Required

On public projects, claimants who have a direct contractual relationship with a subcontractor, but no direct contractual relationship with the prime contractor, must serve the prime contractor with a preliminary twenty (20)-day notice *and* a ninety (90)-day post-completion demand for payment to enforce their rights against the payment bond. Ariz. Rev. Stat. § 34-223(A) (Little Miller Act); Ariz. Rev. Stat. § 41-2574 (Arizona Procurement Code). The Little Miller Act and the Procurement Code refer to the preliminary twenty (20)-day notice requirements found in Arizona's mechanics' lien statutes. Ariz. Rev. Stat. §§ 33-992.01(C)(1)–(4); 33-992.01(E), 33-992.01(F); 33-992.01(H).

The preliminary notice must be served by mail no later than twenty (20) days after the claimant first furnished labor or provided materials to the jobsite, and the notice must include a general description of the labor or materials furnished, an estimate of the total price, the name and address of the claimant, the name of the person who contracted for the labor or materials, and the legal description, subdivision plat, street address, or other sufficient description of the location of the jobsite. The proper form to use is spelled out in Ariz. Rev. Stat. § 33-992.01, and the failure to use the proper form can result in a subsequent bond claim being declared invalid.

If preliminary notice is not given within twenty (20) days after the claimant first provided labor or materials to the jobsite, the claimant may still provide the prime contractor with preliminary twenty (20)-day notice, but only the labor or materials provided within twenty (20) days prior to the service of the preliminary notice, and at any time thereafter, may be included in the payment bond claim. Ariz. Rev. Stat. § 33-992.01(F).

The post-completion demand for payment must state with substantial accuracy the amount of the claim and the name of the party to whom the materials were furnished or for whom the labor was performed. The demand must be served within ninety (90) days from the date on which the claimant performed the last of the labor or furnished the last of the material for which the claim is made. At least one court has held the demand must be received by the prime contractor within ninety (90) days. *Maricopa Turf, Inc. v. Sunmaster, Inc.*, 173 Ariz. 357, 842 P.2d 1370 (Ariz. Ct. App. 1992) [Westlaw].

Under Arizona's Little Miller Act and Procurement Code, service of the preliminary notice must be made by registered or certified mail, or by way of use of a certificate of mailing. Service of the post-completion demand must be made by registered or certified mail, or other method allowing third-party verification such as UPS or FedEx, sent to any address where the prime contractor maintains an office, conducts business, or resides. Failure to provide the prime contractor with preliminary notice and a post-completion demand may cause the claim against the payment bond to be invalid unless the prime contractor admits receipt of the notice. *Cemex Constr. Materials S., Ltd. Liab. Co. v. Falcone Bros. & Assocs.*, 237 Ariz. 236, 237, 349 P.3d 210, 211 (Ariz. Ct. App. 2015) [Westlaw].

D. Coverage

In Arizona, as elsewhere, the state Little Miller Act is remedial in nature and "must be liberally construed to protect subcontractors providing labor and materials for a public construction project." *R.E. Monks Constr. Co. v. Aetna Cas. & Sur. Co.*, 189 Ariz. 575, 576, 944 P.2d 517, 518 (Ariz. Ct. App. 1997) [Westlaw] (internal citations omitted). However, such a liberal construction

must not disregard limitations imposed by the legislature but must give effect to the purpose of the limitations. *Id.* Arizona courts deem cases interpreting the federal Miller Act "highly persuasive" when construing the coverage of the Arizona Little Miller Act. *Honeywell, Inc. v. Arnold Constr. Co.*, 134 Ariz. 153, 156, 654 P.2d 301, 304 (Ariz. Ct. App. 1982) [Westlaw].

1. Labor

a. Professional Services

Arizona public payment bonds cover "claimants supplying labor or materials to the contractor or his subcontractors in the prosecution of the work[.]" Ariz. Rev. Stat. § 34-222(F). Professional services have not been classified as labor or materials. Although Arizona's mechanics lien statutes have been amended to allow professionals to record mechanics liens, no similar amendments were made to the bond statutes, and providers of professional services are not entitled to assert a claim under a public works payment bond. *See Fields v. Capitol Indem. Corp.*, 180 Ariz. 312, 884 P.2d 198 (Ariz. Ct. App. 1994) [Westlaw].

b. Union Benefits

Union benefits are considered "labor or material" and are covered by a public works payment bond. *Operating Eng'rs Health and Welfare Tr. Fund v. JWJ Contracting, Co.*, 135 F.3d 671 (9th Cir. 1998) [Westlaw]. If the union trust fund has a direct contract with a subcontractor and no contractual relationship with the prime contractor and principal on the payment bond, the union trust fund must provide the preliminary twenty (20)-day notice and ninety (90)-day post completion demand required from all claimants not in direct privity with the principal. *Performance Funding, LLC v. Arizona Pipe Trade Tr. Funds*, 203 Ariz. 21, 49 P.3d 293 (Ariz. Ct. App. 2002) [Westlaw].

2. Material

In *U. S. Fidelity & Guaranty Co. v. California–Arizona Construction Co.*, 21 Ariz. 172, 186 P. 502 (Ariz. 1920) [Westlaw], the Court limited recovery to "material [that] actually enters into the work done, or is consumed, or substantially consumed" when denying recovery to a lumber supplier whose lumber was used as forms and could be used again as forms, much like a tool is used on multiple projects. Under Arizona's mechanics' lien law, actual incorporation into the project is required to establish a valid lien. *Wahl v. Sw. Savings & Loan Association*, 106 Ariz. 381, 476 P.2d 836 (Ariz. 1970) [Westlaw] (requiring actual incorporation into project for mechanics' lien purposes). The same rule may apply to payment bond claimants. *Arizona Gunite Builders, Inc. v. Continental Cas. Co.*, 105 Ariz. 99, 101, 459 P.2d 724, 726 (Ariz. 1969) [Westlaw] (reading mechanics' lien and bond statutes *in pari materia*).

3. Equipment

a. Repair

In one of the more convoluted Arizona surety decisions, the Court of Appeals held an equipment supplier's claim under a payment bond may be tolled until the damaged equipment is picked up from the job, repaired, and returned to the rental company's inventory. *Norquip Rental Corp. v. Sky Steel Erectors, Inc*., 175 Ariz. 199, 854 P.2d 1185 (App. 1993) [Westlaw].

b. Rentals

Suppliers of rental equipment provide "labor or materials" within the definition of the Arizona Little Miller Act and may assert a claim under the payment bond. Included in this claim may be the cost of repairing the equipment. *Arizona Gunite Builders, Inc. v. Continental Cas. Co*., 105 Ariz. 99, 459 P.2d 724 (Ariz. 1969) [Westlaw].

4. Other

a. Attorneys' Fees

Payment bonds provided on public works projects allow "the prevailing party in a suit on such bond to recover as a part of the judgment such reasonable attorneys' fees as may be fixed by a judge of the court." Ariz. Rev. Stat. § 34-222(B).

b. Interest

The "general rule is that a surety on a contractor's bond is not liable for interest on supplier's or subcontractor's claims unless a demand for payment has been made on it." *Hartford Accident & Indem. Co. v. Arizona Dep't of Transp*., 172 Ariz. 564, 838 P.2d 1325 (Ariz. Ct. App. 1992) [Westlaw]. However, the court reached a different result in *Webb v. Crane Co*., 52 Ariz. 299, 80 P.2d 698 (Ariz. 1938) [Westlaw] and determined interest was calculated from the date payment from the principal was due. The Arizona courts have also held the statutory interest rate applies, and not the sometimes-higher rate described in the claimant's contract. Ariz. Rev. Stat. § 44-1201; *Env't Liners v. Ryley, Carlock & Applewhite, P.C*., 187 Ariz. 379, 930 P.2d 456 (Ariz. Ct. App. 1996) [Westlaw]. Arizona also has a Private Project Prompt Payment Act, Ariz. Rev. Stat. §§ 32-1181 *et seq.* (imposing a one-and-a-half percent (1.5%) per month penalty for violation of the Act) and a Public Project Prompt Payment Act, Ariz. Rev. Stat. §§ 34-221 and 41-2577 (imposing a one percent (1%) per month penalty for violation of the Act). In the context of a mechanics' lien discharge bond, the Arizona courts have held "reasonable value does not include Draconian contract terms designed to coerce prompt payment." *Cashway Concrete & Materials v. Sanner Contracting Co*., 158 Ariz. 81, 82, 761 P.2d 155, 156 (Ariz. Ct. App. 1988) [Westlaw]. A court could conclude the Prompt Payment Act penalties are intended to coerce payment and are not recoverable under a statutory payment bond. One court required a surety to pay interest above the penal sum of its bond if the claim was liquidated. *See In re Guardianship of Pacheco*, 219 Ariz. 421, 199 P.3d 676 (Ariz. Ct. App. 2006) [Westlaw].

c. Financing Charges

Unless deemed part of the cost of "labor or materials" supplied "in the prosecution of the work," finance charges would not be allowed under a statutory payment bond. Ariz. Rev. Stat. § 34-222(A)(2).

d. Insurance Premiums

Unless deemed part of the cost of "labor or materials" supplied "in the prosecution of the work," insurance premium costs would not be allowed under a statutory payment bond. Ariz. Rev. Stat. § 34-222(A)(2).

e. Loans

Under Arizona's mechanics' lien laws, a claimant who loans a contractor the funds to purchase labor or materials for incorporation into a project is not entitled to a mechanics' lien for the funds advanced. *Lilley v. J. D. Halstead Lumber Co.*, 42 Ariz. 546, 28 P.2d 616 (Ariz. 1934) [Westlaw]. Because the mechanics' lien statutes use of the terms "labor" or "materials" is considered the same under payment bonds, a similar result should be reached regarding the validity of a lender's claim against a payment bond. *See Fields v. Capitol Indem. Corp*., 180 Ariz. 312, 884 P.2d 198 (Ariz. Ct. App. 1994) [Westlaw].

f. Delay Damages

There is no reported Arizona opinion allowing delay damages as part of a payment bond claim. Under the statutes, if the cost of labor or materials provided by the claimant increased as a result of delay, the claim allowed under the payment bond may include delay-related cost increases.

g. Profits

The general rule is lost profits from work not performed is not considered "labor" or "materials" and is therefore not recoverable. *See Fortune v. Superior Court*, 159 Ariz. 549, 768 P.2d 1194 (Ariz. Ct. App. 1989) [Westlaw]. On the other hand, a claimant is not limited to recovery of just its costs of performance, and a payment bond claim can include a reasonable profit earned on the work performed and incorporated into the project. *Parker v. Holmes*, 79 Ariz. 82, 284 P.2d 455 (Ariz. 1955) [Westlaw].

h. Extracontractual

There are no Arizona authorities holding a statutory payment bond surety liable for punitive damages. In a case where the claimant pursued a statutory payment bond surety for tort recovery, the Court held a surety issuing a statutory payment bond does not face exposure to bad faith tort claims. *S & S Paving & Constr., Inc. v Berkley Reg'l Ins. Co*., 239 Ariz. 512, 372 P.3d 1036 (Ariz. Ct. App. 2016) [Westlaw]. This holding is likely to apply to a claim for punitive damages.

E. Contracts Excluded

Arizona Little Miller Act's requires the posting of payment bonds regardless of the value of the contract in question. Under Ariz. Rev. Stat. § 34-609, payment bonds are required for construction-manager-at-risk, design-build, and job-order-contracting construction services, but persons providing design services, preconstruction services, finance services, and the like do not qualify as valid payment bond claimants themselves.

F. Time for Suit

On public works projects, all lawsuits against the surety on a statutory payment bond must be commenced no sooner than ninety (90) days nor later than one (1) year after the claimant last furnished labor or materials to the project. The suit must include as defendants the principal and surety. Ariz. Rev. Stat. § 34-223(B); *SCA Constr. Supply v. Aetna Cas. & Sur. Co.*, 157 Ariz. 64, 754 P.2d 1339 (Ariz. 1987) [Westlaw]. Work done for the purpose of preparing final contract documentation, correcting defects, or making repairs may not toll the running of the one (1)-year limitation. *R.E. Monks Constr. Co. v. Aetna Cas. & Sur. Co.*, 189 Ariz. 575, 944 P.2d 517 (Ariz. Ct. App. 1997) [Westlaw]; *Honeywell, Inc. v. Arnold Constr. Co.*, 134 Ariz. 153, 654 P.2d 301 (Ariz. Ct. App. 1982) [Westlaw].

G. Remarks

Payment bond lawsuits make certain state procedural rules of potential relevance for the surety. Generally, pursuant to Ariz. R. Civ. Proc. 17(f) [Westlaw], the bond principal is deemed a necessary party, unless the bond principal resides beyond the limits of the state or in such part of the state that the bond principal cannot be reached by ordinary process of law. *See also* *SCA Constr. Supply v. Aetna Cas. & Sur. Co.*, 754 P.2d 1339 (Ariz. 1988) [Westlaw] (municipal subcontractor's supplier required to join general contractor as party defendant). With respect to service on the surety, service on the state Department of Insurance effects valid service, and the surety has forty (40) days to file an answer or other responsive pleading. Ariz. Rev. Stat § 20-222.

Arizona also has fairly robust public payment bond caselaw on the sufficiency and timeliness of claimant notice. In *R.E. Monks Construction Co. v. Aetna Casualty & Surety Co.*, 189 Ariz. 575, 944 P.2d 517 (Ariz. Ct. App. 1997) [Westlaw], for example, the claimant was contractually required to complete certain documentation before final payment was due. However, the one (1)-year limitation period governing an action against the statutory, public-works payment bond begins on the last day labor or material is provided to the project. The office work done after the last day of labor at the project did not toll the one (1)-year limitation period. The claim against the payment bond was held to be untimely even if the claim under the subcontract was not yet due.

H. Case Annotations

Effect of Conditional Payment Clause

In *L. Harvey Concrete, Inc. v. Agro Construction and Supply Co.*, 189 Ariz. 178, 939 P.2d 811 (Ariz. Ct. App. 1997) [Westlaw], the court held the earthwork subcontractor's claim for extra

compensation was barred by a pay-if-paid clause so long as the owner did not make a gross mistake of fact as to its calculation of the quantities. This action involved the subcontractor's claim against the prime contractor and the Little Miller Act payment bond surety. Both the principal and surety asserted a defense under the pay-if-paid clause, and both were successful at the trial court. On appeal, the court found a genuine issue of material fact as to whether the public owner had made a gross mistake of fact concerning the quantity of earthwork removed by the subcontractor.

Equitable Subrogation

Arizona recognizes the surety's equitable subrogation rights, premised on the doctrine that when one fulfills the duty of another pursuant to a legal obligation and not as a volunteer, (s)he is entitled to assert the rights of that other against third parties. *Gen. Acrylics v. U.S. Fid & Guar.*, 128 Ariz. 50, 623 P.2d 839 (Ariz. Ct. App. 1981) [Westlaw]; *see also* Ariz. Rev. Stat. § 12-1643 (surety is subrogated to rights of creditor upon payment of judgment against its bond).

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

A contractual payment bond is one that is interpreted in accordance with common contract law, *i.e.*, the bond's coverage, notice requirements, *etc*. are given by the language of the bond, as that language is interpreted as is any other contract. *W. Sur. Co. v. Horrall*, 111 Ariz. 486, 533 P.2d 543 (Ariz. 1975) [Westlaw].

Some payment bonds on private projects are statutory bonds and conditioned in the same manner as a Little Miller Act payment bond. These bonds are often called "bonds in lieu of lien rights," which are provided and recorded in compliance with Ariz. Rev. Stat. § 33-1003. Another statutory bond found on private projects is a lien discharge bond, provided and recorded in compliance with Ariz. Rev. Stat. § 33-1004. If the bond is not provided and recorded in compliance with the statute, the bond is not a statutory bond and is considered a common law bond. *Hartford Accident & Indem. Co. v. Fed. Ins. Co.*, 172 Ariz. 104, 834 P.2d 827 (App. 1992) [Westlaw].

B. Time for Suit

A private payment bond may contain a provision limiting the time for suit to as short as two (2) years. Ariz. Rev. Stat § 20-1115. Otherwise, Ariz. Rev. Stat § 12-548 establishes a six (6)-year limitations period for actions founded on written contracts executed in Arizona, and Ariz. Rev. Stat. § 12-544(3) establishes a four (4)-year limitations period for actions based on written contracts executed outside of the state.

Moreover, Ariz. Rev. Stat. § 12-1641 provides that "[a]ny person bound as surety upon a contract for payment of money or performance of an act…may require, by notice in writing, the creditor or obligee forthwith to bring an action upon the contract." Should the creditor or obligee fail to bring such an action within sixty (60) days after receipt of such notice, the surety is discharged from all liability. *Id.*

C. Case Annotations

Liability Delimited by Bond Terms

The surety's liability is strictly limited according to the terms of its bond "and the surety has the right to stand on the strict, or precise, or the very terms of his contract[.]" *Cushman v. Nat'l Sur. Corp. of New York*, 417 P.2d 537, 540 (Ariz. Ct. App. 1966) [Westlaw] (citing 72 C.J.S. PRINCIPAL AND SURETY § 91 (1951)).

Defenses of Principal

Generally, the liability of the surety is coextensive with that of its principal, and the surety may set up any defense available to the principal (excepting personal defenses). *See, e.g.*, *Paul Schoonover, Inc. v. Ram Constr., Inc.*, 630 P.2d 27 (Ariz. 1981) [Westlaw]; *Sorensen v. Robert N. Ewing, General Contractor*, 448 P.2d 110 (Ariz. Ct. App. 1968) [Westlaw]; *Spear v. Indus. Comm'n*, 114 Ariz. 601, 603, 562 P.2d 1099, 1102 (Ariz. Ct. App. 1977) [Westlaw].

Tribal Sovereign Immunity

In *Smith Plumbing Co. v. Aetna Casualty & Surety Company*, 149 Ariz. 524, 533 (Ariz. 1986) [Westlaw], the Supreme Court of Arizona held that "a non-Indian materialman suing a non-Indian surety on a performance-payment bond" does not violate federal policy or infringe upon tribal self-government, such that an action could be maintained in state court. This case stands for the principle that tribal sovereign immunity is considered a personal defense—one not available to the tribe's surety.

ARKANSAS

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

In Arkansas, payment bonds are required for any public construction contract exceeding $50,000. ARK. CODE ANN. § 18-44-503(a). Contracts involving religious or charitable institutions over $20,000 require payment bonds. ARK. CODE ANN. § 18-44-504(a). In both instances the payment bond must be equal in sum to the amount of the construction contract. ARK. CODE ANN. § 18-44-503(a); ARK. CODE ANN. § 18-44-504(a). However, contracts executed by the Arkansas Department of Transportation are specifically exempt. ARK. CODE ANN § 18-44-502.

B. Tiers Covered

Arkansas presumably covers any tier of labor. ARK. CODE ANN § 18-44-503(b) states a payment bond for public works covers claims asserted by claimants providing labor or materials necessary or used for the public construction contract, including without limitation a claim for: wages of construction workers under the public construction contract; wages or salaries of supervisory and administrative personnel under the public construction contract; and wages earned by workers on the public construction contract covered by the payment bond, among other things. ARK. CODE ANN § 18-44-503(b). ARK. CODE ANN § 22-9-401 states similarly and notably does not limit claims on labor. ARK. CODE ANN § 22-9-401(b).

Suppliers are not covered under the statute. The Arkansas Supreme Court in *Sweetser* provided guidance on the bounds of liability, holding "[i]n this opinion we do not mean to hold that a person who furnishes material to a subcontractor is not in privy with the prime contractor, but just the contrary . . . It is generally held that persons supplying materials and labor to a subcontractor, rather than directly to the general contractor, may recover on a bond given pursuant to such a statute." *Sweetser Constr. Co. v. Newman Bros., Inc.*, 371 S.W.2d 515, 517–18 (Ark. 1963) [Westlaw]; *see also Am States Ins. Co. v. Tri Tech, Inc.*, 812 S.W.2d 490, 492 (Ark. Ct. App. 1991) [Westlaw]. Two general principles emerge from the *Sweetser* decision: A materialman who furnishes material to a materialman has no recourse against the bond for lack of privity with the prime contractor, while a materialman who supplies material to a subcontractor in privity with the contractor may recover on the bond. *Id.* Both the *Sweester* and the *American States* courts affirm that the rationale supporting these principles is to afford a reasonable degree of certainty regarding the extent of liability under the bond. *See also PERI Formwork Sys., Inc. v. Harcon, Inc.*, No. 5:11-CV-05120, 2012 WL 13026680, U.S. Dist. LEXIS 205367 (W.D. Ark. June 22, 2012) [Westlaw] (holding supplier was "too remote in the chain of contractors and subcontractors in this case to be a proper beneficiary under the statutory payment bond.").

C. Notice Required

Before bringing a civil action concerning a payment bond under this subchapter, a person having no contractual relationship with the contractor furnishing the bond, express or implied, shall give written notice to the contractor and his or her surety within ninety (90) days after the last date labor was performed or the last of the material or services for which the claim is based were furnished or supplied. ARK. CODE ANN § 18-44-508 (d)(1). The required notice must state the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. ARK. CODE ANN § 18-44-508 (d)(2)(A). Additionally, the notice must be served by any means that provides written third-party verification of delivery to the contractor's residence or to any place the contractor maintains an office or conducts business, or in any manner appropriate under the rules of civil procedure for the service of process in a civil action. ARK. CODE ANN § 18-44-508 (d)(2)(B).

D. Coverage

ARK. CODE ANN § 22-9-401 discusses the coverage required by all public surety bonds. The statute states, "[a]ll surety bonds required by the State of Arkansas or any subdivisions thereof by any county, municipality, school district, or other local taxing unit, or by any agency of any of the foregoing for the repair, alteration, construction, or improvement of any public works, including, but not limited to, buildings, levees, sewers, drains, roads, streets, highways, and bridges shall be liable on all claims for labor and materials entering into the construction, or necessary or incident to or used in the course of construction, of the public improvements." ARK. CODE ANN § 22-9-401(a).

The statute goes on to clarify what labor and material should be included. "Claims for labor and materials shall include, but not be limited to, fuel oil, gasoline, camp equipment, food for workers, feed for animals, premiums for bonds and liability and workers' compensation insurance, rentals on machinery, equipment, and draft animals, and taxes or payments due the State of Arkansas or any political subdivision thereof which shall have arisen on account of, or in connection with, wages earned by workers on the project covered by the bond." ARK. CODE ANN § 22-9-401(b). ARK. CODE ANN § 18-44-503 enumerates several additional claims for labor and materials that are covered, including:

> (1) Wages of construction workers under the public construction contract;
> (2) Wages or salaries of supervisory and administrative personnel under the public construction contract;
> (3) Use of temporary facilities;
> (4) Purchase or rental of any machinery, equipment, or hand tools not customarily owned by construction workers;
> (5) Purchase of building permits;
> (6) Payment of construction testing fees;
> (7) Purchase of fuel oil and gasoline;
> (8) Payment of premiums for bonds and liability and workers' compensation insurance;
> (9) Taxes or payments due to the state or any political subdivision of the state arising from the wages earned by construction workers

> under the public construction contract or in connection with the public construction contract; and
> (10) Wages earned by workers on the public construction contract covered by the payment bond.

ARK. CODE ANN § 18-44-503(b)(1-10).

1. Labor

Payment bond labor is discussed in both ARK. CODE ANN. § 22-9-401 and ARK. CODE ANN. § 18-44-503. Together the statutes make it clear that the legislature intends a wide range of labor costs to be covered. ARK. CODE ANN. § 22-9-401 specifically states,

> (a) All surety bonds required by the State of Arkansas or any subdivisions thereof…for the repair, alteration, construction, or improvement of any public works…*shall be liable on all claims for labor and materials entering into the construction, or necessary or incident to or used in the course of construction, of the public improvements*.

ARK. CODE ANN § 22-9-401 (emphasis added).

ARK. CODE ANN. § 18-44-503 discusses coverage of several different labor or wages costs that are required to be covered under the payment bond. It specifically provides coverage for "all claims for labor and materials necessary or used for the public construction contract, including without limitation a claim for the: (1) Wages of construction workers under the public construction contract; (2) Wages or salaries of supervisory and administrative personnel under the public construction contract…(10) Wages earned by workers on the public construction contract covered by the payment bond." ARK. CODE ANN. § 18-44-503(b)(1–2 &10).

Where the bond has been executed, the contractor becomes responsible for all labor used in the performance of his contract, unless released by the laborers themselves. *Miller v. Roetzel Bros.*, 155 Ark. 620, 245 S.W. 33 (Ark. 1922) [Westlaw] (decision under prior law).

a. Professional Services

Arkansas does not provide guidance on whether professional services are considered labor. Although not binding, the Eighth Circuit has held that under the federal Miller Act, only certain professional supervisory work is covered, namely, "skilled professional work which involves actual superintending, supervision, or inspection at the job site." *United States ex rel. Olson v. W.H. Cates Constr. Co.*, 972 F.2d 987, 990 (8th Cir. 1992) [Westlaw] (citing *U.S. ex rel. Naberhaus-Burke, Inc. v. Butt & Head, Inc.*, 535 F. Supp. 1155, 1160 (S.D. Ohio 1982) [Westlaw]). Accordingly, "plaintiff can only recover on the payment bond . . . to the extent that [he] performed on-site services." *Id*.

b. Union Benefits

Arkansas law provides no guidance as to whether union benefits are considered labor.

2. Material

There are several items explicitly included in the Arkansas statutory authority that could constitute materials, the most obvious example is the purchase of fuel oil and gasoline. ARK. CODE ANN. § 22-9-401 and ARK. CODE ANN. § 18-44-503.

Courts have found "materials" to include items such as tools (*Nat'l Sur. Corp. v. Ideal Lumber Co.*, 460 S.W.2d 55 (Ark. 1970) [Westlaw]), pipes (*Detroit Fid. & Sur. Co. v. Yaffe Iron & Metal Co.*, 44 S.W.2d 1085 (Ark. 1932) [Westlaw]), road materials (*United States Fid. & Guar. Co. v. Little Rock Quarry Co.*, 309 Ark. 269, 830 S.W.2d 362 (Ark. 1992) [Westlaw]), and asphalt (*State ex rel. Berry Asphalt Co. v. W. Sur. Co.*, 266 S.W.2d 835 (Ark. 1954) [Westlaw]). However, principal contractors and their sureties are not liable on their bond for supplies sold to subcontractors and used elsewhere even though the seller erroneously concludes that the supplies will be used on the particular bonded job. *Proctor Tire Serv. Inc. v. Nat'l Sur. Corp.*, 415 S.W.2d 45, 46–47 (Ark. 1967) [Westlaw]. In addition, *Proctor Tire* makes it clear that the material cannot be only rarely used. The contractor's bond was not liable for tires sold to a subcontractor who rarely used them on the bonded job. *Id.* A contractor's bond is liable only for materials that are actually used in the construction of the building. *Reiff v. Fedfield School Bd.*, 191 S.W. 16 (Ark. 1916) [Westlaw] (decision under prior law).

Furthermore, the surety is not liable for materials delivered to a subcontractor after the bonded project is completed where the supplier fails to conduct an adequate investigation to determine where the materials are being used. *Ergon Asphalt & Emulsions, Inc. v. Hogan Constr. Co.*, 721 F. Supp. 1050 (E.D. Ark. 1989) [Westlaw].

However, it is noteworthy that other courts have confused the analysis, such as in *National Surety*. There, the surety on a general contractor's bond was held liable for tools sold to a subcontractor even though the tools did not become a part of the construction but were retained by the subcontractor for use on other employment and became a part of his permanent assets. *Nat'l Sur. Corp. v. Ideal Lumber Co.*, 460 S.W.2d 55 (Ark. 1970) [Westlaw].

3. Equipment

a. Repairs

ARK. CODE ANN. § 22-9-401 does not specifically enumerate repairs to equipment as covered under the statute. The same is true of ARK. CODE ANN. § 18-44-503. However, Act 368 of 1929 provided for "repairs on machinery or equipment used in connection with the construction of … public buildings…" and ARK. CODE ANN. § 22-9-401, which had its genesis in Act 368 speaks in similar, but not identical, terms. *Wright v. C. Watts & Sons Constr. Co.*, No. 2:12-2089, 2012 U.S. Dist. LEXIS 138973, at *8, 2012 WL 4472125 (W.D. Ark. Sept. 27, 2012) [Westlaw].

b. Rentals

Both ARK. CODE ANN. § 18-44-503 and ARK. CODE ANN. § 22-9-401 include the "purchase or rental of any machinery, equipment, or hand tools not customarily owned by construction workers…" as covered under a bond. ARK. CODE ANN. § 18-44-503(b)(4); ARK. CODE ANN. § 22-9-401. ARK. CODE ANN. § 22-9-401 phrases the coverage as extending to "…rentals on machinery, equipment, and draft animals[.]" ARK. CODE ANN. § 22-9-401(b).

Leased materials for which recovery has been allowed under federal and Arkansas law include: trucks supplied to a subcontractor to haul materials (*Basich Bros. Constr. Co. v. U.S. ex rel. Turner*, 159 F.2d 182 (9th Cir. 1946) [Westlaw]), tractors used on a dam project (*Roane v. U.S. Fid. & Guar. Co.*, 378 F.2d 40 (10th Cir. 1967) [Westlaw]), earth-compacting machine (*Arnold v. Koehring Co.*, 415 S.W.2d 552 (Ark. 1967) [Westlaw]), dirt-moving equipment used in constructing improvements to a municipal airport (*Continental Cas. Co. v. Clarence L. Boyd Co.*, 140 F.2d 115 (10th Cir. 1944) [Westlaw]), cars, track, and equipment used in work on a naval training station (*Illinois Sur. Co. v. John Davis. Co.*, 244 U.S. 376 (1917) [Westlaw]), plaster planks and scaffolding planks furnished to a subcontractor (*United States ex rel. P. A. Bourquin & Co. v. Chester Constr. Co.*, 104 F.2d 648 (2d Cir. 1939) [Westlaw]), and construction equipment (*Nat'l Sur. Corp. v. Edison*, 401 S.W.2d 754 (Ark. 1966) [Westlaw]).

Where a city-approved bond issue raised money for the construction of a factory on land owned by a nonprofit corporation, later deeded to city, the surety on the contractor's bond was liable for rentals because the contract was deemed to be a public contract. *Nat'l Sur. Corp. v. Edison*, 401 S.W.2d 754 (Ark. 1966) [Westlaw]; *Integon Indem. Corp. v. Bull*, 842 S.W.2d 1 (Ark. 1992) [Westlaw].

No court in Arkansas has found rental of real property itself or damage to rented real property to be within the scope of any labor and materials payment bond. *Wright v. C. Watts & Sons Constr. Co., Inc.*, No. 2:12-2089, 2012 WL 4472125, 2012 U.S. Dist. LEXIS 138973, at *10–11 (W.D. Ark. Sep. 27, 2012) [Westlaw]. The *Wright* court held that, "[d]espite a liberal reading, alleged unpaid rent for use of real property in a state construction project does not appear to fall within the broad scope of 'materials' covered by the Contractor's Bonds statute." *Id.* at *10–11.

4. Other

a. Attorneys' Fees

ARK. CODE ANN. § 23-79-208 provides the outline for recovery of attorneys' fees. When a surety fails to pay the loss in the time specified in the policy, it will be liable for the loss, 12% damages on the amount of the loss and attorney's fees. ARK. CODE ANN. § 23-79-208; *see also R.J. "Bob" Jones Excavating Contractor v. Firemen's Ins. Co.*, 324 Ark. 282, 920 S.W.2d 483 (Ark. 1996) [Westlaw].

More broadly, ARK. CODE ANN. § 16-22-308 allows for the recovery of the prevailing party's attorneys' fees in a breach of contract case. ARK. CODE ANN. § 16-22-308.

b. Interest

Arkansas law provides little guidance as to whether interest is a recoverable damage, but the Eighth Circuit has opined on the matter. In *Owners Insurance Co. v. Fidelity & Deposit Co.*, the Court held that "[s]everal Miller Act cases have presented issues like the one presented here—whether the phrase 'justly due' includes things like costs and attorneys' fees. And in those cases, courts consistently held that, though the Miller Act did not explicitly provide for the recovery of attorneys' fees or interest, subcontractors were nonetheless entitled to those items if the underlying contract between the subcontractor and the general contractor permitted their recovery." 41 F.4th 956, 959 (8th Cir. 2022) [Westlaw]. *See also, e.g.*, *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 336 (4th Cir. 1996) [Westlaw] (per curiam) (collecting cases).

c. Financing Charges

The United States Bankruptcy Court for the Eastern District of Arkansas has analyzed what costs payment bond money should be allocated toward. *Int'l Fid. Ins. Co. v. Fox (In re Fox)*, 357 B.R. 770 (Bankr. E.D. Ark. 2006) [Westlaw]. Using ARK. CODE ANN § 22-9-401 as its guide, the court determined, after reviewing two dueling CPA calculations, that only "direct costs" or costs that were properly allocated to the bonded projects were properly paid under § 22-9-401. The court found that payment bond money used to cover the contractor's own expenses, whether that be the cost of using his own equipment, the cost of maintaining full-time employees or the contractor's overhead expenses, and whether that be expressed as "job support costs" or "general and administrative expenses" amounted to "a misuse of payment bond money". *Id.* at 781. Direct job expenses are those related to a bonded project that are for the benefit of materialmen, laborers, suppliers, subcontractors and owners, not the contractor's own expenses. *Id.* The losing CPA included "interest and finance charges" under a "burden" category and the court concluded that use of payment bond money was inappropriate for this expense. *Id.* at 776–81.

d. Insurance Premiums

The costs premiums for bonds and liability and workers' compensation insurance are covered under the relevant statutes. ARK. CODE ANN. § 18-44-503(b)(8); ARK. CODE ANN. § 22-9-401(b); *and see, e.g.*, *Int'l Fid. Ins. Co. v. Fox (In re Fox)*, 357 B.R. 770 (Bankr. E.D. Ark. 2006) [Westlaw].

e. Loans

Loans would likely be excluded under the rationale of *In re Fox*, *supra*. 357 B.R. 770 (Bankr. E.D. Ark. 2006) [Westlaw]. To be considered compensable, the expense cannot be the contractor's overhead expenses, whether that be expressed as "job support costs" or "general and administrative expenses". *Id.* at 781.

f. Delay Damages

No authority has been found regarding whether delay damages are recoverable under ARK. CODE ANN § 22-9-401 or ARK. CODE ANN § 18-44-503 to date. However, although not necessarily binding, the Eighth Circuit has held that under the Miller Act a subcontractor can recover additional expenses incurred because of delay regardless of the fault of the general contractor. *Consol. Elec. & Mechs., Inc. v. Biggs Gen. Contracting, Inc.*, 167 F.3d 432 (8th Cir. 1999) [Westlaw]; *see also Lighting & Power Servs. v. Roberts*, 354 F.3d 817, 823 (8th Cir. 2004) [Westlaw]. As *Consolidated* reasons, "[t]he Miller Act favors allowing full recovery from a general contractor regardless of fault because general contractors have privity of contract with the government and can thus recover delay damages directly from the government, while subcontractors cannot." *Id.* at 435.

g. Profits

No authority has been found regarding whether profits are recoverable under ARK. CODE ANN § 22-9-401 or ARK. CODE ANN § 18-44-503. However, the Arkansas Eastern Bankruptcy

Court has analyzed what costs payment bond money should be allocated toward. *In re Fox*, *supra*. 357 B.R. 770 (Bankr. E.D. Ark. 2006) [Westlaw]. Using ARK. CODE ANN § 22-9-401 as its guide, the Court determined, after reviewing two dueling CPA calculations, that only "direct costs" or costs that were properly allocated to the bonded projects were properly paid under § 22-9-401.

h. Extracontractual

No authority has been found regarding whether extracontractual damages are recoverable under ARK. CODE ANN § 22-9-401 or ARK. CODE ANN § 18-44-503. However, the analysis of *In re Fox*, *supra*, is at least persuasive authority that only "direct costs" or costs that were properly allocated to the bonded projects are properly payable under § 22-9-401. 357 B.R. 770 (Bankr. E.D. Ark. 2006) [Westlaw].

E. Contracts Excluded

ARK. CODE ANN. § 18-44-502 specifically exempts any contract executed by the Arkansas Department of Transportation. ARK. CODE ANN. § 18-44-502.

F. Time for Suit

Arkansas law provides that all persons, firms, associations, and corporations who have valid claims against a payment bond (or performance bond) may bring an action thereon against the corporate surety. ARK. CODE ANN § 18-44-508(a). It allows that such action shall not be brought on a payment bond after one (1) year from the date of whichever of the following occurs first: (1) final payment is made on the construction contract, public construction contract, or real estate construction contract; or (2) the principal contractor on the payment bond ceases work on the construction contract, public construction contract, or real estate construction contract. ARK. CODE ANN § 18-44-508(b).

G. Remarks

The Arkansas Supreme Court has noted that § 22-9-401 cannot be reasonably interpreted to require protection for claims based on negligence. *United States Fid. & Guar. Co. v. Little Rock Quarry Co.*, 309 Ark. 269, 272, 830 S.W.2d 362 (Ark. 1992) [Westlaw] (statute contains considerable language defining the scope of claims for labor and materials); *see also Wright v. C. Watts & Sons Constr. Co.*, No. 2:12-2089, 2012 U.S. Dist. LEXIS 138973, at *6, 2012 WL 4472125 (W.D. Ark. Sept. 27, 2012) [Westlaw].

H. Case Annotations

Cases of note are discussed in the preceding sections.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

As for private work projects, bonds are not statutorily required, but an owner can require a contractor to furnish a bond if the owner so chooses. ARK. CODE ANN. § 18-44-505. In such cases, there is no prescribed form for the payment bond to follow. Thus, the bond is considered a common law bond, and it is imperative that the unique terms of the bond be referenced when analyzing the requirements and responsibilities of the parties. If the language of a policy is unambiguous, effect must be given to the plain language of the policy without resort to the rules of construction. *Castaneda v. Progressive Classic Ins. Co.*, 166 S.W.3d 556, 560 (Ark. 2004) [Westlaw]; *Angelo Iafrate Constr., LLC v. Potashnick Constr., Inc.*, 370 F.3d 715, 720 (8th Cir. 2004) [Westlaw].

B. Time for Suit

A civil action may be brought in circuit court on a private payment furnished under section § 18-44-505 as provided in § 18-44-508. ARK. CODE ANN. § 18-44-505. Section 18-44-508 provides a one-year limitations period for an action brought on a payment bond, running from the first of two events: (1) when final payment is made on the construction contract,; or (2) the principal contractor on the payment bond ceases work on the construction contract. ARK. CODE ANN. § 18-44-508(b)(1-2).

Before bringing suit, a person without a direct contractual relationship with the contractor furnishing the bond must give the contractor and its surety ninety (90) days' written notice. ARK. CODE ANN. § 18-44-508(d)(1).

C. Case Annotations

Arkansas private payment bond law relies primarily on statutory authority; however, each bond will be subject to the rules of ordinary contract construction.

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

On all public projects in excess of $25,000, the general contractor is required to file a payment bond with the officer or entity that awarded the contract. Statutory payment bonds serve as a substitute for mechanics' liens, which are not available on public projects. *See* Civ. Code § 9554 [Lexis]; *see also* Civ. Code § 9100 [Lexis].

B. Tiers Covered

In general, the same classes of claimants that are permitted to assert a mechanics' lien claim on a private project are permitted to assert a claim under a public works payment bond. See Civ. Code § 8004 [Lexis]. Thus, proper claimants under a public works payment bond include general contractors, subcontractors, material suppliers, equipment lessors, laborers, and design professionals. Civ. Code § 9100 [Lexis]; *see also* Civ. Code § 8004 [Lexis].

C. Notice Required

On a public project, a claimant that is not in a direct contractual relationship with the general contractor is required to give preliminary notice to the public entity and the general contractor. Civ. Code § 9560 [Lexis]; *see also* Civ. Code §§ 9300 [Lexis], 9302 [Lexis], 9303 [Lexis]. A preliminary notice is required to include: (1) the name and address of the owner or reputed owner; (2) the name and address of the general contractor; (3) the name and address of the construction lender, if any; (4) a description of the site sufficient for identification, including the street address of the site, if any; and (5) the name, address and relationship to the parties of the person giving notice. If the person giving notice is a claimant, the notice must also include: (6) a general statement of work provided; (7) the name of the person to or for whom the work is provided; and (8) a statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets. *See id.*; *see also* Civ. Code § 8102 [Lexis]. Notice must be given by personal delivery, registered or certified mail, express mail, overnight delivery, or by leaving the notice and mailing a copy in the manner allowed for the service of a summons and complaint. *See id.*; *see also* Civ. Code § 8106 [Lexis]. If the claimant does not serve the preliminary notice within 20 days after it first provided labor or materials to the jobsite, the claimant may still provide the preliminary day notice, but the payment bond only covers the labor or materials provided within 20 days prior to the service of the notice and any time thereafter. Civ. Code § 9304 [Lexis].

If a claimant fails to serve a 20-day preliminary notice, the claimant must serve either a 15-day notice (where the owner has recorded a notice of completion) or a 75-day notice (where the owner has not recorded a notice of completion) to the surety and general contractor. Civ. Code §§ 9560 [Lexis], 9562 [Lexis]. The 15/75-day notice must be in writing and state with substantial

accuracy the amount claimed and the name of the party to whom the claimant furnished labor or materials. Civ. Code § 9562 [Lexis]. No 15/75-day notice is required in either of the following circumstances: (1) all progress payments, except for those disputed in good faith, have been made to a subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services; or (2) the subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services has been terminated from the project pursuant to the contract, and all progress payments, except those disputed in good faith, have been made as of the termination date. Civ. Code § 9560 [Lexis].

D. Coverage

A public works payment bond must "provide that if the direct contractor or his subcontractor fails to pay any of the following, the surety will pay the obligation and, if an action is brought to enforce the liability on the bond, a reasonable attorney's fee, to be fixed by the court: (1) A person authorized under Section 9100 [Lexis] to assert a claim against a payment bond. (2) Amounts due under the Unemployment Insurance Code with respect to work or labor performed pursuant to the public works contract. (3) Amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the contractor and subcontractors under Section 13020 of the Unemployment Insurance Code [Lexis] with respect to the work and labor." Civ. Code § 9554 [Lexis]. Persons authorized under Civ. Code § 9100 [Lexis] include: "(1) A person that provides for a public works contract, if the work is authorized by a direct contractor, subcontractor, architect, project manager, or other person having charge of the public works contract. (2) A laborer. (3) A person described in Section 4107.7 of the Public Contract Code [Lexis]."

1. Labor

Persons providing labor to a public project are covered by a public works payment bond. *See* Civ. Code § 9100 [Lexis]; *see also* Civ. Code §§ 8024 [Lexis], 8400 [Lexis].

a. Professional Services

Design professionals, including licensed architects, licensed landscape architects, licensed professional engineers, and licensed land surveyors, are proper claimants under a public works payment bond. *See* Civ. Code § 9100 [Lexis]; *see also* Civ. Code §§ 8024 [Lexis], 8400 [Lexis].

Although not explicit, such claimants would most likely only be afforded coverage on design-build contracts or performance specification work where the principal was obligated to furnish the design.

b. Union Benefits

Labor trust funds are entitled to claim for unpaid fringe benefits and can assert the same rights and claims as laborers performing labor upon, or bestowing skill or other necessary services on, a work of improvement. *See* Civ. Code § 9100 [Lexis]; *see also* Civ. Code §§ 8024 [Lexis], 8400 [Lexis].

2. Material

Coverage for materials under a public works payment bond turns on whether the materials were incorporated into or consumed in connection with the construction of a project. *See* *Primo Team, Inc. v. Blake Constr. Co.*, 3 Cal. App. 4th 801 (Cal. Ct. App. 1992) [Lexis]. The California Supreme Court has stated that: "It is settled by many decisions in this state that to entitle a materialman to a lien . . . the materials must be furnished to be used, and must actually be used, in the construction of the building or other structure against which the lien is sought to be enforced." *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 31–32 (Cal. 1903) [Lexis]. Courts have also addressed the meaning of the phrase "consumed in," stating that it refers to "such a use of material in the construction of a building as would result in its destruction." *Consol. Lumber Co. v. Bosworth, Inc.*, 40 Cal. App. 80, 88 (Cal. Dist. Ct. App. 1919) [Lexis].

3. Equipment

a. Repair

Public works payment bonds do not cover the purchase price of equipment that the claimant can use on more than one project or that becomes part of the contractor's general equipment. Rather, coverage extends to equipment that is of such nature that in the usual course of events, the claimant will entirely use or consume it on the subject project. *See* *George F. Kennedy, Inc. v. Miles and Sons Constr. Div.*, 5 Cal. App. 3d 516 (Cal. Ct. App. 1970) [Lexis]; *see also* *A. L. Young Mach. Co. v. Cupps*, 213 Cal. 210 (Cal. 1931) [Lexis].

b. Rentals

The cost of rental equipment and machinery, on the other hand, is recoverable against the surety. *See* *John A. Artukovich Sons, Inc. v. Am. Fid. Fire Ins. Co.*, 72 Cal. App. 3d 940 (Cal. Ct. App. 1977) [Lexis].

4. Other

a. Attorneys' Fees

In actions on public works payment bonds, prevailing party attorneys' fees are recoverable by statute. *See* Civ. Code §§ 9554 [Lexis], 9564 [Lexis]; *see also* *Winick Corp. v. Safeco Ins. Co. of Am.*, 187 Cal. App. 3d 1502 (Cal. Ct. App. 1986) [Lexis].

Attorneys' fees may also be recoverable under California's prompt payment statutes. Business and Professions Code § 7108.5 [Lexis]; *see also* *Wash. Int'l Ins. Co. v. Superior Court*, 62 Cal. App. 4th 981 (Cal. Ct. App. 1998) [Lexis].

b. Pre-Judgment Interest on Claims against Surety

A claimant can collect pre-judgment interest on claims against a surety, even if it is in excess of the bond. *See* *Burns v. Mass. Bonding & Ins. Co.*, 62 Cal. App. 2d 972 (Cal. Dist. Ct. App. 1944) [Lexis]. The court in *Burns* stated: "In this state, and in the majority of other states, a surety may be

held liable for interest, and that such liability to an amount in excess exists although the effect is to bring the surety's total liability to an amount in excess of the bond." *Id.* at 975.

Code of Civil Procedure § 685.010 [Lexis] provides that interest accrues at the rate of 10% per annum. There is no compounding of interest. *Westbrook v. Fairchild*, 7 Cal. App. 4th 889 (Cal. Ct. App. 1992) [Lexis].

If the litigation on a state bond is venued in federal court, including on grounds of diversity jurisdiction, interest is at a floating rate determined by the coupon yield of United States treasury bills. *See* 28 U.S.C.A. § 1961 [Lexis].

c. Financing Charges

See Subsection (e), *infra*.

d. Insurance Premiums

An insurance company, agent, or broker is not one of the entities defined as a claimant under relevant statutes. Further, insurance premiums do not fall under the category of "labor done," "materials furnished," or "appliances, equipment, teams, or power." Accordingly, a public works payment bond does not cover insurance premiums. *See* Civ. Code §§ 8400 [Lexis], 8404 [Lexis], 8430 [Lexis], 9100 [Lexis].

e. Loans

A bank or other lending institution is not one of the entities defined as a claimant under the relevant statutes. Further, a loan does not fall under the category of "labor done," "materials furnished," or "appliances, equipment, teams, or power." Accordingly, a public works payment bond does not cover loans. *See* Civ. Code §§ 8400 [Lexis], 8404 [Lexis], 8430 [Lexis], 9100 [Lexis].

f. Delay Damages

If, because of delay, a public works payment bond claimant was required to expend more for labor done, materials furnished, or equipment used, such additional cost would be covered by the payment bond, whether termed delay damages or otherwise. Delay damages are recoverable. *See* Civ. Code §§ 8400 [Lexis], 8404 [Lexis], 8430 [Lexis], 9100 [Lexis].

g. Profits

Profits in connection with a contract are recoverable against a public works payment bond. Civil Code § 8434 [Lexis] (which applies to mechanics' liens but is also applicable to payment bonds) provides: "A direct contractor or subcontractor may enforce a lien only for the amount due pursuant to that contractor's contract after deducting all lien claims of other claimants for work provided *and embraced within that contract.*" (emphasis added).

h. Extracontractual

California law does not impose extracontractual liability against a surety, as contract remedies provide adequate compensation for a breach of a surety bond. In *Cates Construction Inc. v. Talbot Partners*, 21 Cal. 4th 28 (Cal. 1999) [Lexis], the California Supreme Court resoundingly rejected extending insurance bad-faith concepts—and remedies sounding in tort—to the suretyship context.

E. Contracts Excluded

Public works contracts with any public agency calling for an expenditure of less than $25,000 do not require the contractor to furnish a payment bond. *See* Civ. Code § 9550 [Lexis]; Public Contract Code § 7103 [Lexis].

F. Time for Suit

The limitations period within which a claimant must bring a lawsuit against the surety on a public works payment bond depends on whether the owner has recorded a notice of completion. If a notice of completion has been recorded, the limitations period is 30 days plus six months from the date of recording. *See* Civ. Code § 9558 [Lexis]; *see also* Civ. Code § 9356 [Lexis]. If a notice of completion has not been recorded, the limitations period is 90 days plus six months from the date of project completion. *See id.* In this context, and with the exception of projects awarded under the State Contract Act, project completion occurs at the earliest of: (1) acceptance of the work of improvement by the public entity; or (2) cessation of labor on the work of improvement for a continuous period of 60 days. Civ. Code § 9200 [Lexis]. For projects awarded under the State Contract Act, completion occurs upon acceptance by the public entity. Even where the physical construction work on a public project is not actually completed, the project can nonetheless be considered complete for purposes of the limitations period under a public works payment bond upon a cessation of labor for the statutory period. *See W. F. Hayward Co. v. Transamerica Ins. Co.*, 16 Cal. App. 4th 1101 (Cal. Ct. App. 1993) [Lexis] (interpreting the former Civ. Code § 3086).

There may be an exception to the rules discussed above where a claimant makes a timely claim and the surety neglects to inform the claimant of the applicable limitations period. In *Spray, Gould & Bowers v. Associated International Insurance Co.*, 71 Cal. App. 4th 1260 (Cal. Ct. App. 1999) [Lexis], the court of appeal reversed a summary judgment in favor of an insurer, citing Cal. Code Regs. tit. 10, § 2695.4 [Lexis], which requires insurers to disclose all "benefits, coverage time limits or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant." The court held that the insurer's failure to inform the insured of the limitations period in its policy estopped the insurer from asserting expiration of the limitations period as a defense.

Since the *Spray* decision, Cal. Code Regs. tit. 10, § 2695.10 [Lexis], which applies to sureties, has been revised to include a specific requirement for sureties to provide written notice of any statute of limitations to claimants. Thus, if a surety fails to satisfy this requirement, a claimant could argue that the surety is estopped from asserting a statute of limitations defense.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Generally, a common law bond is one that is written and executed under an agreement between parties and not issued pursuant to any statute. A typical example of a common law bond would be a private works payment or performance bond. In California, however, some courts have construed a bond issued in connection with a private works project as a statutory bond. *See* *Winick Corp. v. Gen. Ins. Co. of Am.*, 187 Cal. App. 3d 142 (Cal. Ct. App. 1986) [Lexis]. Therefore, what may appear to be a common law bond at first glance can end up being a statutory bond depending upon a court's interpretation of the bond. For example, in *Progress Glass Co. v. American Insurance Co.*, 100 Cal. App. 3d 720 (Cal. Ct. App. 1980) [Lexis], the court determined that a private works payment bond was statutory. The *Progress Glass* court found that the project owner pursued the "primary purpose" of Civil Code section 3236 by "exacting" a payment bond from its principal. *Id.* at 728. Therefore, according to the court, the bond was "given" pursuant to a statute and was thus a statutory bond for purposes of determining that the statutory limitations period applied and not the contractual limitations period set forth in the bond. *Id.*

B. Time for Suit

The statute of limitations for an action against a private works payment bond is four years from accrual of the cause of action pursuant to Code of Civil Procedure § 337 [Lexis] unless such period is shortened under Civil Code § 8609 [Lexis] by a surety's recordation of the payment bond prior to the commencement of the project. Section 8609 [Lexis] provides: "Any provision in a payment bond attempting by contract to shorten the period prescribed in Section 337 of the Code of Civil Procedure [Lexis] for the commencement of an action thereon shall not be valid under either of the following circumstances: (a) If the provision attempts to limit the time for commencement of and action on the bond to a shorter period than six months from the completion of the work. (b) As applied to any action brought by a claimant, unless the bond is recorded before the work of improvement is commenced." If, however, the surety has not recorded the bond prior to commencement of the project, but has recorded it prior to the completion of the project, then Civil Code § 8610 [Lexis] shortens the limitations period to six months: "Notwithstanding Section 8609 [Lexis], if a payment bond under this title is recorded before the completion of a work of improvement, an action to enforce the liability on the bond may not be commenced later than six months after completion of the work of improvement."

C. Case Annotations

Penal Sum Limit

California follows the general rule that the amount that can be recovered from a surety is limited to the penal sum of the surety's bond. *See* *Trumpler v. Cotton*, 109 Cal. 250 (Cal. 1895) [Lexis]; *Amerson v. Christman*, 261 Cal. App. 2d 811 (Cal. Ct. App. 1968) [Lexis]; *see also* *Hartford Accident & Indem. Co. v. Indus. Accident Comm'n*, 216 Cal. 40 (Cal. 1932) [Lexis] (stating that "[e]ven where the bond stipulates that damages shall include attorney's fees, under the rule that

a surety on a bond is not liable beyond the penalty named therein, the surety is not liable for attorney's fees in excess of the penalty named").

In *Harris v. Northwestern National Insurance Co.*, 6 Cal. App. 4th 1061 (Cal. Ct. App. 1992) [Lexis], the court, again discussing *Burns v. Massachusetts Bonding & Insurance Co.* [Lexis], held that while a surety cannot be held liable for damages, including interest, in excess of the penal sum, liability for costs may be imposed beyond the penal sum. The *Harris* court reasoned a surety could be liable for costs beyond the penal sum because Code of Civil Procedure § 1032 [Lexis] imposes the duty to pay costs. Further, the court found that such litigation costs do not result from a default by the bond principal; rather, they are a result of the surety's own conduct in unsuccessfully litigating. *Id.* at 1067–68.

Extracontractual Liability of Sureties

California law does not impose extra-contractual liability against a surety, as contract remedies provide adequate compensation for a breach of a surety bond. *Cates Constr. Inc. v. Talbot Partners*, 21 Cal. 4th 28 (Cal. 1999) [Lexis].

Conditional Payment Clauses

"Pay-if-paid" clauses are unenforceable and void on public policy grounds because they operate as an indirect waiver of a subcontractor's constitutional right to assert a mechanics' lien for unpaid labor and/or material. *Wm. R. Clarke Corp. v. Safeco Ins. Co. of Am.*, 15 Cal. 4th 882 (Cal. 1997) [Lexis]; *Capitol Steel Fabricators, Inc. v. Mega Constr. Co.*, 58 Cal. App. 4th 1049 (Cal. Ct. App. 1997) [Lexis].

"Pay-when-paid" clauses are enforceable. *Yamanishi v. Bleily and Collishaw, Inc.*, 29 Cal. App. 3d 457 (Cal. Ct. App. 1972) [Lexis]. However, California courts will interpret such clauses to mean that payment is due upon performance of the subcontract or within a reasonable time thereafter. *Id.* at 462. Thus, pay-when-paid clauses cannot bar subcontractors from receiving payment simply because the contractor has not yet received payment; payment is still due within a reasonable time.

Sureties cannot assert a valid pay-if-paid defense to bond claims. A pay-when-paid defense is available, provided that the claimant receives payment within a reasonable time after performance of the subcontract. *Crosno Constr. Inc. v. Travelers Cas. and Sur. Co. of Am.*, 47 Cal. App. 5th 940 (Cal. Ct. App. 2020) [Lexis].

Arbitration

Civil Code § 2855 [Lexis] provides: "An arbitration award rendered against a principal alone shall not be, be deemed to be, or be utilized as, an award against his surety."

No statute or case law requires a payment bond surety to participate in arbitration with a payment bond claimant. Thus, unless a payment bond incorporates the subcontract or purchase order that forms the basis of a claim, which it typically does not, the surety would not be bound to arbitrate a payment bond claim. However, a court may stay a lawsuit against a surety pending the arbitration of the underlying principal–claimant dispute. In *Federal Insurance Co. v. Superior Court*, 60 Cal. App. 4th 1370 (Cal. Ct. App. 1998) [Lexis], for example, the court stated that the arbitration would adjudge the validity of the subcontractor's claim, but did not cite to Civil Code § 2855 [Lexis].

In *Liton General Engingeering Contractor, Inc. v. United Pacific Insurance*, 16 Cal. App. 4th 577 (Cal. Ct. App. 1993) [Lexis], the court went one step further and ruled that a public works payment bond surety was obligated to pay attorney's fees that a claimant incurred in an arbitration proceeding with the principal to which the surety was not a party. There, the surety moved to stay the claimant's lawsuit against it pending the outcome of the arbitration in which the claimant ultimately prevailed. *Id.* at 585.

COLORADO

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

C.R.S. § 38-26-105(1) [Lexis] establishes the payment bond requirements for public projects in Colorado, which include a broad category of infrastructure projects that are financed and constructed by governmental entities. Every contractor awarded a contract that exceeds $50,000 must provide a bond conditioned on prompt payment of all people/entities supplying labor, laborers, materials, rental machinery, tools, or equipment used or performed in the prosecution of the work provided for in the contract.

C.R.S. § 24-105-202(1) [Lexis] governs the payment bond requirements when a contract that exceeds $150,000 is awarded to a contractor. In this situation, the bond shall be in an amount equal to 50% of the price specified in the contract.

B. Tiers Covered

Under C.R.S. § 38-26-105(1) [Lexis], Colorado requires a two-tiered level of protection at a minimum. Therefore, subcontractors, materialmen, mechanics, and suppliers of a contractor or its subcontractors may pursue a bond claim. A supplier to a materialman has been held to have no claim under the payment bond. *Lovell Clay Prods. v. Statewide Supply Co.*, 580 P.2d 1278, 1280 (Colo Ct. App. 1978) [Lexis].

In *Western Metal Lath, a Div. of Triton Grp., Ltd. v. Acoustical & Construction Supply, Inc.*, 851 P.2d 875 (Colo. 1993) Lexis], a supplier to materialman on public works project argued that the C.R.S. § 38-26-105(1) [Lexis] (identified as the "Colorado Public Works Act") violated the equal protection clause because it provided a remedy for a supplier to a subcontractor, but it did not provide a remedy for someone in his situation, a supplier to a materialman. The supplier's equal protection arguments were rejected, and the Court reiterated that "[p]rotected claimants are those who have a direct relationship with the contractor or one whose acts in purchasing labor and materials are imputed to him." *Id.* at 881 (internal citation omitted).

C. Notice Required

Pursuant to C.R.S. § 38-26-107(1) [Lexis], if the amount of the contract awarded to the contractor exceeds $150,000, no later than ten days before the final settlement is made, the owner must publish a notice of the final settlement at least twice in a newspaper of general circulation in any county where the work was contracted for or performed or in an electronic medium approved by the executive director of the department of personnel.

Before the date of advertised final settlement, a subcontractor, supplier, or materialman may file with the owner a verified statement of claim asserting a claim against the contract funds held by the owner. *Id.*

Under C.R.S. § 38-26-107(2) [Lexis], upon the filing of such a claim, the owner must withhold funds sufficient to cover the claim for 90 days after final settlement.

D. Coverage

1. Labor

Per C.R.S. § 38-26-105 [Lexis], Colorado public payment bonds cover people/entities supplying labor for the work provided for in the bonded contract.

a. Professional Services

"Professional services" have not been classified as labor under Colorado's payment bond laws.

b. Union Benefits

Fringe benefits earned by construction workers on a public works project and required under a collective bargaining agreement to be paid into labor trust funds, have been deemed "payments of…amounts lawfully due to all persons supplying or furnishing [a contractor] or his subcontractors with labor or materials used or performed in the prosecution of the work provided for in such contract[.]" *Trustees of Colo. Carpenters & Millwrights Health Ben. Tr. Fund v. Pinkard Const. Co.*, 604 P.2d 683, 684 (Colo. 1979) [Lexis]. Fringe benefits are thus proper items for which payment bond claims can be made.

2. Material

Per C.R.S. § 38-26-105 [Lexis], Colorado public payment bonds also cover people/entities supplying materials, rental machinery, tools, or equipment used in the work provided for in the bonded contract.

3. Equipment

a. Repair

No reported decision in Colorado has been found addressing whether equipment repair costs are compensable under payment bonds furnished pursuant to the Colorado Public Works Act.

b. Rentals

Claims for rental equipment and unpaid rental charges are expressly allowed by statute. C.R.S. § 38-26-107(1) [Lexis] (claim afforded to one furnishing "rental machinery, tools, or equipment to the extent used in the prosecution of the work whose claim therefor has not been paid"); *see also Colorado Crane & Hauling Inc. v. Robert E. McKee, Inc.*, 761 P.2d 792, 794 (Colo. Ct. App. 1988) [Lexis].

4. Other

a. Attorneys' Fees

C.R.S. § 38-26-105 [Lexis] does not expressly allow a party to recover attorneys' fees against a public payment bond. Attorneys' fees, however, may be recoverable against the bond if that obligation is expressly stated in the bond and/or bonded contract. *Cement Asbestos Prod. Co. v. Hartford Acc. & Indem. Co.*, 592 F.2d 1144, 1148 (10th Cir. 1979) [Lexis].

b. Interest

A claimant may recover prejudgment interest from a surety from the date the claimant delivers the notice and demand for payment to the surety. *Autocon Indus., Inc. v. W. States Constr. Co.*, 728 P.2d 374, 376 (Colo. App. 1986) [Lexis].

c. Financing Charges

Finance charges have not been considered regarding Colorado payment bonds.

d. Insurance Premiums

Insurance premiums have not been considered regarding Colorado payment bonds.

e. Loans

There is no reported Colorado opinion allowing recovery of damages relating to a loan as part of a payment bond claim.

f. Delay Damages

There is no reported Colorado opinion allowing recovery of delay damages against a public works payment bond.

g. Profits

Colorado courts have not specifically construed whether claims for lost profits can be asserted against a public works payment bond surety. Instead, case law exists concerning payment bond *principals*' claims for lost profits.

A principal's claim for lost profits due to impaired bonding capacity must be analyzed like any other claim for lost profits. *Denny Const., Inc. v. City & Cnty. of Denver*, 199 P.3d 742, 747 (Colo. 2009) [Lexis]. The general rule in Colorado is that damages for lost profits may be awarded in breach of contract cases, so long as the plaintiff meets two requirements. *U.S. ex rel. Sun Constr. Co. v. Torix Gen. Contractors, LLC*, 2009 WL 3416214, at 3 (D. Colo. Oct. 20, 2009) [Lexis]. First, lost profits are recoverable only if they can be proven with reasonable certainty. *Id.* Second—in addition to proving lost profits with a reasonable certainty—a plaintiff must prove the particular lost profits were objectively foreseeable by the parties at the time of contracting. *Id.*

h. Extracontractual

Extracontractual damages such as punitive damages are generally not recoverable under a payment bond unless the bond specifically provides for recovery of such damages. *In re McGill*, 623 B.R. 876, 886 (Bankr. D. Colo. 2020) [Lexis]. Sureties, however, can be liable for common law and statutory bad-faith claims relating to the handling of bond claims. *Transamerica Premier Ins. Co. v. Brighton Sch. Dist. 27J*, 940 P.2d 348, 352 (Colo. 1997) [Lexis].

E. Contracts Excluded

Public contracts awarded to a contractor in an amount less than $50,000 are generally excluded from bonding requirements. C.R.S. § 38-26-105(2) [Lexis].

F. Time for Suit

Actions to recover payment under a public works payment bond must be commenced within six months of completion of the contract unless the bond provides for a longer period. C.R.S. § 38-26-105(1) [Lexis]; *Pat's Constr. Serv., Inc. v. Ins. Co. of the W.*, 141 P.3d 885, 888 (Colo. Ct. App. 2005) [Lexis]; *Montezuma Plumbing & Heating, Inc. v. Hous. Auth.*, 651 P.2d 426 (Colo. App. 1982) [Lexis].

G. Remarks

In addition to the statutory six-month time frame to commence and action on a payment bond, an action may also be brought within ninety days after the date of final settlement. *Rocky Mountain Ass'n of Credit Mgmt. v. Marshall*, 615 P.2d 68, 70 (1980) [Lexis]; C.R.S. § 38-26-107(3) [Lexis]. If, however, the action is not brought within ninety days after final settlement, the action can still be brought within the statutory six-month time period of completion on the project. *Cont'l Cas. Co. v. Rio Grande Fuel Co.*, 119 P.2d 618, 620 (Colo. 1941)[Lexis]. Completion on the project is the date the work is completed, not the date of default or abandonment. *Allen v. Wells*, 75 Colo. 608, 227 P. 833, 834 (Colo. 1924) [Lexis].

H. Case Annotations

Contract Interpretation Pertaining to Attorney's Fees

In *Cement Asbestos* (discussed above), a pipe manufacturer sued a surety under a contractor's payment and performance bond. *Cement Asbestos Prod. Co. v. Hartford Acc. & Indem. Co.*, 592 F.2d 1144, 1145 (10th Cir. 1979) [Lexis]. The pipe manufacturer was entitled to an award of attorney's fees pursuant to terms appearing on the reverse side of the manufacturer's acceptance acknowledgement, although those terms were never discussed between the parties during contract negotiations, in that those terms were "different" and "additional" terms within the meaning of statute providing that, between merchants, a written confirmation sent within a reasonable time operates as acceptance even though it states terms additional to or different from

those offered or agreed upon, and both manufacturer and contractor came within definition of "merchant." *Id.* at 1148.

Pay-If-Paid Clause

To create a pay-if-paid clause in a construction contract, the relevant contract terms must unequivocally state that the subcontractor will be paid only if the general contractor is first paid by the owner and set forth the fact that the subcontractor bears the risk of the owner's nonpayment. *Main Elec., Ltd. v. Printz Servs. Corp.*, 980 P.2d 522, 528 (Colo. 1999) [Lexis]. Colorado law has not addressed whether a surety can enforce a principal's pay-if-paid defense relating to a public works payment bond claim. Generally, however, "…a surety's liability is derivative and defenses available to the principal are available to the surety." *Gen. Ins. Co. of Am. v. City of Colorado Springs*, 638 P.2d 752, 760 n.10 (Colo. 1981). Therefore, it is likely that Colorado courts would permit a surety to enforce such a defense if it is available to the principal.

Penalty Interest

In *New Design Constr. Co. v. Hamon Contractors, Inc.*, the Colorado Court of Appeals held that "the plain language of the payment bond contract" limited the payment bond surety's liability for interest to a contractual rate of 8%; the surety's liability did not extend to prompt payment statute penalty interest of 15% (pursuant to C.R.S. § 24-91-103 [Lexis]). 215 P.3d 1172 (Colo. Ct. App. 2008) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

Colorado does not require contractors to furnish payment bonds on private projects.

A. Rules of Construction

A common-law payment bond furnished for use on a private project will be construed according to its express terms and in light of ordinary rules of contract interpretation. "A bond, like other contracts, should be construed to give effect to the intent of the parties, and reference may be made to the bond and other instruments to which the bond refers to ascertain intent." *Powder Horn Constructors, Inc. v. City of Florence*, 754 P.2d 356, 365 (Colo. 1988) [Lexis] (internal citations omitted); *see also Edmonds v. Western Sur. Co.*, 962 P.2d 323, 326 (Colo. Ct. App. 1998) [Lexis] (concerning a motor vehicle dealer bond, but reciting rules of construction for surety bonds generally).

B. Time for Suit

No Colorado reported decision suggests that a payment bond provision limiting the time for suit or detailing the time in which claims must be presented would be unenforceable. *See Brookshire Downs at Heatherridge Condo. Ass'n, Inc. v. Owners Ins. Co.*, 324 F. Supp. 3d 1201, 1203 (D. Colo. 2018) (stating that a contractual limitations period may override a statutory limitations period so long as such contractual clauses are not prohibited by statute). In the absence of a contractual limitations provision, the three-year statute of limitations provided by C.R.S. § 13-

80-101(1)(a) [Lexis], or six-year statute of limitations provided by C.R.S. § 13-80-103.5(1)(a) [Lexis], will apply.

C. Case Annotations

In *Whiting-Turner Constr. Co. v. Guar. Co. of N. Am. USA*, a performance and payment bond surety on a private project for the construction of an office building disputed whether the obligee had validly triggered the surety's obligations. 440 P.3d 1282 (Colo. Ct. App. 2019) [Lexis]. While the opinion ultimately focuses on the AIA A312 performance bond and claims thereunder, this decision represents one of very few published decisions in Colorado that construes the language of common-law bond forms together with that of the underlying bonded contract. Among its holdings, the Colorado Court of Appeals ruled that the obligee had not "triple-dipped" by seeking reduction of the "Balance of the Contract Price" payable to the surety, seeking payment of the same amount under the performance bond, and attempting to recover this sum under the payment bond, and that attorneys' fees were properly awarded pursuant to the terms of the incorporated bonded contract. *Id.* at 1290.

CONNECTICUT

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Connecticut's Little Miller Act regulates public works contracts entered into by the state or a municipality for the construction, repair, or alteration of a public building or public work. Conn. Gen. Stat. § 49-41 *et seq*. The Little Miller Act requires a payment bond in the amount of the bonded contract for all public works contracts in excess of one hundred thousand dollars ($100,000). Conn. Gen. Stat. § 49-41(a).

The Little Miller Act applies solely to bonds designating a public owner as obligee. Conn. Gen. Stat. § 49-41. Bonds issued to subcontractors on public projects which name the contractor as obligee are common law bonds that are not subject to the Little Miller Act. *Cf.* *Trs. of the Iron Workers' Locals 15 & 424 Pension Fund v. Liberty Mutual Ins. Co.*, Docket No. 3:18-cv-00157 (VAB), 2020 U.S. Dist. LEXIS 152042 (D. Conn. Aug. 21, 2020) [Westlaw].

B. Tiers Covered

Coverage under a Little Miller Act bond is afforded to all parties having a direct contractual relationship with the prime contractor or a subcontractor. Conn. Gen. Stat. § 49-42(a)(2). This includes first and second-tier subcontractors and suppliers which contract directly with the contractor or a first-tier subcontractor. Coverage is not afforded to suppliers that contract with another supplier. *Summit Crane Co. v. Continental Metalcraft*, cv-93-035564S, 1996 Conn. Super. LEXIS 2507 (Conn. Super. Ct. Sep. 25, 1996) [Westlaw].

C. Notice Required

Except for its timing provisions, Connecticut's Little Miller Act is liberally construed by the courts consistent with its remedial purpose. *Okee Indus., Inc. v. Nat'l Grange Mut. Ins. Co.*, 225 Conn. 367, 623 A.2d 483 (Conn. 1993) [Westlaw].

Under the statute, written notice of a claim be served on the surety, with a copy of the written notice also served on the bond principal. Conn. Gen. Stat. § 49-42(a)(1). The notice should be served by registered or certified mail and should state the amount of the claim, the name of the party for whom the work was performed, and the project on which the materials or services were provided. *Id.* A timely written notice is sufficient despite technical deficiencies in its contents or regarding the method of service so long as the requisite notice is in fact given and received. *Okee*, 623 A.2d at 487–88.

In contrast, the timing provisions for providing notice and filing suit under the Little Miller Act are deemed to be jurisdictional and are strictly construed. *Paradigm Contract Mgmt. Co. v. St. Paul Fire & Marine Ins. Co.*, 293 Conn. 569, 979 A.2d 1041 (Conn. 2009) [Westlaw]; *P&D Mech., Inc. v. Gar-San Corp.*, No. MMXCV146011423, 2015 Conn. Super. LEXIS 1968 (Conn.

Super. Ct. July 9, 2015) [Westlaw]; *Grinnell Fire Prot. Sys. Co. v. Hartford Fire Ins. Co.*, 32 20 81, 1996 Conn. Super. LEXIS 2878 (Conn. Super. Ct. Nov. 1, 1996) [Westlaw]. Equitable doctrines such as waiver or estoppel are inapplicable if a claim is not timely noticed or suit is not timely filed. *Id.*

The requirement that a copy of the written notice of claim to the surety be timely served on the bond principal is strictly construed and enforced. *P&D Mech.*, 2015 Conn. Super. LEXIS 1968 [Westlaw]; *Grinnell*, 1996 Conn. Super. LEXIS 2878 [Westlaw].

The Little Miller Act establishes three distinct time periods for providing notice: one applicable where the claimant seeks payment for goods or services which were included on a requisition from the prime contractor to the public owner; another applicable where the unpaid goods and services were not included on a requisition from the prime contractor to the public owner; and a third applicable to claims for retainage. These notice requirements can be ascertained by reading together the terms of Conn. Gen. Stat. § 49-41a(a)(1) and Conn. Gen. Stat. § 49-42(a)(1).

1. Claims for payment for goods or services which were included on a requisition from the prime contractor to the public owner

- The contractor must issue payment to the subcontractor within 30 days after it receives payment from the owner. Conn. Gen. Stat. § 49-41a(a). *See Bernhard Thomas Bldg. Sys., LLC v. JPI Apartment Constr., LP*, No. CV054002713S, 2007 Conn. Super. LEXIS 1433 (Conn. Super. Ct. June 5, 2007) [Westlaw]; *Gagliardi Elec., LLC v. Lawrence Brunoli, Inc.*, No. CV030827774S, 2004 Conn. Super. LEXIS 1895 (Conn. Super. Ct. July 14, 2004) [Westlaw]; *J.J. Landerman Roofing Co. v. Orlando Annulli & Sons*, CV 9764108S, 1998 Conn. Super. LEXIS 602 (Conn. Super. Ct. Mar. 9, 1998) [Westlaw]. This 30-day period is referred to in Conn. Gen. Stat. § 49-42(a) as "the applicable payment date."
- A payment bond claim is premature until 60 days after the "applicable payment date." Conn. Gen. Stat. § 49-42(a). Therefore, a payment bond claim is not ripe until 90 days after the contractor has been paid by the owner for the goods and services at issue. *See Elec. Contractors v. Ins. Co. of PA.*, 314 Conn. 749, 104 A.3d 713 (2014) [Westlaw]; *Gagliardi*, 2004 Conn. Super. LEXIS 1895 [Westlaw]; *Landerman*, 1998 Conn. Super. LEXIS 602 [Westlaw].
- The surety must receive written notice of the claim no later than 180 days after the claimant's last work on the bonded project. Conn. Gen. Stat. § 49-42(a). The surety must pay or deny the claim in whole or part within 90 days after its receipt of written notice of a ripe claim, with the 90-day period running from the date that the claim becomes ripe if it was premature when transmitted to the surety. Conn. Gen. Stat. § 49-42(a).

2. Claims for payment for goods or services which were *not* included on a requisition from the prime contractor to the public owner

Payment bond claims for work that is not billed by the contractor to the owner typically involve proposed change orders or other disputes for extras where the contractor does not seek to pass through possible extras to the owner for payment. Payment bond claims may be asserted for these work items sixty (60) days after the claimant has provided the goods or services to the bonded project. Conn. Gen. Stat. § 49-42(a). *See N. Haven Constr. Co. v. Banton Constr. Co.*, No.

CV990427298, 2008 Conn. Super. LEXIS 2053 (Conn. Super. Ct. Aug. 7, 2008) [Westlaw]. The surety must receive written notice of the claim no later than 180 days after the claimant's last work on the bonded project. The surety must pay or deny the claim in whole or part within 90 days after its receipt of the claim, with the 90-day period running from the date that the claim becomes ripe. Conn. Gen. Stat. § 49-42(a).

3. Claims for retainage

Notice of claims for retainage must be served on the surety no more than 180 days after the applicable payment date (or 210 days after the contractor has received payment of the retainage from the owner). Conn. Gen. Stat. § 49-42(a). The surety must pay or deny the claim in whole or part within 90 days after its receipt of a ripe claim. *Id.*

D. Coverage

The courts afford a liberal construction to the determination of what materials and services are compensable under a Little Miller Act payment bond. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors*, 239 Conn. 708, 687 A.2d 506 (Conn. 1997) [Westlaw]. Because the Little Miller Act was patterned after the federal Miller Act, case law construing the federal statute is persuasive in construing the state statute. *Id.*

1. Labor

a. Professional Services

The Little Miller Act affords protection "…for persons supplying labor or materials in the prosecution of the work provided for…" in the bonded contract. Conn. Gen. Stat. § 49-41(a). In *Herbert S. Newman & Partners, P.C. v. CFC Construction Ltd. Partnership*, the trial court ruled based on the operative facts that the Little Miller Act afforded coverage for unpaid architect's fees incurred by the bonded principal. No. CV 91-0318137-S, 1994 Conn. Super. LEXIS 3002 (Conn. Super. Ct. Nov. 28, 1994) [Westlaw]. On appeal, the Connecticut Supreme Court chose not to address this issue, holding instead that the terms of the particular payment bond afforded coverage in excess of the statutory minimum and that this added language afforded coverage for outstanding architect's fees. See *Herbert S. Newman & Partners, P.C. v. CFC Constr. Ltd. Pshp.*, 236 Conn. 750, 674 A.2d 1313 (1996) [Westlaw].

b. Union Benefits

A payment bond claim under the Little Miller Act affords coverage for outstanding wages and fringe benefits owed to covered employees. *Comm'r of Labor v. C.J.M. Servs.*, 73 Conn. App. 39, 806 A.2d 1105 (Conn. App. Ct. 2002) [Westlaw]. A union fringe benefit fund has standing to assert claims under a Little Miller Act payment bond for unpaid fringe benefits. *Bleiler v. Metcalf & Eddy, Inc.*, CV 980580066S, 1999 Conn. Super. LEXIS 453 (Super. Ct. Feb. 17, 1999) [Westlaw].

c. Standby Labor

The wages and benefits costs attributable to "stand-by labor" may be recoverable under a Little Miller Act bond where the claimant acts in good faith in keeping labor available for work, regardless of whether or not services were actually performed. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors*, 239 Conn. 708, 687 A.2d 506 (Conn. 1997) [Westlaw].

2. Materials

Costs for materials incorporated into the bonded project are recoverable under the Little Miller Act. Conn. Gen. Stat. § 49-42. Material costs are also covered if the materials are made available to the bonded project in good faith, irrespective of whether or not the materials are actually used on the project. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, #040938, 1993 Conn. Super. LEXIS 2685 (Conn. Super. Ct. Oct. 13, 1993) [Westlaw].

3. Equipment

Equipment costs are compensable under the Little Miller Act. Conn. Gen. Stat. § 49-42(c). See *Blakeslee Arpaia Chapman, Inc. v. EI Constructors*, 239 Conn. 708, 687 A.2d 506 (Conn. 1997) [Westlaw].

Equipment costs may be recoverable if equipment is reasonably available for use on the bonded project, even though the equipment remains idle through no fault of the claimant. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors*, 239 Conn. 708, 687 A.2d 506 (Conn. 1997) [Westlaw].

a. Repairs

There may be recovery for costs incurred to remediate wear and tear to equipment due to work on the bonded project where the claimed costs should have been reasonably anticipated at the outset of the project due to the character of the work. *Int'l Harvester Co. v. L. G. De Felice & Son, Inc.*, 151 Conn. 325, 197 A.2d 638 (Conn. 1964) [Westlaw].

Coverage is not afforded for repairs which enhance the value of the claimant's capital in its equipment nor should repair costs be compensable where the need for repairs arises due to the condition of the equipment prior to the onset of work on the bonded project. *Id.*

b. Rentals

The statue affords coverage for "construction equipment and machinery" and expressly applies to machinery and equipment that is "rented or leased". Conn. Gen. Stat. § 49-42(c). *See Blakeslee Arpaia Chapman, Inc. v. EI Constructors*, 239 Conn. 708, 687 A.2d 506 (Conn. 1997) [Westlaw].

4. Other

a. Attorneys' Fees

Attorneys' fees may be awarded to either party in Little Miller Act litigation if the court determines that there was no substantial basis in law or fact to the original claim, the surety's denial of liability, or the defenses interposed to the claim. Conn. Gen. Stat. § 49-42(a)(2). *See* *Elgard Corp. v. Brennan Constr. Co.*, 388 F.3d 30 (2d Cir. 2004) [Westlaw].

In addition, if the surety fails to pay or deny a claim within 90 days of its receipt of a ripe claim, the claimant is entitled to an award of fees and costs limited to the fees and costs that the claimant incurred to recover any sums determined to be owing. Conn. Gen. Stat. § 49-42 (a)(1). *See* *United Concrete Prods. v. NJR Constr., LLC*, 207 Conn. App. 551, 263 A.3d 823 (Conn. App. Ct. 2021) [Westlaw].

b. Interest

A judgment for claims asserted under the Little Miller Act should award the prevailing party its costs and allow interest at the interest rate specified in the labor or materials contract under which the claim arises or, if no interest rate is specified, the court may award interest at the statutory rate as determined under Conn. Gen. Stat. § 37-3a, computed from the date of service of the claim on the surety or from the date that the claim becomes due and payable, whichever date is later. Conn. Gen. Stat. § 49-42(a)(2). *See* *Blakeslee Arpaia Chapman, Inc. v. EI Constructors*, 239 Conn. 708, 687 A.2d 506 (Conn. 1997) [Westlaw].

c. Financing Charges

The Little Miller Act does not expressly reference the recovery of "financing charges". The statute authorizes an award of interest to the prevailing party at the interest rate specified in the labor or materials contract under which the claim arises or, if no interest rate is specified, the court may award interest at the statutory rate as determined under Conn. Gen. Stat. § 37-3a, computed from the date of service of the claim on the surety or from the date that the claim becomes due and payable, whichever date is later. Conn. Gen. Stat. § 49-42(a)(2).

d. Insurance Premiums

The Little Miller Act does not expressly reference the recovery of "insurance premiums". However, a recovery under the Little Miller Act may include the recovery of overhead and profit, in addition to the reasonable value of the work and material furnished to the project. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, #040938, 1993 Conn. Super. LEXIS 2685 (Conn. Super. Ct. Oct. 13, 1993) [Westlaw].

e. Loans

The Little Miller Act does not expressly reference the recovery of costs relating to "loans". However, a recovery under the Little Miller Act may include the recovery of overhead and profit, in addition to the reasonable value of the work and material furnished to the project. *Blakeslee*

Arpaia Chapman, Inc. v. EI Constructors, Inc., No. 040938, 1993 Conn. Super. LEXIS 2685 (Conn. Super. Ct. Oct. 13, 1993) [Westlaw].

f. Delay Damages

The Little Miller Act may afford coverage for delay damages incurred by the claimant. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, No. 040938, 1993 Conn. Super. LEXIS 2685 (Conn. Super. Ct. Oct. 13, 1993) [Westlaw].

g. Profits

The Little Miller Act case law draws a distinction between "earned" and "unearned" profits. The statute affords coverage for lost profits on work performed by the claimant on the bonded project. The Little Miller Act does not provide a remedy for anticipated profits in connection with work that the claimant contracted for but did not perform. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors*, 239 Conn. 708, 687 A.2d 506 (Conn. 1997) [Westlaw].

h. Extracontractual

An implied covenant of good faith and fair dealing is read into every contract in Connecticut, including surety contracts such as payment bonds. See *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 838 A.2d 135 (Conn. 2004) [Westlaw]. A claimant may assert a claim against a payment bond surety for breach of the covenant of good faith and fair dealing, but the claimant will not prevail unless it proves that the surety acted with an improper motive or a dishonest purpose. *Id.* at 152–53.

The Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a *et seq.* ("CUTPA"), provides a private right of action against sureties for alleged unfair insurance claims settlement practices as specified in the Connecticut Unfair Insurance Practices Act, Conn. Gen. Stat. § 38a-816(6) ("CUIPA"). In order to state a claim against a surety for unfair claims settlement practices under CUIPA and CUTPA, the plaintiff must generally allege and prove a pattern of misconduct as opposed to a single incident of misconduct. *State v. Acordia, Inc.*, 310 Conn. 1, 73 A.3d 711 (Conn. 2013) [Westlaw]. There are trial court decisions which suggest that the "pattern and practice" requirement may not apply where the surety breaches its obligations under the Little Miller Act. *See, e.g.*, *Brico, LLC v. Travelers Cas. & Sur. Co. of Am.*, No. CV095023993, 2010 Conn. Super. LEXIS 3334 (Conn. Super. Ct. Dec. 28, 2010) [Westlaw]. However, these decisions may no longer be good law in light of the subsequent Connecticut Supreme Court's decision in *State v. Acordia, Inc.*, 310 Conn. 1, 73 A.3d 711 (2013) [Westlaw]. *See Chi. Title Ins. Co. v. LaPuma*, No. AANCV156018031S, 2016 Conn. Super. LEXIS 2263 (Conn. Super. Ct. Aug. 23, 2016) [Westlaw].

E. Contracts Excluded

Contracts less than one hundred thousand dollars ($100,000) are not subject to the bonding requirements of The Little Miller Act. Conn. Gen. Stat. § 49-41(a).

F. Time for Suit

The limitations periods set out in the Little Miller Act are jurisdictional and must be strictly construed. *See* *Paradigm Contract Mgmt. Co. v. St. Paul Fire & Marine Ins. Co.*, 293 Conn. 569, 979 A.2d 1041 (Conn. 2009) [Westlaw].

Litigation under the Little Miller Act must be commenced within one year of the last date on which the claimant supplied materials or service to the bonded project except that in regard to claims for retainage, suit must be filed within one year from the date that payment of retainage was due to the claimant. Conn. Gen. Stat. § 49-42(a). *See* *Bernhard Thomas Bldg. Sys., LLC v. JPI Apartment Constr., LP*, No. CV054002713S, 2007 Conn. Super. LEXIS 1433 (Conn. Super. Ct. June 5, 2007) [Westlaw]. In the case of a claim filed by a first-tier subcontractor, payment for retainage would be owing to the claimant from the contractor thirty days after the contractor received payment of the retainage from the project owner. Conn. Gen. Stat. § 49-41a. Therefore, the limitations period for a first-tier claimant seeking retainage under the Little Miller Act would run one year and thirty days from the date that the contractor received payment of retainage from the owner. *See* *Bernhard Thomas Building Systems*, 2007 Conn. Super. LEXIS 1433 [Westlaw]. If the owner paid retainage to the contractor through multiple installments, there would be a different limitations period relating to each such payment.

The limitations period(s) under the Little Miller Act is not extended for correcting defective work, making repairs, performing warranty work, providing replacement parts, or removing a trailer from the jobsite. *See* *Wickes Mfg. Co. v. Currier Elec. Co.*, 25 Conn. App. 751, 596 A.2d 1331 (Conn. 1991) [Westlaw]; *All Seasons Landscaping v. Travelers Cas. & Sur. Co. of Am.*, No. DBD-CV21-6039074-S, 2022 Conn. Super. LEXIS 425 (Conn. Super. Ct. Apr. 4, 2022) [Westlaw]; *Am. Pride Builders v. Hous. Auth. of New Haven*, No. HHDCV136079165S, 2018 Conn. Super. LEXIS 13 (Conn. Super. Ct. Jan. 9, 2018) [Westlaw].

G. Remarks

A surety must pay or deny a payment bond claim in whole or part within 90 days after its receipt of written notice of the claim, with the 90-day period running from the date that the claim becomes ripe if it was premature when transmitted to the surety. Conn. Gen. Stat. § 49-42(a). If the surety fails to pay or deny a claim within 90 days of its receipt of a ripe claim, the claimant is entitled to an award of fees and costs limited to the fees and costs that the claimant incurred to recover any sums determined to be owing. Conn. Gen. Stat. § 49-42(a)(1). *See* *United Concrete Prods. v. NJR Constr., LLC*, 207 Conn. App. 551, 263 A.3d 823 (Conn. App. Ct. 2021) [Westlaw].

H. Case Annotations

Key cases discussing the Connecticut Little Miller Act are referenced in the preceding sections.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

An insurance policy or a surety bond is to be interpreted by the same general rules that govern the construction of a written contract. *Goldberg v. Hartford Fire Ins. Co.*, 269 Conn. 550, 849 A.2d 368 (Conn. 2004) [Westlaw]; *Crow & Sutton Assocs. v. C.R. Klewin N.E., LLC*, No. HHDX04CV054016823S, 2010 Conn. Super. LEXIS 1197 (Conn. Super. Ct. May 21, 2010) [Westlaw]. The determinative question in construing a bond or insurance policy is the intent of the parties. *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 333 Conn. 343, 216 A.3d 629 (2019) [Westlaw]. The contract must be viewed in its entirety and the underlying intent of the parties is derived from the four corners of the policy or bond. *Goldberg*, 849 A.2d at 373 [Westlaw]. If the terms are unambiguous, the language will be applied as written. *R.T. Vanderbilt*, 216 A.3d at 641 [Westlaw].

B. Time for Suit

A contractual limitations provision in a payment bond will be enforced except that any such provision is unenforceable where it limits the period of time to file suit to less than three years from the date on which the claimant last performed work or supplied material for which the claim is made. Conn. Gen. Stat. § 38a-290. *See Trs. of the Iron Workers' Locals 15 & 424 Pension Fund v. Liberty Mut. Ins. Co.*, No. 3:18-cv-00157 (VAB), 2020 U.S. Dist. LEXIS 152042 (D. Conn. Aug. 21, 2020) [Westlaw].

In the absence of an enforceable contractual limitations period, the operative statute of limitations for a payment bond claim is the statute for written contracts, pursuant to which a claim must be filed within six years after the right of action accrues. Conn. Gen. Stat. § 52-576. *See Crow & Sutton Assocs. v. C.R. Klewin Ne., LLC*, No. HHDX04CV054016823S, 2010 Conn. Super. LEXIS 1197 (Conn. Super. Ct. May 21, 2010) [Westlaw].

C. Case Annotations

Certain of the payment issues arising in the course of private construction projects in Connecticut are regulated under Conn. Gen. Stat. § 42-158i if, *inter alia*, the prime contract between the contractor and owner is in excess of $25,000 or if the project is for construction of a residential structure containing five or more units. The regulated issues that may relate to payment bond claims on private projects include the following:

- The contractor must pay its subcontractors no later than 25 days after the owner has paid the contractor for work performed by the subcontractor. Conn. Gen. Stat. § 42-158j. Each subcontractor must pay its subcontractors and suppliers no later than 25 days after the subcontractor has been paid by the contractor for services or materials supplied by lower tier subcontractors and suppliers. *Id.*
- Clauses in construction contracts purporting to waive rights to assert claims under payment bonds are void. Conn. Gen. Stat. § 42-158l.
- A payment bond surety is not obligated to pay interest, costs, penalties, or attorneys' fees for which its principal is liable, unless, *inter alia*, the terms of the payment bond expressly impose such obligations on the surety. Conn. Gen. Stat. § 42-158o. *See Secured Sys. Tech.,*

Inc. v. Vigilant Ins. Co., No. CV095021153S, 2013 Conn. Super. LEXIS 123 (Super. Ct. Jan. 13, 2013) [Westlaw]; *Reliable Truss & Components, Inc. v. Travelers Cas. & Sur. Co. of Am.*, No. CV116006350S, 2012 Conn. Super. LEXIS 2272 (Conn. Super. Ct. Sep. 11, 2012) [Westlaw].

DELAWARE

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

The bonding requirements for Delaware public works projects are set forth in the Delaware Public Works Contracting Laws (the "Public Works Law"), 29 Del. Code §§ 6961–6962, which is a part of Delaware's State Procurement Code, 29 Del. Code §§ 6901–6986. Delaware's Little Miller Act establishes the statutory requirements of payment bonds for public works projects in Delaware. 29 Del. Code § 6962(d)(9). In Delaware, a "public works contract" is a project that is paid for, in whole or in part, with public funds involving "construction, reconstruction, demolition, alteration and repair work and maintenance work." Del. Code § 6902(23).

The Contracting and Purchasing Advisory Council, which was created by 29 Del. Code § 6913(a), requires that payment bonds be acquired for public work contracts exceeding a yearly cumulative value of $150,000. See *State Procurement and Public Works Procedures*, DELAWARE.GOV, https://dfm.delaware.gov/construc/papwp.shtml.

On qualifying public works contracts, the prime contractor is required to provide a payment bond that is equal to 100% of the contract price. 29 Del. Code 6962(d)(9)(a). The payment bond enables subcontractors providing materials or performing labor to recover what they are owed in the event the prime contract defaults on payment. *Id.* Payment bonds must be in the form issued by the Office of Management and Budget. *Id.*

B. Tiers Covered

Delaware's Little Miller Act enables "[e]very firm furnishing material or performing labor under the contract for which the successful bidder is liable [to] maintain an action on the bond . . . ." 29 Del. Code § 6962(d)(9)(d). Delaware courts have interpreted the statute as conferring the right to maintain an action on the payment bond to persons furnishing materials or performing labor who are under contract with the prime contractor. *State ex rel. Lawrence v. Am. Ins. Co.*, 559 A.2d 1247, 1250 (Del. 1989) [Lexis]; *Warner Co. v. Schoonmaker*, 20 Del. Ch. 165, 174 A. 449 (Del. Ch. 1934) [Lexis]. Delaware courts have only allowed a second-tier subcontractor or supplier to maintain an action on a payment bond if "the language of the bond shows an intent to protect the subcontractor." *Royal Indem. Co. v. Alexander Indus.*, 58 Del. 548, 551, 211 A.2d 919, 920 (Del. 1965) [Lexis]. The precise terms of the payment bond are controlling. *Certain-Teed Prods. Corp. v. United Pac. Ins. Co*. 389 A.2d 777, 779 (Del. 1978) [Lexis] (noting that "bonds may be drafted with terms more liberal than those required by the statute"). Therefore, second-tier subcontractors are entitled to maintain an action on the payment bond if the language employed in the payment bond extends coverage to second-tier subcontractors. *Id.* (concluding that the claimant was qualified under the express terms of the bond, which extended coverage to "all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of

the work provided for in such contract"). *See also* *Berlin Steel Constr. Co. v. Salah & Pecci Leasing Co.*, 5 A.3d 608 (Del. 2010) [Lexis] (specific bond language permitted second tier claimants but not third tier claimants).

C. Notice Required

The Public Works Law does not require claimants to serve any notice in order to maintain an action on a payment bond. 29 Del Code §§ 6961 through 6962.

D. Coverage

For projects subject to the Public Works Law's bonding requirement, the payment bond covers every firm "furnishing material or performing labor under the contract for which the successful bidder is liable." 29 Del. Code § 6962(d)(9)(d). However, the specific terms of the payment bond will determine the extent of coverage provided by the payment bond. *State ex rel. Certain-Teed Prods. Corp. v. United Pac. Ins. Co.*, 389 A.2d 777, 779 (Del. 1978) [Lexis]. Generally, the liability of the surety "is coextensive with the liability of the general contractor." *Quality Elec. Co. v. E. States Constr. Serv., Inc.*, 663 A.2d 488 (Del. 1995) [Lexis]. Therefore, the surety cannot be held liable for more than the prime contractor is liable. *Id.*

Delaware courts construe language in payment bonds "to provide at least the minimum coverage provided by the statute." *Certain-Teed*, 389 A.2d at 779 [Lexis]. However, Delaware courts will not give language a meaning that is not within the reasonable limits of the "clearly expressed terms" provided. *Warner Co. v. Schoonmaker*, 20 Del. Ch. 165, 174 (Del. Ch. 1934) [Lexis] (holding claims for premiums on workmen's compensation insurance policies, telephone service and premiums on the bond are not "properly described as material furnished or labor performed in and about the construction of the highway" and are therefore not within the limits of the bond). If a bond includes terms that contravene the language or purpose in the Public Works Law, such terms will be discarded as "surplusage." *State ex. re. Bd. of Trs. of State Coll. v. Fid. and Dep. Co. of Md.*, 194 A.2 858, 862 (Del. 1963) [Lexis].

If the payment bond employs restrictive language, Delaware courts will not construe such language in a manner that impedes statutory protections. *Id*. Delaware courts are mindful of the fact that claimants, who are not a party to the contract of suretyship, are denied the opportunity to negotiate the terms and conditions of the payment bond. *Id*. As such, Delaware courts apply a liberal construction to the language of the payment bond so that it favors the claimant. *Id.* However, this rule of construction is not applied in instances "where the surety has clearly and unambiguously placed limitations upon their liability." *Id.*

Provided the language employed in the payment bond is construed in a manner that ensures the minimum statutory protections are satisfied, courts will generally enforce terms that employ language in a way that limits coverage. *Berlin Steel Constr. Co. v. Salah & Pecci Leasing Co., Inc.*, 5 A.3d 608, 611 (Del. 2010) [Lexis] (holding that where a payment bond defines the meaning of "claimant" narrowly, third tier subcontractors—who are not protected under the statute—can be properly precluded from maintaining an action on the bond). As such, Delaware courts have generally held the precise terms of the payment bond controlling. *Certain-Teed*, 389 A.2d at 779 [Lexis]. Because the terms governing the payment bond are typically enforceable, Delaware courts will also enforce terms that employ language in a way that expands the claimant's coverage. *Id.* at

779 ("[B]onds may be drafted with terms more liberal than those required by the statute, and a suit may be maintained on the bond, itself, rather than the statute.").

1. Labor

Delaware's Wage Payment and Collection Act, 19 Del. C. § 1105, makes general contractors civilly liable to the employees of subcontractors for payment of wages. Consequently, such wages may be within the scope of a payment bond. *State ex rel. Christopher v. Planet Ins. Co.*, 321 A.2d 128 (Del. Super. 1974) [Lexis].

a. Professional Services

There is no reported Delaware opinion that includes or excludes the rendering of professional services within the meaning of "labor" under 29 Del. Code § 6962(d)(9)(d).

b. Union Benefits

The meaning of "materials" or "labor" under Delaware's Public Works Law does not preclude or provide coverage for union benefits. 29 Del. Code § 6962(d)(9)(d). Therefore, a claimant would not be able to maintain an action on the payment bond to recover costs associated with union benefits unless the bond describes coverage expansively or unless the terms of the payment expressly provide for such recovery. *State ex rel. Lawrence v. Am. Ins. Co.*, 559 A.2d 1247, 1250 (Del. 1989) [Lexis] (holding that the former employees of a subcontractor are not qualified to maintain an action under the Public Works Law in the absence of a contractual relationship between the former employees and the prime contractor).

2. Material

"Materials" furnished under the contract include any "materials, equipment, tools, supplies, or any other personal property…" However, "materials" do not include real property and utilities—such as (but not limited to) electric, gas, water, and telephone charges. 29 Del. Code § 6902(17). In the absence of contrary language in the bond, whether furnished materials are covered under the terms of the bond may depend on whether the materials employed in the execution of the contract survive construction. *Warner Co. v. Schoonmaker*, 20 Del. Ch. 165, 174 A. 449 (Del. Ch. 1934) [Lexis]. Delaware courts have generally held that all materials that are consumed in the construction of the work are covered by a payment bond. *Id.*

3. Equipment

a. Repairs

At least one Delaware opinion had denied a bond claim for equipment repair costs because a contract presumes that the subcontractor furnishes equipment that is in the condition necessary to complete the work under contract. *Warner Co. v. Schoonmaker*, 20 Del. Ch. 165, 174 A. 449 (Del. Ch. 1934) [Lexis].

b. Rentals

Delaware courts have construed the rental of equipment within the meaning of "materials" under Delaware's Public Works Law. 29 Del. Code § 6962(d)(9)(d). Therefore, suppliers of rental equipment are beneficiaries of the surety contract if they are qualified to maintain an action on the bond. *Griffin Dewatering Corp. v. B.W. Knox Constr. Corp.*, No. CIV. A. 98L-09-008, 2001 Del. Super. LEXIS 176, 2001 WL 541476, at *10 (Del. Super. May 14, 2001) [Lexis] (involving a claimant who sought recovery for what they were owed from leasing equipment that was used in the performance of the contract); *Berlin Steel Constr. Co. v. Salah & Pecci Leasing Co.*, 5 A.3d 608 (Del. 2010) [Lexis] (denying claim on other grounds, but appearing to recognize a crane leasing company as a potentially proper claimant within the scope of the bond); *but see Warner Co. v. Schoonmaker*, 20 Del. Ch. 165, 174 A. 449 (Del. Ch. 1934) [Lexis] (rejecting bond claim for equipment rental).

4. Other

a. Attorneys' Fees

Generally, under Delaware law, "a court may not order the payment of attorneys' fees as part of the costs to be paid by the losing party unless the payment of such fees is authorized by some provision of a statute or of the bond sued upon." *Great Am. Indem. Co. v. State ex rel. Mills*, 88 A.2d 426, 428 (Del. 1952) [Lexis]. The meaning of "materials" or "labor" under Delaware's Public Works Law does not preclude or provide coverage for costs incurred from attorneys' fees. 29 Del. Code § 6962(d)(9)(d). Therefore, a claimant would not be able to maintain an action on the payment bond to recover costs associated with attorneys' fees unless the bond describes coverage expansively or unless the terms of the payment expressly provide for such recovery. *Griffin Dewatering Corp. v. B.W. Knox Constr. Corp.*, No. CIV. A. 98L-09-008, 2001 Del. Super. LEXIS 176, 2001 WL 541476, at *10 (Del. Super. May 14, 2001) [Lexis] (concluding that the surety is not liable for the costs incurred by the claimant for attorneys' fees in the absence of express language in the payment bond imposing liability on the surety for attorneys' fees); *Town of Georgetown v. David A. Bramble, Inc.*, C.A. No. 15-554-LPS, 2017 U.S. Dist. LEXIS 121682, 2017 WL 3335757 (D. Del. 2017) [Lexis] (granting motion *in limine* to preclude introduction of attorneys' fees damages because the bond did not clearly so provide); *but see State ex rel. Mills v. Birkins*, 78 A.2d 868 (Del. Ch. 1951) [Lexis] (holding lost instrument bond covering "costs and expenses" included attorneys' fees).

b. Interest

The meaning of "materials" or "labor" under Delaware's Public Works Law does not preclude or provide coverage for costs incurred from interest charges. 29 Del. Code § 6962(d)(9)(d). Therefore, a claimant would not be able to maintain an action on the payment bond to recover costs associated with interest charges unless the bond describes coverage expansively or unless the terms of the payment expressly provide for such recovery. *Griffin Dewatering Corp. v. B.W. Knox Constr. Corp.*, No. CIV. A. 98L-09-008, 2001 Del. Super. LEXIS 176, 2001 WL 541476, at *10 (Del. Super. May 14, 2001) [Lexis] (concluding that the surety is not liable for the

costs incurred by the claimant for interest charges in the absence of express language in the payment bond imposing liability on the surety for interest charges).

c. Financing Charges

The meaning of "materials" or "labor" under Delaware's Public Works Law does not preclude or provide coverage for costs incurred from financing charges. 29 Del. Code § 6962(d)(9)(d).

In a recent opinion, a Delaware court held that a surety was potentially liable when the principal's conduct forced a subcontractor to extend their financing. *Iron Branch Assocs. v. The Hartford Fire Ins. Co.*, 559 F. Supp 3d 368 (D. Del. 2021) [Lexis]. Although the terms of the common-law payment bond at issue "broadly waived all claims for consequential damages and enumerated damages, including those incurred 'for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons[,]'" the court determined that financing charges were not within the meaning of consequential damages. *Id.* (holding that when financing charges are incurred because of an extended financing period, such charges are "direct damages" because they are the direct result of the prime contractor's default).

d. Insurance Premiums

The meaning of "materials" or "labor" under Delaware's Public Works Law does not preclude or provide coverage for insurance premiums. 29 Del. Code § 6962(d)(9)(d). Therefore, a claimant would not be able to maintain an action on the payment bond to recover costs associated with insurance premiums unless the bond describes coverage expansively or unless the terms of the payment expressly provide for such recovery. *State ex rel. Certain-Teed Prods. Corp. v. United Pac. Ins. Co.*, 389 A.2d 777, 779 (Del. 1978) [Lexis]. (enforcing the express terms of a payment bond, which provided broad coverage for "all amounts due for . . . all insurance premiums on said work"); *Warner Co. v. Schoonmaker*, 20 Del. Ch. 165, 174 A. 449 (Del. Ch. 1934) [Lexis] (on a claim for workmen's compensation premiums noting that "it is impossible to see how they can be properly described as material furnished or labor performed").

e. Loans

There is no reported Delaware opinion allowing loans as part of a public payment bond claim. Presumably, Delaware courts would allow a claimant to recover loans only if the terms of the payment bond expressly entitle qualified claimants to such recovery.

f. Delay Damages

The meaning of "materials" or "labor" under Delaware's Public Works Law does not preclude or provide coverage for delay damages. 29 Del. Code § 6962(d)(9)(d). Therefore, a claimant would not be able to maintain an action on the payment bond to recover costs associated with delay damages unless the bond describes coverage expansively or unless the terms of the payment expressly provide for such recovery. *Certain-Teed*, 89 A.2d at 779 [Lexis]; *Iron Branch Assocs. v. The Hartford Fire Ins. Co.*, 559 F.Supp 3d 368 (D. Del. 2021) [Lexis] (court found surety not liable for consequential damages based on the specific language in the bond and the

specific language in the bonded contract); *see also* *Wilmington Hous. Auth. v. Pan Builders, Inc.*, 665 F. Supp. 351 (D. Del. 1987) [Lexis]; *State ex rel. Christopher v. Planet Ins. Co.*, 321 A.2d 128 (Del. Super. 1974) [Lexis].

g. Profits

There is no reported Delaware opinion allowing lost profits as part of a public payment bond claim. Presumably, Delaware courts would allow a claimant to recover lost profits only if the terms of the payment bond expressly entitle qualified claimants to such recovery.

h. Extracontractual

Delaware courts have recognized claims of bad faith against sureties. *Int'l Fid. Ins. Co. v. Delmarva Sys. Corp.*, No. 99C-10-065 WCC, 2001 Del. Super. LEXIS 165, 2001 WL 541469, at *2 (Del. 2001) [Lexis] (concluding that bad faith claims deter sureties from intentionally delaying disbursements to claimants for the benefit of the surety). In *Tackett v. State Farm Fire and Casualty Ins. Co.*, the Delaware Supreme Court awarded the claimant punitive damages upon determining that the surety intentionally delayed rendering payments to subcontractors and suppliers in bad faith. 653 A.2d 254 (Del. 1995) [Lexis]. To maintain a cause of action against a surety for bad faith, the claimant must establish that the surety's delay in rendering payment "result from a conscious indifference to the decision's foreseeable effect." *Id.*

E. Contracts Excluded

With the approval of the Division Director, a prime contractor can waive the requirement to obtain a payment bond, but only if the public work contract has a yearly cumulative value of less than $150,000. *State Procurement and Public Works Procedures*, DELAWARE.GOV, https://dfm.delaware.gov/construc/papwp.shtml.

F. Time for Suit

If the claimant is entitled to maintain an action on the payment bond, they must file a complaint within three years of the date the last work was done under the contract. 29 Del. Code § 6962(d)(9)(d). However, the statute of limitations may be reduced to one year following the date that the last work was done under the contract, provided such reduction is explicitly set forth in the terms of the bond. *Rumsey Elec. Co. v. Univ. of Del.*, 334 A.2d 226, 229 (Del. Super. 1975) [Lexis].

The Public Works Law does not define "the date the last work was done on the contract." 29 Del. Code § 6962. Generally, the date from which the statute of limitations runs is fact dependent. Because Delaware courts place an emphasis on the terms of the payment bond that have been agreed upon between parties, courts will consider the language of the bond in making a determination. *Rumsey*, 334 A.2d at 229 [Lexis].

G. Remarks/Case Annotations

Bad-Faith Claims

In *International Fidelity Insurance Co. v. Delmarva Systems Corp.*, the court held that a surety could be held liable for punitive damages for violating their obligations under contract in bad faith. No. 99C-10-065 WCC, 2001 Del. Super. LEXIS 165, 2001 WL 541469, at *2 (Del. 2001) [Lexis]. The claimant argued that the surety, in bad faith, exploited "its financial wealth to oppress and unlawfully avoid its obligation to pay the claims." *Id*. at *1. The court considered the Delaware Supreme Court's history of awarding punitive damages for bad-faith breach of contract in the context of insurance. *Id*. at *7. Ultimately, the court established sufficient parallels between sureties and obligees, and insurers and the insured. *Id*. at *8. Like the insured, the obligee requires security that the project can be completed. In effect, the bond provides insurance by "allow[ing] the obligee to respond quickly to the [prime] contractor's non-performance and to avoid delays and additional cost to the overall project." *Id*. The court explained that unless sureties are deterred from manipulating the payment of claims in bad faith, the security the bond provides would be undermined. *Id*. at *9. In further justifying the award of punitive damages, the court reasoned that the recovery of the amount under contract may not adequately remedy "the potentially catastrophic losses related to the surety's bad faith delay." *Id*.

Intent

In *Royal Indemnity Co. v. Alexander Industries, Inc.*, the subcontractor brought action against the surety to recover for labor and materials supplied in the performance of the work under contract. 58 Del. 548, 551, 211 A.2d 919, 920 (Del. 1965) [Lexis]. In holding that the subcontractor was qualified to maintain an action, the Supreme Court of Delaware held that the extent of coverage provided by the payment bond depends on "whether the language of the bond shows an intent" to extend such coverage. *Id.* at 920. Because the payment bond was conditioned on prime contractor's performance of all things set forth in contract, including a provision that expressly required the prime contractor to pay for all materials and labor necessary in the performance of the contract, the Supreme Court of Delaware held that the language of the payment bond showed an "intent to benefit those who [] supplied materials and labor . . . ." *Id*. In the absence of language that defined or limited the types of suppliers that were covered under the bond, the Supreme Court of Delaware concluded that the intent was to provide coverage to all parties supplying materials and performing labor in the performance of the contract. *Id.* at 921.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Delaware courts have generally held the precise terms of the payment bond controlling. *State ex rel. Certain-Teed Prods. Corp. v. United Pac. Ins. Co.*, 389 A.2d 777, 779 (Del. 1978) [Lexis]. Where the claimant has no opportunity to negotiate the terms and conditions of the contract of suretyship, the bonds are liberally construed in favor of the claimant. *State ex. re. Bd. of Trs. of State Coll. v. Fid. and Dep. Co. of Md.*, 194 A.2 858, 861 (Del. 1963) [Lexis]. This rule

of construction, however, does not extend a surety's liability beyond the terms for which it has contracted. *Id.*

B. Time for Suit

The statute of limitations is the same for both private and public payment bonds. 29 Del. Code § 6962(d)(9)(d). Claimants who are qualified to maintain an action on the payment bond are required to file a complaint within three years of the date the last work was done under the contract. *Id*. If the bond explicitly provides, the statute of limitations may be reduced to one year following the date that the last work was done under the contract. *Rumsey Elec. Co. v. Univ. of Del.*, 358 A.2d 712, 714 (Del. 1976) [Lexis].

C. Case Annotations

In *Rumsey*, *supra*, the Supreme Court of Delaware held that in the absence of any statutory conflict, claimants' rights are "measured by the terms of the agreement between principals." 358 A.2d 712 at 714 [Lexis]. The claimant sought to recover what they were owed for the equipment supplied in the performance of the work under contract, however, the period of limitations that was stipulated in the payment bond had already run. *Id*. The claimant argued that the payment bond's one-year statute of limitations was not enforceable because the defendants incorrectly believed that the university was a state agency, and therefore, that the contract was subject to the Public Works Law. *Id*. The claimant argued that, in the alternative, the three-year period of limitations for contract actions was controlling. *Id.* In upholding the payment bond's one-year limitations period, the court held that the university "clearly acted in a private capacity in executing the bond," and because the terms of the payment bond did not conflict with any statutory provision, the claimant's "failure to sue within one year after completion of project defeated its claim." *Id.* Provided that the language of the bond does not conflict with any statutory provision, Delaware courts have generally held that parties to a contract are free to agree to terms that restrict a claimant's ability to maintain an action on a payment bond. *Id.*

DISTRICT OF COLUMBIA

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§ 1.0 PUBLIC PAYMENT BONDS

The District of Columbia has two separate, but largely similar, statutes governing public payment bonds: D.C.'s Little Miller Act, which can be found in D.C. Code Title 2, Chapter 2, and The Procurement Practices Reform Act ("PPRA") of 2010 found at D.C. Code Title 2, Chapter 3A. Both code sections are modeled after the federal Miller Act. D.C. courts have generally followed the federal Miller Act and related precedent when interpreting public payment bonds under D.C.'s statutes. *See* *Campbell v. Cumbari Assocs., Inc.*, 2817-84, 1987 WL 114846 (D.D.C. July 6, 1987); *Dist. of Columbia v. Campbell*, 580 A.2d 1295 (D.C. 1990) [Lexis]. D.C. Code § 2-351.05 lists types of contracts and city agencies that do not fall under the PPRA's regulations. D.C. Code § 2-351.05. These excluded contracts and entities are covered by the Little Miller Act's lower thresholds.

When a bond is required by statute, the terms of the statutory scheme are incorporated into the bond. *U.S. Plywood Corp. v. Cont'l Cas. Co.*, 157 A.2d 286 (D.C. 1960) [Lexis] ("The extent of the surety's undertaking is measured by the terms of the bond and the statute requiring its execution."); *see also* *May v. Cont'l Cas. Co.*, 936 A.2d 747 (D.C. 2007) [Lexis] (holding that the terms of the statute requiring a bond are to be read into the bond); *Dist. of Columbia v. Campbell*, 580 A.2d 1295 (D.C. 1990) [Lexis] (holding that the requirements of the Little Miller Act are incorporated into the underlying contract between the District and the contractor).

"While the D.C. Little Miller Act itself has been the subject of little judicial interpretation, because it is a statute very closely modeled on the Federal Miller Act, 40 U.S.C. § 3131, it is appropriate to look to the persuasive authority of those cases interpreting its federal counterpart." *Dist. of Columbia ex rel. Strittmatter Metro, LLC v. Fid. & Deposit Co. of Md.*, 208 F. Supp. 3d 178, 180 (D.D.C. 2016) [Lexis] (internal citation omitted). Similarly, because D.C. derives its common law from Maryland, D.C. courts look to Maryland law to solve surety-related disputes where D.C. statutes and case law are silent. *Conesco Indus., Ltd. v. Conforti & Eisele, Inc., D. C.*, 627 F.2d 312 (D.C. Cir. 1980) [Lexis].

A. Requirements for Bond

Under D.C.'s Little Miller Act, a payment bond is required before the award of any public construction contract exceeding $25,000. D.C. Code § 2-201.01; 2-201.11. Where a contract is valued at or below $1,000,000, the payment bond must be equal to 50% of the total amount payable under the contract. Where a contract is valued between $1,000,000.01 and $5,000,000, the payment bond must be equal to 40% of the total amount payable under the contract. Where the contract is valued above $5,000,000, the payment bond must be for $2,500,000.

[1] The chapter was prepared with the substantial assistance of Abby Bello Salinas, who is a current third-year law student at Tulane University Law School and will join Peckar & Abramson, P.C. as an associate after graduating.

The PPRA provides that, when a construction contract is awarded in excess of $100,000, the contractor must deliver a payment bond in the full amount of the contract (not including operating or maintenance costs or finance costs), as well as a 100% performance bond. This requirement may be adjusted by the Director of the Office of Contracting and Procurement, a.k.a. the Chief Procurement Officer ("CPO"). Pursuant to D.C. Code § 2–357.02(b), the CPO may:

> (1) Reduce the amount of performance and payment bonds for construction contracts to 50% of the amounts established in subsection (a) of this section;
> (2) Substitute for a bond required by subsection (a) of this section, a letter of credit in an amount equal to at least 10% of the portion of the contract price that does not include the cost of operation, maintenance, and finance, in cases in which the contractor:
>
> > (A) Is a nonprofit corporation, as defined in § 29-401.02(6), or an entity controlled, directly or indirectly, by a nonprofit corporation;
> > (B) Had a net worth of at least $1 million in the preceding fiscal year;
> > (C) Is a licensed general contractor; and
> > (D) Has done business as a construction contractor for at least 5 years.

B. Tiers Covered

Any subcontractor or supplier who furnished labor or material in furtherance of the contract, and who has not been paid within 90 days after the labor was completed or the material was supplied, has the right to sue on the payment bond for the unpaid balance of the payment owed to him. D.C. Code § 2-201.02; D.C. Code § 2-357.02(d)(1). However, rights to assert a Little Miller Act claim are limited to two tiers (*i.e.*, those parties having a direct contractual relationship with the contractor providing the bond or a party who contracted with a subcontractor to the contractor providing the bond. D.C. Code § 2-201.02; D.C. Code § 2-357.02(d)(1); *Castro v. Fid. & Deposit Co. of Md.*, 39 F. Supp. 3d 1, 6 (D.D.C. 2014) [Lexis].

C. Notice Required

No notice is required by a subcontractor who contracted directly with the prime contractor. A party who contracted with the subcontractor, but not the prime contractor, for work or materials under the contract, may acquire a right of action against the prime contractor's bond by giving written notice to the prime contractor within 90 days of the date on which it completed the labor or delivered the last of the materials. The written notice must state with substantial accuracy the amount claimed and the name of the subcontractor with whom the party contracted and must be sent by prepaid registered mail to any place the contractor maintains an office or conducts business. D.C. Code § 2-201.02; D.C. Code § 2-357.02(d)(2).

Although "the Miller Act should receive a liberal construction to effectuate its protective purposes," *U.S. ex rel. Sherman v. Carter*, 353 U.S. 210, 216, 77 S.Ct. 793, 796–97, 1 L.Ed.2d 776 (1957) [Lexis], such "liberality" goes to the remedial provisions of the statute, not the notice provisions. *U.S. ex rel. Gen. Dynamics Corp. v. Home Indem. Co.*, 489 F.2d 1004, 1005 (7th Cir.1973) [Lexis]. Instead, the ninety-day notice requirement is a strict "condition precedent." *See id.*; *see also Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1343 (4th Cir.1992)

[Lexis], *U.S. ex rel. Honeywell v. A & L Mech. Contractors*, 677 F.2d 383, 386 (4th Cir.1982) [Lexis]. Indeed, courts hold that the Little Miller Act's 90-day notice proviso is for the benefit of the prime contractor and should therefore be interpreted narrowly. *U.S. ex rel. I. Burack, Inc. v. Sovereign Constr. Co.*, 338 F. Supp. 657, 661 (S.D.N.Y. 1972) [Lexis].

D. Coverage

Public payment bonds cover all suppliers of labor or material (to either the contractor or a subcontractor) in the prosecution of the work provided for in the contract. D.C. Code § 2-201.02(a); D.C. Code § 2-357.02(d)(2).

1. Labor

a. Professional Services

No published case construing D.C. public payment bond requirements addresses claimant recovery for professional services; case law interpreting the Federal Miller Act is likely to be persuasive.

The court in *Hartford Accident and Indemnity Company v. District of Columbia* held that a subcontractor was entitled to claim the costs of preparing a water damage repair estimate under the D.C. payment bond statute. 441 A.2d 969 (D.C. 1982) [Lexis].

b. Union Benefits

Case law construing Federal Miller Act claimants' rights to recover union and fringe benefits will likely be persuasive.

2. Material

Section 2-201.02 of the D.C. Code provides a right of recovery to one "who has furnished…material in the prosecution of the work provided for in such [public] contract[.]" D.C. Code § 201.02(a). Construing the predecessor section to Section 2-201.02 (affording recovery to a person "who has furnished labor or materials used in the construction or repair of any public building or public work"), the U.S. Court of Appeals for the District of Columbia held that the claimant need only show that materials or equipment had been furnished for use in the public contract—not that the materials were actually *used* in such contract. *Aetna Cas. & Sur. Co. v. Circle Equip. Co.*, 377 F.2d 160 (D.C. Cir. 1967) [Lexis].

Further, at least one court has held that the D.C. payment bond statute entitles a claimant to costs for storage of materials, reasoning that storage costs are recoverable under the Federal Miller Act. *Hartford Acc. & Indem. Co. v. Dist. of Columbia*, 441 A.2d 969 (D.C. 1982) [Lexis].

3. Equipment

The Federal Miller Act—and cases construing its application—will likely inform courts' analysis of payment bond claims concerning equipment, equipment rental, idle equipment, equipment repair, etc.

4. Other

a. Attorneys' Fees

D.C. courts look to the language of the bond and underlying contract to determine whether attorneys' fees may be recovered in a surety claim. *Dist. Contractors, Inc. v. N. Am. Specialty Ins. Co.*, 281 F. Supp. 2d 204 (D.D.C 2003) [Lexis].

b. Interest

In *Hartford Accident and Indemnity Company v. District of Columbia*, the court awarded prejudgment interest to a subcontractor where the claim was "liquidated," meaning that it was an easily ascertainable sum certain at the time it arose. 441 A.2d 969 (D.C. 1982) [Lexis].

Although D.C. Code § 28-2502 disallows damages exceeding the penalty of the bond, the D.C. Circuit Court of Appeals has interpreted the section to allow for the collection of interest in excess of the penal sum where the interest becomes due as a result of the surety's own default. *Cunningham v. Cunningham*, 157 F.2d 859 (C.A.D.C. 1946) [Lexis]. D.C. courts have followed the rule established by the Supreme Court in *United States v. United States Fidelity & Guaranty Co.*, 236 U.S. 512 (1915) [Lexis], whereby a surety may only be liable for interest that accumulates after notice and demand. *Jackson v. Glens Falls Indem. Co.*, 222 F.2d 807 (D.C. Cir. 1955) [Lexis].

c. Financing Charges

No case law is expressly on point.

d. Insurance Premiums

No case law is expressly on point.

e. Loans

No case law is expressly on point.

f. Delay Damages

In *Hartford*, *supra*, the court held that expenses incurred by the subcontractor as a result of the delay in performance are covered within the clear purpose of the Little Miller Act. 441 A.2d 969 (D.C. 1982) [Lexis].

g. Profits

No case law is expressly on point.

h. Extracontractual

The District of Columbia does not recognize a tort cause of action for bad-faith breach of an insurance contract. *Fireman's Fund Ins. Co. v. CTIA*, 480 F. Supp. 2d 7, 16 (D.D.C. 2007) [Lexis].

A surety cannot be held liable for an amount greater than the penal sum of the bond, except where interest in excess of the penal sum becomes due as a result of the surety's own default following notice and demand for payment. *Cunningham v. Cunningham*, 157 F.2d 859 (C.A.D.C. 1946) [Lexis].

E. Contracts Excluded

Under D.C.'s Little Miller Act, bonds are not necessary for contracts valued at or below $25,000. D.C. Code § 2-201.11.

Under D.C. Code § 2-357, the CPO may require a bond for any solicitation, even if the contract value is below $100,000. D.C. Code § 2–357.01(a); § 2–357.05.

F. Time for Suit

A claim against a payment bond must be filed after 90 days and within one year of the date on which the last of the work was performed or the last of the material was supplied. D.C. Code § 2-201.02(b); D.C. Code § 2-357.02(f).

G. Remarks

An interested party may pay for a certified copy of the bond and the prime contract from the City after submitting an affidavit that he has provided labor or materials for work under the contract and has not been paid, or that he is being sued on the bond. D.C. Code § 2-201.03. This copy is prima facie evidence of the contents, execution, and delivery of the original. D.C. Code § 2-201.03.

A claim against a payment bond "shall be brought in the name of the District of Columbia for the use of the person suing, in the Superior Court of the District of Columbia." D.C. Code § 2-201.02(b). The requirement that every subcontractor's suit be brought in the Superior Court, however, does not deprive the United States District Court of diversity jurisdiction. All state law claims properly brought in federal court under diversity jurisdiction are also cognizable in the D.C. courts. *See Dist. of Columbia ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1045 (D.C. Cir. 1986) [Lexis]; *Eckert v. Fitzgerald*, 550 F. Supp. 88 (D.D.C. 1982) [Lexis].

The District is not liable for any costs related to a suit against a payment bond. D.C. Code § 2-201.02(b).

H. Case Annotations

Dist. of Columbia v. Campbell, 580 A.2d 1295 (D.C. 1990) [Lexis]: The City's duty to enforce its Little Miller Act arises from its status as government charged with enforcing the law, not from its status as a party to the construction contract; therefore, actions for breach of duty can only lie in tort.

Campbell v. Cumbari Assocs., Inc., 2817-84, 1987 WL 114846 (D.D.C. July 6, 1987): The City has no immunity from suit by a subcontractor where it failed to require the prime contractor post a statutorily required payment bond.

Gichner v. Ins. Cos. of N. Am., 180 A.2d 842 (D.C. 1962) [Lexis]: Government contractor did not create an independent cause of action under promissory estoppel when it acknowledged indebtedness to a supplier during the statutory one-year period for filing of suits under the Miller Act but later denied liability.

Cunningham v. Cunningham, 157 F.2d 859 (D.C. Cir. 1946) [Lexis]: Under D.C. law, "a surety cannot be held, because of the default of its principal, in an amount greater than the penal sum of the bond."

District of Columbia ex rel. Strittmatter Metro, LLC v. Fid. and Deposit Co. of Md., 208 F.Supp.3d 178 (D.D.C. 2016) [Lexis]: Subcontractor on District of Columbia construction project was under no obligation to await resolution of prime contractor's claims against District of Columbia before filing its claim against payment bond sureties under the Little Miller Act where subcontractor lacked control over any efforts at recovery made on its behalf by prime contractor.

§ 2.0 PRIVATE PAYMENT BONDS

The District of Columbia does not have codified requirements for payment bonds in private contracts.

A. Rules of Construction

Generally, the rules governing the construction of insurance contracts are applicable in surety bond cases in the District of Columbia. *U.S. Plywood Corp. v. Cont'l Cas. Co.*, 157 A.2d 286 (D.C. 1960) [Lexis].

District of Columbia law is well established that "a surety's obligations are measured by the conditions stated in the bond." *Goldberg, Marchesano, Kohlmand, Inc. v. Old Republic Sur. Co.*, 727 A.2d 858 (D.C. 1999) [Lexis]. In other words, "the liability of the surety cannot be extended beyond the terms of the surety contract." *In re Estate of Dickson*, 736 A.2d 1007, 1010 (D.C. 1999) [Lexis] (quoting *In re Estate of Spinner*, 717 A.2d 362, 366 (D.C. 1998) [Lexis] in stating that "[n]othing can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not to extend, by implication, beyond the terms of the contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther."); *see also* *Bevard v. New Amsterdam Cas. Co.*, 132 A.2d 157 (D.C. 1957) [Lexis] ("A surety's obligation must be measured by the condition stated in the bond and . . . such condition cannot be construed to go further than its terms and give rights to others not mentioned either expressly or by intendment.").

D.C. courts apply the express language of a bond when determining if a claimant has a right to sue under a private payment bond. See *Dist. Contractors, Inc. v. N. Am. Specialty Ins. Co.*, 281 F. Supp. 2d 204 (D.D.C 2003) [Lexis] (where the terms of a bond are clear and unambiguous, they must be applied as written); *Aetna Cas. & Sur. Co. v. Kemp Smith Co.*, 208 A.2d 737 (D.C. 1965) [Lexis] (sub-contractor claimant who did not fall in the class of claimants expressly limited by the bond did not have the right to recover).

Where the language of a contract is ambiguous in favor of the beneficiary, D.C. courts will construe the bond liberally in favor of the beneficiary. *Goldberg, Marchesano, Kohlmand, Inc. v. Old Republic Sur. Co.*, 727 A.2d 858 (D.C. 1999) [Lexis].

B. Time for Suit

Although D.C. Courts enforce the clear and unambiguous terms of a private payment bond, there is a caveat if the bond is under seal. Specifically, the statute of limitations for bringing an action "on any other bond or single bill, covenant, or other instrument under seal" is 12 years. D.C. Code § 12-301.

FEDERAL MILLER ACT

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

The Miller Act, originally enacted as the Heard Act in 1894, is a federal statute that requires prime contractors to furnish a payment bond for federally owned projects for construction, alteration, or repair of public buildings in excess of $100,000.00. 40 U.S.C. §§ 3131 *et seq.*; *Clifford F. McEvoy Co. v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 104 (1944) [Westlaw]; *U.S. ex rel. Delval Equip. Corp., v. East Coast Welding and Constr.*, No. ELH-21-1244, 2022 U.S. Dist. LEXIS 42649, 2022 WL 717046, slip op. at 15 (D. Md. March 10, 2022) [Westlaw]. These bonds, which are issued by sureties, provide a source of guaranty for the performance of work and payment of subcontractors and suppliers. 40 U.S.C. §§ 3131 *et seq.* More specifically, payment bonds protect both the government and all persons supplying labor and material in carrying out the work provided for in the contract in the event the contractor defaults on its payment obligations. *See* 40 U.S.C. §§ 3131 *et seq.*

According to the language of the Miller Act, the amount of the payment bond furnished must be equal to the total amount payable under the terms of the contract, unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond amount is impractical. 40 U.S.C. § 3131(b)(2). In the event that the payment bond amount has been deemed impractical by the contracting officer, the contracting office shall set the amount of the payment bond and the amount shall not be less than the amount of the performance bond. *Id.*

B. Tiers Covered

In general, most people that have furnished labor or materials in carrying out work for a bonded project under 40 U.S.C. §§ 3131 and have not been in paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made may bring a civil action on the payment bond. 40 U.S.C. § 3131(b)(1). In these instances, a claim can be made for the amount still unpaid at the time the claim is filed. *Id.*

While the Miller Act was enacted as a means of protection for those subcontractors and material suppliers who work on construction projects in which the Federal Government is the owner, not every supplier and subcontractor is a proper claimant. The right to bring suit on a payment bond is limited to "(1) those materialmen [material suppliers], laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen [material suppliers], laborers and sub-contractors who, lacking express or implied contractual relationships with the prime contractor, have a direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor." *Clifford*, 332 U.S. at 107–08 [Westlaw]; *Mosser Constr. v. Travelers Indem. Co.*, 430 Fed. App'x 417, 422 (6th Cir. 2011) [Westlaw]; *U.S.*

ex rel. Diggermen Constr. Co. v. CA Servs., No. 13-11216, 2014 U.S. Dist. LEXIS 60170, 2014 WL 1746111, at *11 (E.D. Mich. 2014) [Westlaw].

Miller Act claimants are divided into tiers, and their designated tier is determined by their contractual relationship to the government. *See U.S. v. Southwind Constr. Servs., LLC*, 510 Fed. App'x 688, 690 (11th Cir. 2013) [Westlaw]. Essentially, Miller Act claimants are divided into four groups: (1) subcontractors who contracted directly with a prime contractor, known as first-tier subcontractors, (2) material suppliers who contracted directly with a prime contractor, known as first-tier suppliers, (3) subcontractors who contracted directly with a first-tier subcontractor, known as second-tier subcontractors, and (4) material suppliers who contracted directly with a first-tier subcontractor, known as second-tier suppliers. Any subcontractors or material suppliers who are below the above-listed tiers do not qualify as claimants under the Miller Act, *Clifford*, 322 U.S. at 107–08 [Westlaw], including suppliers of labor or materials to material suppliers, also known as third-tier subcontractors or material suppliers. *U.S. ex rel. Adams Steel, LLC v. Elkins Contractors, Inc.*, 225 F. Supp. 3d 351, 360 (D.S.C. 2016) [Westlaw]; *N. Star Terminal & Stevedore Co. v. Nugget Constr., Inc.*, 126 F. App'x 348 (9th Cir. 2005) [Westlaw]; *U. S. ex rel. Clark v. Lloyd T. Moon, Inc.*, 698 F. Supp. 665 (S.D. Miss. 1988) [Westlaw].

C. Notice Required

Under the Miller Act, notice requirements are dependent on the tier designation of the subcontractor or material supplier. According to 40 U.S.C. § 3133(b)(2), the notice requirements contemplated are only required for second-tier subcontractors and second-tier material suppliers, presumably because the prime contractor would already be aware of any outstanding payments it has not yet made to first-tier subcontractors and material suppliers.

Second-tier subcontractors and material suppliers "may bring a civil action on the payment bond on giving written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made." 40 U.S.C. § 3133(b)(2). The civil action must be prepared with detail, as it must state with substantial accuracy the amount claimed and the name of the party "to whom the material was furnished or supplied or for whom the labor was done or performed." *Id.* In terms of service of the notice, the notice must be served on the prime contractor "(A) by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence; or (B) in any manner in which the United States Marshal of the district in which the public improvement is situated by law may serve summons." 40 U.S.C. § 3133(b)(2)(A)–(B).

The statute does not require that the claimant provide notice to the surety.

D. Coverage

1. Labor

a. Professional Services

While design, architectural, and engineer services are an integral part of a construction project, those providing these professional services are not always proper claimants under the Miller Act, as "[g]enerally, the word 'labor' in the Miller Act includes 'physical toil, but not work

by a professional, such as an architect or engineer.'" *Dickson v. Forney Enters.*, No. 1:20-cv-129, 2021 U.S. Dist. LEXIS 75378, 2021 WL 1536574, slip op. at 2 (E.D. Va. April 19, 2021) [Westlaw], *U.S. ex rel. Constructors v. Gulf Ins. Co.*, 313 F. Supp. 2d 593 (E.D. Virginia 2004) [Westlaw]; *U.S. ex rel. Naberhaus-Burke, Inc. v. Butt & Head, Inc.*, 535 F. Supp. 1155, 1158 (S.D. Ohio 1982) [Westlaw]. However, there are some exceptions to this rule when it comes to supervisory work.

b. Supervisory Work

Supervision work in general is also limited in its coverage by the Miller Act. "Only certain supervisory work is covered by the Act, namely "skilled professional work which involves actual superintending, supervision or inspection at the job site." *U.S. ex rel. Constructors v. Gulf Ins. Co.*, 313 F. Supp. 2d 593 (E.D. Virginia 2004) [Westlaw]; *U.S. ex rel. Naberhaus-Burke, Inc. v. Butt & Head, Inc.*, 535 F. Supp. 1155, 1158 (S.D. Ohio 1982) [Westlaw]. On-site supervisory work only "falls within the purview of the Miller Act if such a superintendent did some physical labor at the job site or might have been called upon to do some on-site manual work in the regular course of his job." *Dickson v. Forney Enters.*, No. 1:20-cv-129, 2021 U.S. Dist. LEXIS 75378, 2021 WL 1536574, slip op. at 2 (E.D. Va. April 19, 2021) [Westlaw]; *Gulf*, 313 F. Supp. 2d at 597 [Westlaw]; *U.S. ex rel. Olson v. W.H. Cates Constr. Co.*, 972 F.2d 987, 991 (8th Cir. 1992) [Westlaw].

While it may be true that the term "labor" in the Miller Act statute typically refers to physical labor rather than technical or professional skill or judgment, the term "labor" can refer to work performed by an architect or other skilled person who actually superintends, supervises, or inspects work on site as it is being done. *U.S. ex rel. Shannon v. Federal Ins.*, 251 Fed. App'x 269, 272–73 (5th Cir. 2007) [Westlaw]; *W.H. Cates*, 972 F.2d at 990 [Westlaw]. In other words, an architect or engineer's onsite supervision to ensure work is being performed as intended could be covered by the Miller Act.

c. Union Benefits

Courts have traditionally rejected the notion that labor unions, as an entity, supply labor to the prime contractor or subcontractors on a bonded project covered by the Miller Act. *U.S. ex rel. United Bhd. of Carpenters and Joiners Local Union No. 2028 v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976) [Westlaw]. Courts have typically found that, while individual laborers can give a union authority to sue on their behalf, a union's claim is only "coextensive with and no greater than would be the individual employee's claim had it been necessary for the employee to file a claim for wages under the Miller Act." *U.S. ex rel. Int'l Bhd. of Elec. Workers, Local Union 692 v. Hartford Fire Ins. Co.*, 809 F. Supp. 523, 525 (E.D. Mich. 1992) [Westlaw].

2. Materials

For coverage under the Miller Act, materials supplied do not actually have to be incorporated into the project; the material supplier must only prove "four elements: (1) the materials were supplied in prosecution of the work provided for in the contract; (2) he has not been paid; (3) he had a good faith belief that the materials were intended for the specified work; and (4) the jurisdictional requisites were met." *U.S. ex rel. Graybar Elec. Co. v. Team Constr.*, 275 F.

Supp. 3d 737, 749 (E.D.N.C. 2017) [Westlaw]; *U.S. ex rel. Polied Env't Servs., Inc. v. Incor Grp., Inc.*, 238 F. Supp. 2d 456 (D. Conn. 2002) [Westlaw]; *U.S. ex rel. Steel Constructors v. Avanti Constructors*,750 F.2d 759, 761 (9th Cir. 1984) [Westlaw]. Further, if a supplier reasonably believes, in in good faith, that the material furnished is to be used in the bonded project, he has the protection of the bond, and a later diversion of such materials by the contractor to another use will not deprive the supplier of the bond's protection. *U.S. ex rel. Sunbelt Pipe Corp. v. U.S. Fid. & Guar. Co.*, 785 F.2d 468, 470 (4th Cir. 1986) [Westlaw].

Courts recognize costs associated with providing materials as recoverable under the Miller Act. "The Miller Act's definition of 'material' includes 'things which will be incorporated in the project itself,' as well as 'expendable and other things reasonably expected to be consumed, or substantially consumed, in the performance of the work.'" *U.S. ex rel. McKenney's, Inc. v. Leebcor Servs.*, No. 4:20CV179, 2022 U.S. Dist. LEXIS 6576, 2022 WL 122367 (E.D. Va. Jan. 12, 2022) [Westlaw]; *Sunbelt*, 785 F.2d at 470 [Westlaw]. Courts have permitted recovery "under Miller Act payment bonds for fuel, tires, parts, materials used in formwork, groceries or food, lodging, and transportation." LYBECK, KEVIN L., ET AL., THE LAW OF PAYMENT BONDS, 87–88 (Am. Bar Ass'n 2d ed. 2011) (internal footnotes omitted).

3. Equipment

a. Repairs

Claims for repairs to equipment used to carry out the work on the bonded project are covered by the Miller Act and are recoverable under the payment bond. *U.S. ex rel. Malpass Constr. Co. v. Scotland Concrete Co.*, 294 F. Supp. 1299, 1301 (E.D.N.C. 1968) [Westlaw]. Generally, parts needed to repair equipment, and other appliances and accessories that add materially to the value of the equipment and render it available for other work are not recoverable under a Miller Act payment bond, but current repairs of an incidental and comparatively inexpensive character that do not add substantially to the value of the equipment and compensate only for ordinary wear and tear are covered by the payment bond. *U.S. ex rel. Rent It Co. v. Aetna Cas. & Sur. Co.*, 988 F.2d 88, 90 (10th Cir. 1993) [Westlaw].

b. Rentals

There are limitations to what a claimant can recover for rental equipment under the Miller Act. Generally, rental charges for equipment to perform work on a bonded project covered by the Miller Act are recoverable under the payment bond. *U.S. ex rel. Chemetron Corp. v. George A. Fuller Co.*, 250 F. Supp. 649, 661 (D. Mont. 1965) [Westlaw]. Equipment can form the basis of a Miller Act payment claim, "…including consumed equipment and the cost of rental equipment, but not the cost of tools or equipment that was not 'substantially consumed' during the construction project." *U.S. ex rel. TSI Tri-State Painting v. Fed. Ins. Co.*, No. CV 216-113, 2022 U.S. Dist. LEXIS 84562, 2022 WL 1477441, *10 (S.D. Ga. May 10, 2022) [Westlaw].

In some jurisdictions, under a Miller Act payment bond claim, subcontractors cannot recover damages that constitute rent for equipment that they own, as the use value of a subcontractor's own equipment "does not constitute 'labor or material' within the meaning of the Miller Act." *HPS Mech., Inc. v. JMR Constr. Corp.*, No. 11-VV-02600-JCS, 2014 U.S. Dist. LEXIS 105888, 2014 WL 3845176, *21 (N.D. Cal. Aug 1, 2014) [Westlaw]. In these jurisdictions

"…the use value of a subcontractor's own equipment 'is far more analogous to lost profits—for which recovery against the surety is not allowed—than to actual expenditures for labor or materials or materials utilized in the performance of the subcontract—for which [recovery] is allowed.' *Id.* at *21.

Even in periods of delay, the Fifth and Eleventh Circuits do not permit recovery of the rental value of equipment owned by a contractor. *U.S. ex rel. Am. Civil Constr. v. Hirani Eng'g and Land Surveying*, 345 F. Supp. 3d 11, 46–47 (D.C. 2018) [Westlaw]. The District Court of Maryland denied a contractor's recovery for cost of delays associated with the equipment it owned. *U.S. v. Continental Cas. Co.*, No. ELH-16-3047, 2018 U.S. Dist. LEXIS 144107, 2018 WL4052246 (D. Md. 2018) [Westlaw]. However, the District of Columbia has permitted recovery for equipment owned by subcontractor that was present on site and used with regularity during delays not caused by the subcontractor. *See Hirani*, 345 F. Supp. 3d at 46–47 [Westlaw]. The specifics on recovering for equipment owned by a contractor or subcontractor should be verified on a circuit-by-circuit basis.

c. Capital Expenses & Equipment

Miller Act case law distinguishes between materials and capital equipment/capital expenses, as a subcontractor or material supplier can recover for materials provided on a bonded project but cannot recover for the cost of capital expenses/equipment. Capital equipment is a piece of equipment used by a subcontractor on a Miller Act bonded project that "may reasonably be expected to be removed by the contractor and used in subsequent jobs…" *U.S. ex rel. McKenney's, Inc. v. Leebcor Servs.*, No. 4:20CV179, 2022 U.S. Dist. LEXIS 6576, 2022 WL 122367 (E.D. Va. Jan. 12, 2022) [Westlaw].

Generally, rental charges for equipment used on a public works project "within the purview of the Miller Act is not a capital expense." *Roane v. U. S. Fid. & Guar. Co.*, 378 F.2d 40, 43 (10th Cir. 1967) [Westlaw]. However, when that rental charge is a charge for equipment rental for equipment owned by the subcontractor, that rental cost is not recoverable under the Miller Act, as it is considered capital equipment.

Material provided for work on the federal project is recoverable, however "'the cost of tools may not be claimed under the Miller Act' because tools are equipment which the subcontractor may continue to use and are not consumed in the public project." *U.S. ex rel. TSI Tri-State Painting v. Fed. Ins. Co.*, No. CV 216-113, 2022 U.S. Dist. LEXIS 84562, 2022 WL 1477441, at *10 (S.D. Ga. May 10, 2022) [Westlaw]. "What makes the difference is whether the tool "may be reasonably expected to be removed by the contractor and used in subsequent jobs." *Id.* "Large equipment, such as a crane, would be properly classified as capital equipment (and not recoverable), whereas something "reasonably expected to be consumed, or substantially consumed, in the performance of the work" is properly classified as materials."" *Id.*

4. Other

a. Attorneys' Fees and Interest

The Miller Act statute does not expressly provide for the recovery of attorneys' fees under the payment bond. *See* 40 U.S.C. §§ 3131 *et seq.*; *F.D. Rich Co. v. U.S. ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126 (1974) [Westlaw]; *see U.S. ex rel. WFI Georgia, Inc. v. Gray Ins. Co.*, 701 F.

Supp. 2d 1320 (N.D. Ga. 2010) [Westlaw]. However, many circuits have found that interest and attorneys' fees are recoverable if they are part of the contract between the subcontractor and supplier or the contract between subcontractor and general contractor. *Owners Ins. Co. v. Fid. and Deposit Co. of Maryland*, 41 F.4th 956, 959 (8th Cir. 2022) [Westlaw]; *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 336 (4th Cir. 1996) [Westlaw]. These courts have reasoned that attorneys' fees and interest "may be 'sums justly due' under the Miller Act, [which] is consistent with this court's rulings that contractors and their sureties are obligated to pay amounts owed by their subcontractors and suppliers." *Owners*, 41 F.4th at 959 [Westlaw]; *Maddux*, 86 F.3d at 336 [Westlaw]. The *Maddux* decision is followed in most circuits, but the application of this rule should be confirmed in the specific circuit in which the civil action has been brought.

b. Financing Charges

Traditionally, financing charges are not recoverable under the Miller Act claim, as financing charges are not considered "labor and materials" under the definitions set forth in the Miller Act statute. *Lite-Air Prod., Inc. v. Fid. & Deposit Co. of Maryland*, 437 F. Supp. 801, 804 (E.D. Pa. 1977) [Westlaw]. More specifically, "the claim for finance charges is in the nature of a penalty, and therefore would more appropriately be classified as damages than as part of the value of the materials." *Id.*

c. Insurance Premiums

Liability insurance premiums and workers' compensation insurance premiums are not considered either labor or materials, and therefore are typically not recoverable under a claim against a Miller Act payment bond. LYBECK, KEVIN L., ET AL., THE LAW OF PAYMENT BONDS, 98 (Am. Bar Ass'n 2d ed. 2011); *U.S. ex rel. Ash Equipment Co. v. Morris, Inc.*, 4:14-CV-04131-VLD, 2017 U.S. Dist. LEXIS 125083, 2017 WL 3426063 (D.S.D. 2017) [Westlaw]; *U.S. ex rel. Cobb-Strecker-Dunphy & Zimmerman, Inc. v. M.A. Mortenson Co.*, 706 F. Supp. 685 (D. Minn. 1989), *aff'd*, 894 F.2d 311 (8th Cir. 1990) [Westlaw].

d. Loans

Lenders whose only role on the bonded project is lending or advancing money, even if that loaned money is used to furnish labor or supplies material to the project, are generally unable to recover in a Miller Act claim. This is because "[t]he supplying of money is not equivalent to or synonymous with the furnishing of labor and materials even if the money supplied is used in payment for such labor and materials. The surety has agreed not to hold the contractor free and protected from all claims or indebtedness but only to protect the people supplying labor and material from nonpayment." *U.S. ex rel. First Cont'l Nat. Bank & Tr. Co., Lincoln, Neb. v. W. Contracting Corp.*, 341 F.2d 383, 387 (8th Cir. 1965) [Westlaw]; *see also U.S. ex rel. BAC Funding Consortium v. Westchester Fire Ins.*, 998 F. Supp. 2d 1330, 1332–33 (S.D. Fla. 2013) [Westlaw].

e. Delay Damages

Historically, contractors and material suppliers were not able to recover damages for delay under a claim on a Miller Act payment bond. LYBECK, KEVIN L., ET AL., THE LAW OF PAYMENT BONDS, 100 (Am. Bar Ass'n 2d ed. 2011). However, courts today recognize and award such claims regularly. *See* *U.S. ex rel. McKenney's, Inc. v. Leebcor Servs.*, No. 4:20CV179, 2022 U.S. Dist. LEXIS 6576, 2022 WL 122367 (E.D. Va. Jan. 12, 2022) [Westlaw].

Delay damages in these circumstances are not unlimited, as "contractors may only seek reimbursement for 'labor or material' used on the project," and generally, "contractors can only recover out-of-pocket-costs caused by delays, but not lost profits." *Id.;* *U.S. ex rel. T.M.S. Mech. Contractors v. Millers Mut. Fire Ins. Co.*, 942 F.2d 946 (5th Cir 1991) [Westlaw]. More specifically, subcontractors can only recover for damages related to delays on the bonded project that were additional or increased costs actually expended in furnishing the labor or material in the prosecution for the work provided for in the contract and was attributable to the delay. *Leebcor*, 2022 U.S. Dist. LEXIS 6576, 2022 WL 122367 (E.D. Va. Jan. 12, 2022) [Westlaw].

When recovering under a Miller Act payment bond, out-of-pocket costs on labor and materials as a result of delays are considered part of "sums justly due." *Millers Mut.*, 942 F.2d at 952 [Westlaw].

f. Lost Profits

Lost profits are generally recoverable under a claim on a Miller Act bond. *U.S. ex rel. Ragghianti Founds. III, v. Peter R. Brown Constr., Inc.*, 49 F. Supp. 3d 1031, 1054 (M.D. Fla. 2014) [Westlaw]; *Consol. Elec. & Mechs., Inc. v. Biggs Gen. Contracting, Inc.*, 167 F.3d 432 (8th Cir. 1999) [Westlaw]. Courts have reasoned that the Miller Act "was not meant to replace subcontractors' state law contract remedies, which allow for recovery of lost profits. Rather, [the Miller Act] provides subcontractors an additional remedy to recover costs expended in furnishing "labor or material in the prosecution of the work provided for in [a public construction] contract."" *Id.* at 436.

There are exceptions to this rule. For instance, courts in the Ninth Circuit have held that state law "controls the interpretation of the Miller Act subcontracts to which the United States is not a party." *U.S. ex rel. Reed v. Callahan*, 884 F.2d 1180, 1185 (9th Cir. 1989) [Westlaw]. In a 2021 Miller Act case, the Southern District of California allowed recovery for lost profits under the Miller Act, finding that California law applied to the claim for lost profits. *U.S. ex rel. Just Constr., Inc. v. K.O.O Constrs., Inc.*, No. 19CV1753 JM (KSC), 2021 WL 6882430 (S.D. Cal. 2021) [Westlaw].

E. Contracts Excluded

As previously noted, under the terms of the Miller Act, a bond is not required for construction contracts that do not exceed $100,000. 40 U.S.C. § 3131(b). In addition, Miller Act bonds are typically only required for contracts that involve the construction, alteration, or repair of any public building or public work of the United States. *Id.* However, several other exceptions to the Miller Act requirements exist under federal law.

The Miller Act authorizes the contracting officer to waive the bond requirement in several scenarios. The first of these allows a contracting officer the discretion to waive the requirement for "work under a contract that is to be performed in a foreign country if the officer finds that it is impracticable for the contractor to furnish such bonds." 40 U.S.C. § 3131(d). Second, Secretaries of the Army, Navy, Air Force, and Transportation may waive the requirements "with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the Federal Government and with respect to contracts for manufacturing, producing, furnishing, constructing, altering, repairing, processing, or assembling vessels, aircraft, munitions, materiel, or supplies for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of the contracts as to payment or title."40 U.S.C. § 3134(a). Third, the Secretary of Transportation may also waive the requirements "with respect to contracts for the construction, alteration, or repair of vessels when the contract is made under [31 U.S. Code §§ 1535–1536] or [46 U.S. Code Subtitle V—Merchant Marine], regardless of the terms of the contracts as to payment or title." 40 U.S.C. § 3134(b) And finally, the Secretary of Commerce may waive the statute's bonding requirements "with respect to contracts for the construction, alteration, or repair of vessels, regardless of the terms of the contracts as to payment or title, when the contract is made under the Act entitled 'An Act to define the functions and duties of the Coast and Geodetic Survey, and for other purposes.'" 40 U.S.C. § 3134(c).

In actual practice however, the right to waive the Miller Act bonding requirements is rarely exercised. As such, it is recommended that contractors should operate under the assumption that a Miller Act bond will be required on otherwise qualifying projects.

F. Jurisdiction & Venue

United States Districts Courts have exclusive jurisdiction over Miller Act payment bond claims. *U.S. ex rel. Jr. Brooks Constr. v. Essex Elec. Co.*, 1:13-cv-00025-TLS, 2014 U.S. Dist. LEXIS 91590, 2014 WL 3077830 (N.D. Ind. July 7, 2014) [Westlaw]; *U.S. ex rel. Owens-Corning Fiberglass Corp. v. Brandt Constr. Co.*, 826 F.2d 643, 645 (7th Cir. 1987) [Westlaw]. Claims must be brought in the "United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy." 40 U.S.C. § 3133(3)(B). Under the jurisdictional requirement set forth in the statute itself, Miller Act claims cannot be asserted in state court, and while the jurisdiction of claims is fixed, the venue of claims is permissive: "[t]he jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigations and as such is subject to their disposition." *U.S. ex rel. B & D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co.*, 70 F.3d 1115, 1117–18 (10th Cir. 1995) [Westlaw].

When there is no forum selection clause, a growing number of district courts have held that "even where a larger percentage of work for a public project has occurred elsewhere, the correct district to bring a cause of action under the Miller Act is where the government jobsite is actually located." *Chowns Group, LLC v. Liberty Mut. Ins. Co.*, No. 2:22-cv-02275-MMB, 2022 U.S. Dist. LEXIS 183854, 2022 WL 6184893 (E.D. Penn. 2022) [Westlaw] (internal citations omitted). A minority of districts have held that the venue is proper if any part of the performance of the contract occurred there. *Id.* In 1974, the U.S. Supreme Court determined that courts should still take into account principles of judicial economy and prejudice to both parties in determining if a venue is appropriate under the Miller Act. *F.D. Rich Co. v. U.S. ex rel. Indus. Lumber Co.*, 417 U.S. 116,

126–127 (1974) [Westlaw]. Because there is a circuit split on the proper venue for a Miller Act claim to be brought, reference the specific circuits that are relevant to your case.

G. Time for Suit

Under the Miller Act, "[e]very person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due." 40 U.S.C. § 3133(b)(1). However, claims must be brought within the one-year statute of limitations: "[a]n action brought under this subsection must be brought not 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 plainer terms, if a subcontractor or material supplier has not been paid in full within 90 days of the last date of his labor or material supply, he has one year from the last day of his labor or material supply to bring his claim under the Miller Act. When it comes to the date of last delivery by a supplier, some circuits have found that date of last delivery runs from the last date the supplier delivered to the jobsite materials that were included in the original contract, and not from the last date remedial or corrective materials were delivered. *U.S. ex rel. Lee Masonry Product v. Forrest B. White, Jr. Masonry, Inc.*, No. 20-5582, 2021 U.S. App. LEXIS 29447, 2021 WL 5918011 (6th Cir. Sept. 29, 2021) [Westlaw]. The majority of circuits that have addressed this issue have held that "remedial or corrective work or materials, or inspection of work already completed, falls outside the meaning of 'labor' or 'materials' under [§ 3133](b)." *U.S. ex rel. RCO Constr., LLC v. Fed. Ins.*, 601 F. Supp. 3d 1091, 1097–98 (N.D. Okla. 2022) (quoting *U.S. ex rel. Interstate Mech. Contractors, Inc. v. Int'l Fid. Ins. Co.*, 200 F.3d 456, 460 (6th Cir. 2000) [Westlaw]).

However, the United States Supreme Court has not addressed the accrual of a Miller Act cause of action, and Courts have followed varied approaches in determining when the statute of limitations begins to run on a Miller Act claim. *U.S. ex rel. Am. Civ. Constr., LLC v. Hirani Eng'g & Land Surveying, PC*, 26 F.4th 952 (D.C. Cir. 2022) [Westlaw]. A majority of courts have held that only labor and materials furnished for the original contract (as opposed to corrective or repair work performed after final inspection) were "labor" or "materials" for the purposes of the statute of limitations. *U.S. ex rel. Am. Civ. Constr., LLC v. Hirani Eng'g & Land Surveying, P.C.*, 263 F. Supp. 3d 99, 109–10 (D.C. 2017) [Westlaw]. Other courts have held that the statute of limitations begins to run when the contract is substantially completed, and a third group of court have applied a multi-factor analysis to determine when the statute of limitations begins to run. *Id.* at 110. The accrual time of a Miller Act payment bond varies by jurisdiction and interpretation and requires special attention when filing a claim against a payment bond under the Miller Act.

H. Remarks

The Miller Act is highly remedial in nature and is liberally construed and applied in order to achieve the congressional intent behind its creation — to protect those whose labor and materials go into public projects. *D.C. ex rel. Strittmatter Metro v. Fidelity and Deposit Co. of Maryland*, 208 F. Supp. 3d 178, 183 (D.C. 2016) [Westlaw]; *Aetna Cas. & Sur. Co. v. U. S. ex rel. R. J. Studer*

& Sons, 365 F.2d 997 (8th Cir. 1966) [Westlaw]. The Act provides broad, but not unlimited protection to contractors and suppliers. *U.S. ex rel. Sherman v. Carter*, 353 U.S. 210, 77 S. Ct. 793, 797, 1 L. Ed. 2d 776 (1957) [Westlaw]. Thus, claimants should make sure to comply with the procedural and substantive requirements of the Act in order to recover. *J. W. Bateson Co., Inc. v. U.S. ex rel. Bd. of Trs. of Nat'l Automatic Sprinkler Indus. Pension Fund*, 434 U.S. 586, 98 S. Ct. 873, 55 L. Ed. 2d 50 (1978) [Westlaw].

Federal law governs both the scope of the remedy as well as the substance of the rights created by the Miller Act. *U.S. ex rel. Tusco, Inc. v. Clark Constr. Grp., LLC*, 235 F. Supp. 3d 745 (D. Md. 2016) [Westlaw]; *U.S. ex rel. Metric Elec., Inc. v. Enviroserve, Inc.*, 301 F. Supp. 2d 56 (D. Mass. 2003) [Westlaw]. However, state law can still come into play on ancillary issues, for example, in the interpretation of a release agreement. *U.S. ex rel. Chasney & Co. v. Hartford Accident & Indem. Co.*, 168 F. Supp. 3d 824 (D. Md. 2016) [Westlaw]. Where state law becomes an issue, a choice-of-law provision in an underlying contract may apply. *Berger Enters. v. Zurich American Ins. Co.*, 845 F. Supp. 2d 809 (E.D. Mich. 2012) [Westlaw]. As such, it behooves those parties involved on a Miller Act construction project, and indeed, any construction project, to carefully review the provisions of their contracts rather than relying on assumptions that may or may not be accurate.

I. Case Annotations

Pay-If/Pay-When-Paid Clauses

In *U.S. ex rel. J.H. Lynch & Sons, Inc. v. Travelers Casualty & Surety Co. of America*, a subcontractor's Miller Act claim against the surety and general contractor, who were jointly and severally liable under the payment bond to pay contractors and subcontractors for work on a Naval Station project, was not foreclosed by pay-when- paid or price-adjustment clauses in the contract between the subcontractor and a contractor hired by the general contractor. 783 F. Supp. 2d 294 (D.R.I. 2011) [Westlaw]. The Court reasoned that the policy underlying the Miller Act would be defeated by precluding the subcontractor from bringing suit until the contractor received payment, and the claim was cognizable regardless of any subsequent price adjustment.

Pay-when-paid clauses in subcontracts do not preclude a subcontractor's recovery on its contract work and change order claim; under the Miller Act, the liability of the contractor was to its subcontractor, despite nonpayment by the government to the contractor. *U.S. ex rel. T.M.S. Mech. Contractors, Inc. v. Millers Mut. Fire Ins. Co. of Texas*, 942 F.2d 946 (5th Cir. 1991) [Westlaw].

In *U.S. ex rel. Tusco, Inc. v. Clark Construction Group, LLC*, a surety was not entitled to enforce its principal's conditional payment clause as an affirmative defense, as federal courts that had addressed the issue had unanimously held that surety is not entitled to the benefits of its principal's pay-when-paid or pay-if-paid clause. 235 F. Supp. 3d 745, 756 (D. Md. 2016) [Westlaw].

Setoff Provisions

Although a Miller Act surety which completes a defaulted contract under a performance bond has a right to withhold contract funds free from claims of setoff by the government for debts of the contractor, such right extends only to the unexpended contract balance, which does not

include liquidated damages to which the government is entitled. *U.S. Sur. Co. v. U.S.*, 83 Fed. Cl. 306 (Fed. Cl. 2008) [Westlaw].

A Miller Act surety that satisfies its payment, but not its performance, bond obligations and settles all unpaid claims of laborers and materialmen is subrogated to the equitable rights both of the subcontractors and of the prime contractor in any retained contract funds, with the limitation that a payment-bond surety has a priority inferior to the government's right to set off the remaining contract balance if the United States has an unsettled claim against the contractor. *Travelers Indem. Co. v. U.S.*, 72 Fed. Cl. 56 (Fed. Cl. 2006) [Westlaw].

In *U.S. ex rel. Acoustical Concepts, Inc. v. Travelers Casualty & Surety Co. of America*, co-sureties on the general contractor's payment bonds were not entitled to rely on the contractor's claim that the subcontractor had breached the subcontract on a non-federal construction project as a setoff defense to bond liability, even though the subcontracts contained setoff provisions; the subcontracts contained payment clauses requiring the contractor to pay the subcontractor for labor and materials provided to federal projects, the payment bonds made no reference to setoff provisions, and the setoff provisions were distinct from, and did not relate to, amount(s) owed to the subcontractor for providing labor and materials on federal projects. 635 F. Supp. 2d 434, 438 (E.D. Va. 2009) [Westlaw].

FLORIDA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Florida's Little Miller Act is set forth at § 255.05, Fla. Stat. The Act requires a payment bond on any formal contract with the state or any county, city, or political subdivision—including any public authority or private entity—for the construction of a public building, prosecution of public work, and repairs upon a public building or public work. § 255.05(1), Fla. Stat. The payment bond must be executed and recorded in the public records of the county where the improvement is located before any work is commenced or before recommencing the work after a default or abandonment. *Id*. The surety used for the payment bond must be authorized to do business in Florida as a surety. *Id*. However, a public entity cannot require a contractor to secure a surety bond from a specific agent or bonding company. *Id*. Moreover, a payment bond is not required on a contract for $100,000 or less, and a contract for $200,000 or less may be exempted from a payment bond. § 255.05(1)(d), Fla. Stat.

The Section 255.05 payment bond must state on its front page: (1) The name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity; (2) The contract number assigned by the contracting public entity; (3) The bond number assigned by the surety; and (4) A description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the improvement. § 255.05(1)(a), Fla. Stat. Section 255.05 provides a form payment bond. § 255.05(3), Fla. Stat. All Section 255.05 payment bond forms must reference Section 255.05 by number and shall contain reference to the notice and time limitations provisions in 255.05(2) and (10). § 255.05(6), Fla. Stat. Before a contractor commences or recommences work, it must provide the public entity with a certified copy of the recorded bond. § 255.05(1)(b), Fla. Stat. The public entity may not make any payments to the contractor until the contractor complies with this requirement. *Id*.

The amount of a Section 255.05 payment bond must be equal to the contract price unless the contract is in excess of $250 million and a bond in the amount of the contract is not reasonably available. § 255.05(1)(g)(1), Fla. Stat. At such time, the public owner shall set the amount of the bond at the largest amount reasonable available that is not less than $250 million. *Id*.

Section 337.18, Fla. Stat. sets forth requirements for statutory payment bonds for Florida Department of Transportation ("FDOT") projects. Bonds for the FDOT are not controlled by Section 255.05. § 337.18(1)(f), Fla. Stat. The FDOT must require successful bidders to post a bond in the amount equal to the contract price. § 337.18(1)(a), Fla. Stat. Exceptions include that the FDOT can allow incremental annual bonds for multiyear maintenance or if the contract price is less than $250,000 and the project is of a noncritical nature and that nonperformance will not engager public health, safety, or property. *Id*. Further, penal sums of bonds can be reduced if the contract price is more than $250 million and the principal provides an acceptable alternate means

of security. § 337.18(1)(a)(2), Fla. Stat. The surety must be authorized to do business in Florida. *Id*.

Section 337.18 requires that the principal to maintain a copy of the bond at its principal place of business and the jobsite office. § 337.18(1)(b), Fla. Stat. The principal must provide a copy of the bond within five days of a written request for the bond. *Id*. The bond can also be obtained from the FDOT through a Chapter 119, Fla. Stat., public records request. *Id*.

B. Tiers Covered

Sections 255.05 and 337.18 cover the same tiers. § 255.05(1)(c), Fla. Stat.; § 337.18(1)(a)(2), Fla. Stat. Both incorporate the definitions found within Florida's statutes governing construction liens: § 713.01, Fla. Stat. *Id*. Generally, both public bonds cover any contractors, subcontractors, sub-subcontractors, laborers, materialmen, architects, interior designers, engineers, surveyors, or mappers who furnish labor, services, or materials for the prosecution of the work provided for in the principal's contract. § 713.01(18), Fla. Stat.; § 713.03, Fla. Stat.

C. Notice Required

Section 255.05 has different notice requirements for claimants depending on whether they are in privity with the principal. A claimant that is not in privity with the principal must, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, serve the principal with a written notice that it intends to look to the payment bond for protection. § 255.05(2)(a)(2), Fla. Stat. A claimant begins to furnish services or materials for purpose of giving notice when services or materials are delivered to the job site. *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623 (Fla. 1995) [Lexis]. Further, a claimant that is not in privity with the principal must serve a written notice of nonpayment on the principal and on the surety that substantially follows the statutory form. § 255.05(2)(a)(2), Fla. Stat. The notice of nonpayment may not be served earlier than 45 days after the first furnishing of labor, services, or materials or later than 90 days after the final furnishing of the labor, services, or materials or, with respect to rental equipment, later than 90 days after the date that the rental equipment was last on the job site available for use. *Id*.; *Harvesters Grp., Inc. v. Westinghouse Elec. Corp.*, 527 So. 2d 257 (Fla. 3d DCA 1988) [Lexis] (claimant's supplier's delivery of new parts to replace defective parts did not extent 90-day period in which supplier could file notice of claim). The notice of nonpayment must also specify the portion of the amount claimed that is for retainage. § 255.05(2)(a)(2), Fla. Stat. The purpose of notices under Section 255.05 is to ensure principal and surety know of a supplier's participation in a project. *Sch. Bd. of Palm Beach Cnty. ex rel. Major Elec. Supplies of Stuart, Inc. v. Vincent J. Fasano, Inc.*, 417 So. 2d 1063 (Fla. 4th DCA 1982) [Lexis]. A claimant's negligent inclusion or omission of any information in the notice of nonpayment that has not prejudiced the principal or surety does not constitute a default to defeat an otherwise valid payment bond claim. § 255.05(2)(a)(2), Fla. Stat. However, a claimant who serves a fraudulent notice of nonpayment forfeits any rights under the payment bond and act as a complete defense. *Id*. Fraudulent notices of nonpayment include a claimant willfully exaggerating the amount unpaid, willfully including work not performed or materials not furnished, or notices prepared with such willful and gross negligence as to amount to a willful exaggeration. *Id*. Failure

to serve these notices, in accordance with § 713.18, Fla. Stat., precludes a claimant from pursuing a lawsuit against the payment bond. *Id*.

Section 337.18 requires certain notices only for claimants that are not in privity with the principal. § 337.18(1)(c), Fla. Stat. A claimant must provide notice to the principal and surety, before commencing or not later than 90 days after commencing to furnish labor, materials, or supplies, that it intends to look to the bond for protection. *Id*. Additionally, claimants not in privity with the principal must serve a notice of nonpayment not earlier than 45 days after, or later than 90 days after, first furnishing labor, services, or materials on the principal and surety. *Id*. For rental equipment, the claimant must serve its notice of nonpayment not later than 90 days after the date that the rental equipment was last on the job site available for use. *Id*. Similar to Section 255.05, failure to serve these notices, in accordance with § 713.18, Fla. Stat., precludes a claimant from pursuing a lawsuit against the payment bond. *Id*.

Time periods for statutory notices are strictly construed. *Tremack Co. v. Fed. Ins. Co.*, 569 So. 2d 1355 (Fla. 3d DCA 1990) [Lexis]; *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So.2d 360 (Fla. 2005) [Lexis] (Section 255.05 is designed to protect those providing work and material on public projects, and despite any deficiencies in the bond form, the bond will not be considered a common law bond; statutory notice requirements will be enforced but claimant can attempt to prove it lacked actual knowledge of the time limitations if the bond does not reference the statute or the specific notice requirements); *Florida Crushed Stone Co. v. Am. Home Assur. Co.*, 815 So. 2d 715 (Fla. 5th DCA 2002) [Lexis] (statutory notice requirements will be enforced however claimant can attempt to prove it lacked actual knowledge of the time limitations if the bond does not reference the statute or the specific notice requirements); *Ardaman & Assocs., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 3:08CV144/MCR, 2009 WL 161203 (N.D. Fla. Jan. 22, 2009) [Lexis] (claimant not in privity with principal must comply with statutory notice requirements to pursue claim against Section 337.18 bond, and the failure to record the bond did not automatically exclude the statutory notice requirements; claimant must show that the failure to record caused the claimant's noncompliance).

D. Coverage

Sections 255.05 and 337.18 define those entitled to recover under public payment bonds by incorporating, in limited fashion, the classes of persons referenced in the definitional § 713.01, Fla. Stat. § 255.05(1)(c), Fla. Stat.; § 337.18(1)(a)(2), Fla. Stat. The main purpose of public bonds is to protect the subcontractors and suppliers on public construction projects. *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So.2d 360 (Fla. 2005) [Lexis] (Section 255.05 is designed to protect those providing work and material on public projects). Florida courts will look to Florida mechanics lien law, Chapter 713, and the Miller Act to resolve ambiguities in Sections 255.05 and 337.18. *Blosam Contractors, Inc. v. Joyce*, 451 So. 2d 545, 547–48 (Fla. 2d DCA 1984) [Lexis].

1. Labor

Sections 255.05 and 337.18 cover the same labor. They both cover subcontractors, sub-subcontractors, laborers, materialmen who contract with the contractor, a subcontractor, or a sub-subcontractor, or any person who performs services as architect, landscape architect, interior designer, engineer, or surveyor and mapper. § 713.01(18), Fla. Stat.; § 713.03, Fla. Stat.

a. Professional Services

Public payment bond claims by design professionals are expressly contemplated by the statutory language of Sections 255.05 and 337.18 (incorporating classes of claimants defined in § 713.01(18), Fla. Stat.; § 713.03, Fla. Stat.).

b. Union Benefits

The coverage of Florida public payment bonds extends to the payment of union benefits. *See Trustees, Fla. W. Coast Trowel Trades Pension Fund v. Quality Concrete Co.*, 385 So. 2d 1163, 1166 (Fla. 2d DCA 1980) [Lexis] ("To hold that trustees of collectively bargained fringe benefit funds cannot recover unpaid contributions from a surety on a Section 255.05 bond would be to render unprotected a large portion of the laborers' compensation package.").

2. Material

Sections 255.05 and 337.18 cover the same materials. Both only reference that the materials must be provided by a person defined in § 713.01, Fla. Stat., for the prosecution of "work provided for in the contract." § 255.05(1)(c), Fla. Stat. Courts look to § 713.01, Fla. Stat., to define the phrase "furnish materials" to mean that the claimant must either supply materials incorporated into the improvement or supply "specially fabricated" materials. *Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 603 (Fla. 4th DCA 2007) [Lexis].

3. Equipment

a. Repairs

Section 255.05 specifically references a claimant's ability to recover against the bond for repairs on a public building. § 255.05(1), Fla. Stat. While Section 337.18 does not specifically mention "repair," it does state that it provides for the prompt payment of all persons defined in Section 713.01. § 337.18(1)(a)(2), Fla. Stat. Section 713.01 defines a "contractor" as a person who "improves" real property and defines "improves" as "build, erect, place, make, alter, remove, repair, or demolish." § 713.01(8), (14), Fla. Stat.

b. Rentals

Both Sections 255.05 and 337.18 specifically reference a claimant's ability to recover against the bond for rental equipment. § 255.05(2)(a)(2), Fla. Stat.; § 337.18(1)(c), Fla. Stat.

4. Other

a. Attorneys' Fees

Sections 255.05 and 337.18 entitle the prevailing party in payment bond litigation to recover reasonable attorneys' fees against the non-prevailing party. § 255.05(2)(a)(2), Fla. Stat.; § 337.18(1)(d), Fla. Stat.; *In re Grubbs Constr. Co.*, 306 B.R. 372 (Bankr. M.D. Fla. 2004) [Lexis]

(prevailing party on Section 255.05 payment bond is entitled to recover its attorneys' fees); *David Boland Inc. v. Trans Coastal Roofing Co.*, 851 So. 2d 724 (Fla. 2003) [Lexis] (Florida statute governing award of attorneys' fees under an insurance contract authorizes recovery of attorneys' fees in excess of penal sum even without showing independent misconduct by the surety).

b. Interest

Florida permits the recovery of prejudgment interest at rates that adjust quarterly. § 687.01, Fla. Stat.; § 55.03, Fla. Stat. However, the amount of interest added to a claim should not permit the total amount paid by the surety to exceed the penal sum. *Fid. & Deposit Co. of Maryland v. LaCentre Trucking, Inc.*, 559 So. 2d 1242, 1243 (Fla. 4th DCA 1990) [Lexis].

c. Financing Charges

Section 255.05 payment bond claimants have a cause of action against the contractor and surety for the amount due, including unpaid finance charges due under the claimant's contract. § 255.05(1)(c), Fla. Stat.

Similarly, under Section 337.18 claimants are entitled to recover unpaid finance charges against the bond. § 337.18(1)(b), Fla. Stat.

d. Loans

Neither Sections 255.05 or 337.18 reference a claimant's entitlement to loan amounts.

e. Delay Damages

Section 255.05 does not reference a claimant's entitlement to delay damages. However, Section 337.18 requires that, "[e]very contract let by the [FDOT] for the performance of work shall contain a provision for payment to the [FDOT] by the contractor of liquidated damages due to failure of the contractor to complete the contract work within the time stipulated in the contract." § 337.18(2), Fla. Stat.

A surety is liable for liquidated delay damages under two circumstances. First, the surety is liable for liquidated damages if the bond provides coverage. *Am. Home Assurance Co. v. Larkin Gen. Hosp.*, 593 So. 2d 195, 196 (Fla. 1992) [Lexis] ("[A] surety cannot be held liable for delay damages due to the contractor's default unless the bond specifically provides coverage for delay damages"). Second, the surety is liable for liquidated damages if the underlying contract includes a liquidated damages clause and the bond incorporates the underlying contract. *See Nat'l Fire Ins. Co. v. Fortune Constr. Co.*, 320 F.3d 1260, 1275 (11th Cir. 2003) [Lexis] ("Where a provision for liquidated delay damages is clearly delineated in the underlying contract and incorporated by reference into the bond, the surety is on notice of the time element of performance and the contractual consequences of failure to timely perform in accordance with the contract").

f. Profits

Section 255.05 does not reference a claimant's entitlement to lost profits. However, Section 337.18 provides that, "[t]he [FDOT] shall have no liability for anticipated profits for unfinished work on a contract which has been determined to be in default." Fla. Stat. § 337.18(2).

g. Extracontractual

Florida precludes extracontractual, bad faith, and unfair and deceptive trade practices against surety's issuing payment and performance bonds. § 624.155(9), Fla. Stat. However, the FDOT can refuse to accept bonds on contract from a surety that "wrongfully fails or refuses to settle or provide a defense for claims or actions arising under a contract for which the surety previously furnished a bond." § 337.18(1)(a)(2), Fla. Stat.

E. Contracts Excluded

Section 255.05 does not require a payment bond on a contract for $100,000 or less and a contract for $200,000 or less may be exempted from a payment bond. § 255.05(1)(d), Fla. Stat.

Section 337.18 provides that the FDOT can allow incremental annual bonds for multiyear maintenance or if the contract price is less than $250,000 and the project is of a noncritical nature and that nonperformance will not engager public health, safety, or property. § 337.18(1)(a), Fla. Stat.

F. Time for Suit

A claimant, under Section 255.05, must file suit against the surety within one year after the performance of the labor or completion of delivery of the materials or supplies. § 255.05(10), Fla. Stat. However, an action on retainage may not be instituted until one of the following conditions is satisfied: (a) the public entity has paid out the claimant's retainage to the principal; (b) claimant has completed all work required under its contract and 70 days have passed since the principal sent its final payment request to the public entity; (c) at least 160 days have passed since reaching substantial completion of the construction services purchased, as defined in the contract, or if not defined in the contract, since reaching beneficial occupancy or use of the project; or (d) the claimant has asked the principal, in writing, for certain information, and the principal has failed to respond to the claimant's request, in writing, within 10 days after receipt of the request. *Id*. The information request from the claimant to the principal must include: (1) whether the project has reached substantial completion, as that term is defined in the contract, or if not defined in the contract, if beneficial occupancy or use of the project has occurred; (2) whether the contractor has received payment of the claimant's retainage, and if so, the date the retainage was received by the contractor; and (3) whether the contractor has sent its final payment request to the public entity, and if so, the date on which the final payment request was sent. *Id*. If none of the conditions are satisfied and an action for recovery of retainage cannot be filed within one year, the limitation period is extended until 120 days after one of the conditions is satisfied. *Id*. A claimant's punch list work does not extend one-year limitations period for action on the payment bond. *Fed. Ins. Co. v. Exel of Orlando, Inc.*, 685 So. 2d 896 (Fla. 5th DCA 1996) [Lexis].

The principal's agent or attorney can shorten the time within which the claimant can file the action by recording in the clerk of court's office a Notice of Contest of Claim Against Payment Bond. § 255.05(2)(a)(1), Fla. Stat. The principal's agent or attorney must serve a copy of the Notice of Contest on the claimant at the address in the notice of nonpayment and must certify serve on the face of the Notice of Contest. *Id*. A claimant must file suit to enforce the claim against the payment bond within 60 days after service or the claim is extinguished automatically. *Id*.

Under Section 337.18, an action must be instituted by a claimant, whether in privity with the principal or not, against the principal or the surety on the payment bond within 365 days after the FDOT's final acceptance of the contract work. § 337.18(1)(d), Fla. Stat. A claimant may not waive in advance the right to bring an action under the bond against the surety. *Id*.

G. Remarks

Any language in the bond restricting the venue of any proceeding related to the payment bond, which limits or expands the effective duration of the bond, or which adds conditions precedent to the enforcement of a claim against the bond beyond Section 255.05 is unenforceable. § 255.05(1)(e), Fla. Stat.; *Am. Ins. Co. v. Joyner Elec., Inc.*, 618 So. 2d 799 (Fla. 1st DCA 1993) [Lexis] (venue for a lawsuit under Section 255.05 may be appropriate in counties other than were the project is located); *Dane Constr. & Co., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 207 F. Supp. 3d 1357 (S.D. Fla. 2016) [Lexis] (court upheld Section 255.05(1)(e) language prohibiting the restricting of the venue of a proceeding against the bond); *Travelers Cas. & Ins. Co. of Am. v. Cmty. Asphalt Corp.*, 221 So. 3d 742 (Fla. 3d DCA 2017) [Lexis] (court found that Section 255.05(1)(e) prohibited surety from transferring venue using subcontract venue provision); *E. Coast Metal Decks, Inc. v. Boran Craig Barber Engel Constr. Co.*, 114 So. 3d 311 (Fla. 2d DCA 2013) [Lexis] (Section 255.05(5) does not require an action on the bond be brought where the project was located); *Fire Stop Sys., Inc. v. Liberty Mut. Ins. Co.*, 2:15-CV-449-FTM-38CM, 2015 WL 6760788 (M.D. Fla. Nov. 5, 2015) [Lexis] (court transferred venue of Section 255.05 claim based upon convenience of witnesses, locus of the operative facts, and interests of efficiency and justice). Moreover, a claimant may not in advance waive the right to bring an action under the payment bond against the surety. § 255.05(2)(a)(2), Fla. Stat. Any action on a Section 255.05 payment bond may be brought in the county in which the project is located. § 255.05(5), Fla. Stat. This is likely the same for Section 337.18. The statute does not mention venue and does not specifically allow venue where project is located.

All payment bonds required under Section 255.05(1) shall be construed and deemed statutory payment bonds and shall not be converted into common law bonds. § 255.05(4), Fla. Stat.

Under Section 255.05, the principal can serve a written demand on any claimant, not in privity with the principal, for a written statement of the claimant's account showing the work performed and to be performed, amount paid to date, amount due, and amount to become due. § 255.05(8), Fla. Stat. If the claimant fails to furnish the statement within 30 days after the demand, then the claimant forfeits is rights under the payment bond. *Id*.

Section 337.18 gives the principal the ability to serve a written demand on any claimant, not in privity with the principal, for a written statement under oath of claimant's account showing the nature of the labor or services performed to date, the materials furnished, the materials to be furnished, the amount paid on account to date, the amount due, and the amount to become due as of the date of the statement. § 337.18(1)(e), Fla. Stat. The written demand must be served on the claimant at the address and to the attention of any person who is designated to receive the demand

in the notice to the principal served by the claimant. *Id*. The claimant's failure to furnish the statement within 60 days after the demand, or the furnishing of a false or fraudulent statement, deprives the claimant who fails to furnish the statement, or who furnishes the false or fraudulent statement, of the rights under the bond. *Id*. The negligent inclusion or omission of any information deprives the claimant of the rights under the bond to the extent that the principal can demonstrate prejudice. *Id*.

Sureties cannot rely on "pay-when-paid" provisions in the underlying contract as a means of denying a claim against the payment bond. *Everett Painting Co. v. Padula & Wadsworth Constr., Inc.*, 856 So. 2d 1059 (Fla. 4th DCA 2003) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

In Florida, a surety's liability is coextensive with that of the principal but the surety's liability for damages is limited by the terms of the bond. *Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd.*, 593 So. 2d 195 (Fla. 1992) [Lexis].

Payment bonds are, generally speaking, treated like regular contracts and construed according to contract principles. *Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc.*, 744 So. 2d 482, 485 (Fla. 1st DCA 1999) [Lexis]. They are, however, construed in a manner so as to provide the "broadest possible coverage" to those to whom the bond provides protection. *Id.* The legislature has tempered that goal with strict notice requirements with which a lienor must comply. *Prof'l Plastering & Stucco, Inc. v. Bridgeport-Strasberg Joint Venture*, 940 S. 2d 444, 450 (Fla. 5th DCA 2006) [Lexis]; *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.*, 937 So. 2d 695, 698 (Fla. 5th DCA 2006) [Lexis] (persons seeking the benefits of Florida's construction lien laws, including under a Section 713.23 payment bond, "must strictly comply with the requirements of the construction lien law.").

B. Requirements for Bond

Payment Bond

A payment bond intended to exempt a property owner from claims of lien must meet the requirements of § 713.23, Fla. Stat. Specifically, it must be issued with a penal sum at least in the amount of the original contract and must be attached to the project's notice of commencement at the time the owner or owner's authorized agent records the notice of commencement under § 713.13, Fla. Stat. The owner or its authorized agent is required to record the notice of commencement, before actually commencing work, in the clerk's office of the county in which the property is located. Fla. Stat. § 713.13(1)(a). The bond must be conditioned on the contractor's prompt payment for all labor, services, and materials to all lienors under the contractor's direct contract. Section 713.23(3), Fla. Stat., provides a form payment bond that, if substantially followed, will be deemed sufficient.

Conditional Payment Bond

A "conditional payment bond" is a means to shift the risk of the owner's nonpayment from the contractor and surety to the owner. Such a bond arises in the first instance only where a contractor's contract contains an explicit "pay when paid" provision limiting the contractor's obligation to pay lienors only as to payments the contractor receives from the owner. *N. Am. Specialty Ins. Co. v. Hughes Supply, Inc.*, 705 So. 2d 616, 617–18 (Fla. 4th DCA 1998) [Lexis]; *see also J.J. Shane, Inc. v. Aetna Cas. & Sur. Co.*, 723 So. 2d 302, 303 (Fla. 3d DCA 1998) [Lexis] (contract must unambiguously express intention to shift risk of payment failure by owner from general contractor to subcontractor). Contrarily, the bond will be construed as an unconditional payment bond under Section 713.23 as to lienors that do not have a "pay when paid" clause in their subcontract. *Hughes*, 705 So. 2d at 617 [Lexis]. If the contractual "pay when paid" provision exists, the surety's obligation to pay lienors will be deemed coextensive with that of the contractor's—*i.e.*, limited to payments actually made by the owner—when certain other statutory requirements under § 713.245, Fla. Stat., are met.

Specifically, to qualify as a "conditional payment bond," (1) the bond must be identified in the project's notice of commencement as a conditional payment bond and recorded together with the notice of commencement; (2) the phrase "conditional payment bond" must be prominently displayed in the title of the bond at the top of the bond's front page; and (3) the bond must contain, on the front page and in at least 10-point type, explicit language set forth in § 713.245(1)(c), Fla. Stat., explaining its conditions. *Goodbys Creek, LLC v. Arch Ins. Co.*, 307-CV-947-J-33HTS, 2008 WL 2950112, at *4 (M.D. Fla. July 31, 2008) [Lexis].

Common Law Bond

A payment bond will be deemed a "common law bond," rather than a statutory bond under § 713.23, Fla. Stat., if it provides more expansive coverage—in the form of either the class of claimants or the payment provisions— than that provided under that statute. *Nat'l Fire Ins. Co. of Hartford v. L.J. Clark Constr. Co.*, 579 So. 2d 743, 744 (Fla. 4th DCA 1991) [Lexis]. In keeping with the general rules of construction, "any ambiguity as to the nature of a bond should be construed against the surety and in favor of granting the broadest possible coverage to those I intended to be benefited by protection of the bond." *Id.* at 745; *see also Gen. Ins. Co. of Am. v. Sentry Indem., Co.*, 384 So. 2d 1305, 1306 (Fla. 5th DCA 1980) [Lexis].

C. Notice Requirements

Notice to Owner/Notice to Contractor

A lienor, other than a laborer, who is not in privity with the contractor must serve a "Notice to Owner" or a "Notice to Owner/Notice to Contractor" before beginning or not later than 45 days after beginning to furnish labor, materials, or supplies, informing the contractor that it will "look to the contractor's bond for protection on the work." Fla. Stat. § 713.23(1)(c). The rationale for exempting laborers stems from the assumption that they are not likely to work long without pay, "and consequently will not have a large hidden claim." *Morgan v. Goodwin*, 355 So. 2d 217, 218 (Fla. 1st DCA 1978) [Lexis]. Lienors that *are in* direct privity with the contractor are also exempted from having to serve this initial notice.

"The purpose of the notice is to protect an owner from the possibility of paying over to his contractor sums which out to go to a subcontractor who remains unpaid." *Bishop v. James A. Knowles, Inc.*, 292 So. 2d 415, 417 (Fla. 2d DCA 1974) [Lexis] (quoting *Boux v. E. Hillsborough Apartments, Inc.*, 218 So. 2d 202, 202 (Fla. 2d DCA 1969) [Lexis]). The notice must be in substantially the form in § 713.23(1)(c), Fla. Stat., providing a description of the services or materials furnished, a description of the property at issue, the lienor's customer, and that the lienor intends to look to the bond to secure payment for the lienor's services and/or materials. A lienor's timely service of a notice to owner pursuant to § 713.06 satisfies its notice obligations under § 713.23(1)(c); *see also Walter E. Heller & Co. Se., Inc. v. Palmer-Smith*, 504 So. 2d 511, 512 (Fla. 5th DCA 1987) [Lexis] (materialman's notice to owner satisfied notice obligation under Section 713.23, even though notice did not state that materialman would "look to the contractor's bond" to secure payment).

If the owner or the owner's representative does not satisfy its obligations with respect to recording a notice of commencement with the bond attached prior to the commencement of construction, the lienor may elect to serve this notice within 45 days of the date the lienor receives service of a copy of the bond. *Id.* It is not, however, altogether excused from providing this notice. *Bishop*, 292 So. 2d at 417 [Lexis]. Similarly, an owner's failure to include the name and address of the surety in the notice of commencement, even when recorded late, will not relieve a lienor of its obligation to timely serve notice under § 713.23(1)(c) of its intent to rely upon the bond. *Standard Heating Serv., Inc. v. Guymann Constr., Inc.*, 459 So. 2d 1103, 1105 (Fla. 2d DCA 1984) [Lexis]. This is because the notice is sent to the contractor, not the surety, such that lienor suffers no prejudice from the absence of this information. *Id.*

Notice of Nonpayment

A lienor, whether in direct privity with the contractor or not, who has not been timely paid must also serve, on both the contractor and surety, a written "Notice of Nonpayment" in substantially the form set forth in § 713.23(1)(d). The information must be current as of the date of the notice.

This notice must be made under oath and served during the progress of the work but in no event later than 90 days after final furnishing of his or her labor, services, or materials, or, in the case of rental equipment, "90 days after the date the rental equipment was on the job site and available for use." Fla. Stat. § 713.23(1)(d). Similar to the "Notice to Owner" or "Notice to Owner/Notice to Contractor," the owner's failure to record the payment bond before commencement of construction will give the lienor the benefit and option of timely serving the notice of nonpayment calculated from the date it receives service of a copy of the bond, rather than the date of final furnishing. *Id.*

Timely service of both notices, depending on privity, is a condition precedent to an action against a contractor or surety on a Section 713.23 payment bond. *See, e.g.*, *Stock Bldg. Supply of Florida, Inc. v. Soares Da Costa Constr. Servs., LLC*, 76 So. 3d 313, 317 (Fla. 3d DCA 2011) [Lexis]. Indeed, actual notice that a materialman is furnishing materials is insufficient in the absence of the requisite written notices. *Id.* (internal citations omitted).

Conditional Payment Bond

A conditional payment bond does not automatically exempt the owner's property from a lienor's claim of lien. Fla. Stat. § 713.245(3). As a result, a lienor must first perfect its lien rights to have a valid claim against the bond. *Id.*

This means a lienor not in privity must both timely serve a notice to owner before commencing or not later than 45 days after commencing to furnish labor, services, or materials on the property, pursuant to § 713.06, Fla. Stat., and record its claim of lien at any time during the progress of the work but in no event later than 90 days after the final furnishing of its labor, services, or materials, pursuant to § 713.08, Fla. Stat.

D. Notice of Bond and Transfer of Liens to Other Security

Generally

Should an owner or its agent fail to properly record the bond with and at the time of recording the notice of commencement, or should a lienor record a claim of lien notwithstanding the presence of a payment bond, the lien will transfer to the bond upon either the contractor or any person having an interest in the property recording a verified "Notice of Bond" pursuant to § 713.23(2), Fla. Stat. The notice must be served along with a copy of the bond to the lienor at the address identified in the claim of lien.

In the absence of a valid Section 713.23 payment bond, parties can transfer any lien, including that of a contractor in privity with the owner, to other security by depositing money or filing a bond with the clerk. § 713.24(1), Fla. Stat. This serves as a mechanism for an owner to remove the lien as an encumbrance against the owner's real property and obtain clear title. *Hiller v. Phoenix Assocs. of S. Florida, Inc.*, 189 So. 3d 272, 274 (Fla. 2d DCA 2016) [Lexis]. Assuming the lien is properly transferred to a Section 713.24 lien transfer bond, the property owner is no longer considered a proper party to a lienor's lawsuit to recover against the bond. *Deltona Corp. v. Indian Palms, Inc.*, 323 So. 2d 282, 283 (Fla. 2d DCA 1975) [Lexis].

The money deposited or the bond must be in an amount equal to the claim of lien, plus interest at the legal rate for a 3-year period, plus the greater of $1,000 or 25% of the claim of lien, which is to apply to attorneys' fees and court costs taxed in any proceeding to enforce the lien. Fla. Stat. § 713.24(1). The bond or deposit must be conditioned on payment of any judgment or decree rendered for the satisfaction of the lien. *Id.*

Upon the deposit of money or filing of a bond, the clerk will record a certificate confirming the transfer of the lien to the security, with a copy mailed to the lienor, after which the property is released from the lien. *Id.*

Conditional Payment Bond

In order to relieve the owner's property from a claim of lien in the context of a conditional payment bond, the contractor or owner must, within 90 days after the claim of lien is recorded, record a notice of bond under section 713.23(2), Fla. Stat., together with a copy of the bond and a sworn statement referred to as a "Certificate of Payment to the Contractor," in substantially the form set forth in section 713.245(4), Fla. Stat. In essence, the certificate of payment confirms the

owner has met the requirements of the pay-when-paid provision, and that the bond remains in full force and effect to satisfy the lienor's claim. The clerk then serves copies of the notice, the conditional payment bond, and the certificate of payment to the contractor, the surety, and the lienor on the claim of lien. Fla. Stat. § 713.245(5).

At that point, the contractor has the option of either joining in the certificate of payment, by recording the requisite joinder under § 713.245(6), disputing the certificate of payment by recording a "Notice of Contest of Payment" within 15 days after the date the clerk certifies service of the certificate of payment, pursuant to § 713.245(8), or doing nothing. If the contractor signs the certificate of payment, joins in it, or fails to timely record the "Notice of Contest of Payment," then the lien transfers to the bond to the extent of the amount certified as having been paid to the contractor. § 713.245(10), Fla. Stat. The amount of any lien exceeding either the amount certified in the certificate of payment or the notice of contest of payment remains as a lien on the owner's property. §§ 713.245(10) and (11), Fla. Stat.

Because a claimant must first perfect its lien rights to have a valid claim against a conditional payment bond, and assuming transfer of the lien to the bond, the surety is expressly entitled to assert "all claims or defenses of the owner regarding the validity of the claim of lien or of the contractor regarding the amount due the lienor." § 713.245(11), Fla. Stat.

D. Coverage

A payment bond covers all lienors, as that term is defined in § 713.01(18), except for a contractor on a direct contract with the owner. § 713.23(2), Fla. Stat.; *see also* § 713.02(6), Fla. Stat. (owner and contractor's agreement that contractor will furnish section 713.23 payment bond "does not exempt the owner from the lien of the contractor who furnishes the bond."). This includes A contractor, subcontractor, or sub-subcontractor who is "unlicensed," pursuant to §§ 489.128 and 489.532, Fla. Stat., has no lien rights. A surety that provides a bond on behalf of such a party cannot absolve itself of liability based on its principal's unlicensed status. Fla. Stat. § 713.02(7).

For a lienor furnishing materials to be covered under a Section 713.23 payment bond, it must either supply materials actually incorporated in the improvement, specially fabricated materials, "materials used for the construction and not remaining in the improvement," or rental equipment. § 713.01(13), Fla. Stat. (defining "furnish materials"); *see Standard Heating Serv., Inc. v. Guymann Constr., Inc.*, 459 So. 2d 1103, 1104 (Fla. 2d DCA 1984) [Lexis] (furnishing of diesel fuel and other petroleum products constituted materials for purposes of claim against Section 713.23 payment bond).

Section 713.29 provides the prevailing party in any suit to enforce a lien or to enforce a claim against a bond the right to recover its reasonable attorneys' fees at trial, on appeal, or for arbitration. They are not awarded as an element of damages, but are, rather, taxed as part of the prevailing party's costs. § 713.29, Fla. Stat.; *see also Zalay v. Ace Cabinets of Clearwater, Inc.*, 700 So. 2d 15, 18 (Fla. 2d DCA 1997) [Lexis].

E. Time for Suit

A claimant must institute an action against a contractor or surety on a 713.23 payment bond no later than one year "from the performance of the labor or completion of delivery of the materials and supplied" at issue in the action. § 713.23(1)(e), Fla. Stat. That one-year time period is measured from the last day the lienor furnishes its labor, services or materials, and "may not be measured by

other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion." *Id.*

Critically, while the time periods for pre-suit notices under Sections 713.23(1)(c) and (d) may be impacted by the failure to fully adhere to the requirements for recording or otherwise providing notice of a bond, there is no similar impact on the limitation period for the commencement of an action on the bond. *Bridgeport, Inc. v. Tampa Roofing Co.*, 903 So. 2d 306, 309 (Fla. 2d DCA 2005) [Lexis] ("[E]ven if the Subcontractor is correct that the Owner, the Surety, and the Contractor did not fully adhere to the requirements of chapter 713, the Subcontractor was not excused from complying with the requirements of section 713.23 . . . that it file suit within one year from its completion of performance . . . .); § 713.23(1)(d), Fla Stat. ("the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded.").

The one-year limitation period, however, may be significantly shortened to 60 days if a contractor or its attorney records what is referred to as a "Notice of Contest of Claim Against Payment Bond," and serves a copy of said notice on the claimant. *Id.* A claimant receiving this notice will see his or her claim automatically extinguished for failure to meet this shortened limitations period. *Id.*

Suit against a conditional payment bond must be initiated within 1 year from the date the lien is transferred to the bond. § 713.245(2), Fla. Stat.

If a lien is transferred to a bond or other security before the lienor has filed suit to foreclose its claim of lien, suit against the lien transfer bond or security under § 713.24, Fla. Stat., must be initiated within one year of the recording of the claim of lien pursuant to § 713.22, Fla. Stat. If, however, a lienor has filed suit to foreclose its claim of lien within that one-year period prior to transfer, and, during the litigation, the lien is then transferred to a lien transfer bond or other security pursuant to § 713.24, Fla. Stat., the lienor must commence an action against the security within one year after the transfer. § 713.24(4), Fla. Stat.

Suit on a common law bond, on the other hand, is subject to the five-year limitation period for suits on contracts in general pursuant to § 95.11(2)(b), Fla. Stat., rather than the one-year period provided for statutory bonds. *See, e.g.*, *Nat'l Fire Ins. Co. of Hartford v. L.J. Clark Constr. Co.*, 579 So. 2d 743, 746 (Fla. 4th DCA 1991) [Lexis]; *Gen. Elec. Co. v. Com. Standard Ins. Co.*, 335 So. 2d 624, 625 (Fla. 1st DCA 1976) [Lexis] (payment bond purporting to be a statutory bond under Sections 713.06 and 713.23 was not subject to one-year limitation provision under Section 713.23 since bond was not issued in at least the amount of the original contract price); *Gen. Ins. Co. of Am. v. Sentry Indem., Co.*, 384 So. 2d 1305, 1306–07 (Fla. 5th DCA 1980) [Lexis] (trial court did not err in holding payment bond was a "common law" rather than statutory bond under Section 713.23 where bond was broader in scope than that required under statute; thus, claimant's action was not barred by one-year statute of limitation).

E. Remarks

Like public project payment bonds under § 255.05, Fla. Stat., any language in the payment bond that restricts the classes of protected persons, that restricts the venue of an action relating to the bond, that limits or expands the bond's duration, or that adds other conditions precedent is unenforceable as a matter of law. § 713.23(1)(f), Fla. Stat.

F. Case Annotations

In theory, a valid Section 713.23 payment bond exempts an owner and its property from claims of lien. *See, e.g.*, *Bankers & Shippers Ins. Co. of New York v. AIA Insulation Indus., Inc.*, 390 So. 2d 734, 739 (Fla. 4th DCA 1980) [Lexis]. Indeed, "[u]pon furnishing of a property payment bond under the section in question no subcontractors, mechanics or materialmen (except the prime contractor) have any further claim against the owner or his property." *Id.* In practice, however, an owner may still find itself and its property subject to a recorded claim of lien. In that instance, transfer of the lien to the bond is accomplished as discussed above and pursuant to Section 713.23(2), and the lienor's suit to foreclose the lien is "subject to being defeated by an affirmative defense asserting the existence of a property payment bond." *Id.* at 739–40.

Challenges to the validity of a claim against a private statutory payment bond largely turn on a claimant's strict compliance with the various notice requirements as conditions precedent to suit. For instance, disputes frequently arise with respect to determining the date on which the 45-day clock begins to run under § 713.23(1)(d)—*i.e.*, upon a lienor "beginning to furnish labor, materials, or supplies"— for purposes of serving a "Notice to Contractor." For example, in *Essex Crane Rental Corp. of Alabama v. Millman Constr. Co.*, the Third District Court of Appeal held the 45-day period began when the lienor delivered unassembled pieces of a crane to the job site, rather than a later date when the crane had been assembled and was ready for use. 516 So. 2d 1130, 1131 (Fla. 3d DCA 1987) [Lexis]. With respect to specially fabricated material, the clock begins to run once fabrication has begun, rather than when the materials are actually delivered to the project. *Oolite Indus., Inc. v. Millman Constr. Co.*, 501 So. 2d 655, 656 (Fla. 3d DCA 1987) [Lexis].

Courts have also acknowledged that notice requirements may depend in part on whether the parties have more than one contract for labor, services, or materials on any given project. The court considered just this argument in *D.I.C. Com. Constr. Corp. v. Knight Erection & Fabrication Inc.*, though in the context of a Section 255.05 public project bond. There, a subcontractor argued that the 45-day period should be measured from when it commenced work on a portion of the project. 547 So. 2d 977, 979 (Fla. 4th DCA 1989) [Lexis]. The contractor, on the other hand, argued the period began to run when the subcontractor gave it a purchase order on another building on the project. The court framed the issue as determining whether the 45-day notice under Section 255.05(2)(a)2, similar to the notice required under Section 713.23(1)(c), begins to run "when *any* work is done by a claimant on the project, or whether it permits the notice time clock to start over if a legitimate second contract is made." *Id.* (emphasis in original).

Rejecting the contractor's position as "unduly harsh, and inconsistent with the language and spirit of the statute," the court sided with the subcontractor. Specifically, the court found that while the statute "appears to contemplate the usual situation where a subcontractor or supplier is engaged in a single agreement," it did not bar "a subsequent claim, or notice thereof, for work done under a genuine subsequent agreement to do work not anticipated to be done initially." *Id.* at 979–80.

In contrast, in *Pilot Elec. Constr. Co. v. Waters*, the court declined to relieve a party's failure to timely serve notice under § 713.06, Fla. Stat., despite the fact that the parties' made "substantial changes" to their written agreement after 70% of the work had been completed. 384 So. 2d 61 (Fla. 1st DCA 1980) [Lexis]. Rather, the court explained "the work and materials were for essentially the same project, at the same location, and it is undisputed that commencement of

the work, the original agreement and the building permits authorizing same, commenced considerably more than 45 days prior to appellant's service of the notice to the owner." *Id.* at 62.

The date of "final furnishing," as the triggering date for timely service of a "Notice of Nonpayment," to record a claim of lien in the case of a conditional payment bond, and otherwise starting the clock to institute an action against a conditional or unconditional statutory payment bond, is a similarly fact-intensive inquiry that lends itself to frequent dispute. For instance, courts have held that testing for final inspections, warranty work, and punch list work do not constitute "final furnishing." *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.*, 937 So. 2d 695, 698 (Fla. 5th DCA 2006) [Lexis] (final inspections, warranty work, and punch list work associated with installed fixtures or equipment does not extend the time for a claimant to serve its notice of nonpayment under § 713.23(1)(d), Fla. Stat.); *Viking Builders, Inc. v. Felices*, 391 So. 2d 302, 303 (Fla. 5th DCA 1980) [Lexis] (correction and repair services on working air conditioning system constituted warranty work not the statutory final furnishing of labor or material). Furnishing material trivial in nature when compared to overall quantities furnished also will not suffice to prolong the period within which to serve notice. *People's Bank of Jacksonville v. Virginia Bridge & Iron Co.*, 113 So. 680, 685 (Fla. 1927) [Lexis] (delivery of steel weighing only 17 pounds, which should have been included in but was negligently omitted from prior shipment of 64,700 pounds of steel, did not constitute final furnishing to extend notice obligation); *but see In re Jennerwein*, 309 B.R. 385, 389 (Bankr. M.D. Fla. 2004) [Lexis] (actions of supervisor of pool contractor inspecting newly installed pavers and making list of unfinished projects to be completed if owners made outstanding payments to contractor, sufficed as final furnishing of services, labor, or materials to extend time to record claim of lien, even though "scope of services rendered admittedly is limited.").

Courts have also offered differing opinions as to the proper venue in which to institute an action against a bond. In particular, courts have held that venue for an action on a payment bond is proper in the county where the project at issue is located and where the surety posts the bond, *see, e.g.*, *Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.*, 522 So. 2d 111, 112 (Fla. 5th DCA 1988) [Lexis]; *Miller & Solomon Gen. Contractors, Inc. v. Brennan's Glass Co.*, 837 So. 2d 1182, 1184 (Fla. 4th DCA 2003) [Lexis]; or, alternatively, with respect to a cause of action for breach of a payment bond, in the county where the lienor to whom payment is owed resides, *see, e.g.*, *Coordinated Constructors v. Florida Fill, Inc.*, 387 So. 2d 1006, 1008 (Fla. 3d DCA 1980) [Lexis] (performance required under contract, *i.e.*, statutory payment bond, was the payment of money and, in absence of provision in bond specifying place of payment, "payment was due where the creditor resides because, in such instance, the debtor must seek the creditor."). Courts are also split as to whether a contractual provision fixing venue will govern. *Compare, e.g.*, *Walbridge Aldinger Co. v. Roberts Plumbing Contractors, Inc.*, 800 So. 2d 285, 288 (Fla. 3d DCA 2001) [Lexis] (reversing trial court's denial of principal's and co-sureties' motion for change of venue, holding, "in the absence of a showing that the agreed upon venue provision in the subcontract was unreasonable or unjust, the trial court below should have enforced it.") *with Brennan's Glass*, 837 So. 2d at 1184 [Lexis] (trial court did not abuse its discretion in denying motion to transfer venue of the entire action or to sever counts where action against bond properly filed in county where project was located and where surety posted bond). Regardless, a surety can be found to have waived the defense of improper venue if it fails to timely raise it. *Garrido v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 891 So. 2d 1091, 1093 (Fla. 4th DCA 2004) [Lexis] (reversing judgment on the pleadings entered in surety's favor based on surety's assertion that circuit court in Broward County, where surety's representatives were located, lacked subject matter jurisdiction, and that

suit could only be filed in Dade County, where project was located; finding surety failed to timely raise improper venue defense and, in doing so, waived it).

GEORGIA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Georgia has two statutes requiring "Little Miller Act" bonds, one for State projects and the other for Local Government projects. To date no case has noted a difference in coverage under the two statutes.

O.C.G.A.	Coverage
§ 13-10-60	state projects
§ 36-91-90	local government projects

Each of these code sections requires bonds on projects over $100,000.00 and that the penal sum is at least the amount of the initial contract. If the contract is increased, upon request the bond amount must also be increased.

B. Tiers Covered

Coverage is extended to all "subcontractors" which has been defined to mean all lower tier subs, no matter how far down the contractual chain. *Sunderland v. Vertex Assocs. Inc.*, 199 Ga. App. 278, 404 S.E.2d 574 (1991) [Westlaw]. The definition of "subcontractors" has been expanded so it not only includes lower tier subs but also includes remote suppliers. *Barton Malow Co. v. Metro Mfg. Co.*, 214 Ga. App. 56, 446 S.E.2d 785 (1994) [Westlaw]. Note there are not any cases under the new and slightly revised statutes.

C. Notice Required

In Georgia there is no notice requirement for subcontractors or materialmen with a direct contractual relationship with the contractor. For these claimants, with a direct contractual relationship with the contractor, their right to pursue an action on the Little Miller Act payment bond does not accrue until 90 days "after the day on which the last of the labor was done or performed by such person or the material or equipment or machinery was furnished or supplied by such person for which such claim is made, or when he or she has completed his or her subcontract for which claim is made." O.C.G.A. § 13-10-63(a) (for state projects); *see also* O.C.G.A. § 36-91-93(a) (for local government projects).

Notice requirements for subcontractors or materialman without a direct contractual relationship with the contractor, depend on whether the contractor has posted a notice of commencement.

Contractors on public projects can file a notice of commencement designed to protect the contractor so that it can pay its subs and be protected from claims of unknown-subcontractors and

materialmen. The notice of commencement requirements are set out for state projects at O.C.G.A. § 13-10-62 and for local government projects at O.C.G.A. § 36-91-92.

These notice of commencement statutes have similar requirements. Within 15 days of the contractor physically commencing work the notice of commencement must be posted at the job site and filed with the clerk of the Superior Court in the County where the site is located. A copy of the notice must be provided within 10 days from a written request from any subcontractor or materialman. The notice of commencement must include the name, address, telephone number of the contractor, name and location of the public work or a description of the improvement, the name and address of the agency or authority that is contracting for the work, the name and address of the contractor's surety, and the name and address of any holder of any security deposit.

When the contractor complies with the notice of commencement requirements, lower tier subcontractors and suppliers — that is, any person with no contractual relationship with the contractor — have rights under the Little Miller Act payment bond only if within 30 days from filing the notice of commencement or 30 days from first delivery of labor or material the lower tier subcontractor or supplier gives the contractor written notice which includes among other things their name, the party to whom they supplied labor and equipment, and a description of the work performed or material supplied. O.C.G.A. § 13-10-63(a)(2) (state projects); O.C.G.A. § 36-91-93(a)(2) (local government projects).

If the contractor does not comply with the notice of commencement statutes, any party not having a direct contractual relationship with the contractor must provide written notice to the contractor within 90 days from the date of last providing labor or material. O.C.G.A. § 13-10-63(a)(1) (state projects); O.C.G.A. § 36-91-93(a)(1) (local government projects).

While the statute says notice must state with substantial accuracy the amount claimed, the name of the party to whom the labor or material was furnished, and notice must be sent by registered mail, cases have eroded strict requirements for compliance as noted below.

D. Coverage

The Little Miller Act is remedial, and requirements such as notice are liberally construed. *S. Elec. Supply Co. v. Trend Constr.*, 259 Ga. App 666, 578 S.E.2d 279 (2003) [Westlaw]; *Southway Crane & Rigging Inc. v. Fed. Ins. Co.*, 294 Ga. App. 504, 669 S.E.2d 482 (2008) [Westlaw]; *Western Sur. Co. v. APAC-Southeast, Inc.*, 302 Ga. App. 654, 691 S.E. 2d 234 (2010) [Westlaw].

Courts have repeatedly recognized that decisions interpreting the Federal Miller Act are persuasive authority in interpreting Georgia's Little Miller Act. *TDS Constr. Inc. v. Burke Co.*, 206 Ga. App. 223, 425 S.E.2d 359 (1992) [Westlaw]; *Devore & Johnson, Inc. v. Bowen & Watson, Inc.*, 216 Ga. App. 63, 453 S.E.2d 67 (1994) [Westlaw].

Georgia recognizes an unusually strong interpretation of the "read-in, read-out" rule for statutory bonds. The terms and requirements of the statute are read in, and anything otherwise stated in the bond which is not stated in the statute is read out. *Campbell v. Benton*, 217 Ga. 368, 371, 122 S.E.2d 223 (1961) [Westlaw]. This holding is applicable even if the coverage provided by the bond is more liberal than what is covered by the statute. *Denny & Assocs. Inc. v. S. Aggregates Co.*, 184 Ga. App. 832, 363 S.E.2d 50 (1988) [Westlaw] (held that the claim made by a supplier who did not provide notice within the 90 days required by statute was barred even though the bond did not include a notice requirement); *Accerbi v. Hartford Fire Ins. Co.*, No. CV 104-048, 2005 U.S. Dist. LEXIS 36032, 2005 WL 2406150 (S.D. Ga. Sep. 26, 2005) [Westlaw].

The Little Miller Act provides that it is for the protection of "all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of work provided in the contract.". O.C.G.A. § 13-10-60 (state projects); O.C.G.A. § 36-91-90 (local government projects). Claims from subcontractors and materialmen providing goods and services deemed outside of these items are ordinarily not covered.

1. Labor

a. Professional Services

There are no cases analyzing bond coverage under the Georgia Little Miller Act for professional services. However, the scope of payment bonds extends to parties supplying labor, materials, machinery, and equipment in the prosecution of work. O.C.G.A. § 13-10-60 (state projects); O.C.G.A. § 36-91-90 (local government projects). Since decisions under the Federal Miller Act are persuasive for coverage under the Georgia Little Miller Act, only professional supervisory work which involves actual superintending, supervision, or inspection at the job site would be likely be covered. *See e.g.*, *U.S. ex rel. Olson v. W.H. Cates Constr. Co., Inc.*, 972 F.2d 987 (8th Cir. 1992) [Westlaw]. But keep in mind Georgia's strict application of the "read-in, read-out" rule. *Supra*.

b. Union Benefits

There are no Georgia cases addressing union benefits.

2. Material

Materials are covered, even if they were diverted to another project, so as long as the claimant has a reasonable good faith belief that the materials were ultimately intended for the bonding project. A materialman who shows that goods were shipped with the intended purpose of material going to the bonded project, they are covered even if they were not incorporated into the project. *TDS Constr. Inc. v. Burke Co.*, 206 Ga. App. 223, 425 S.E.2d 359 (1992) [Westlaw].

3. Equipment

a. Repair

A surety on a Little Miller Act payment bond in Georgia is liable for routine repairs and maintenance of equipment, but the surety is not liable for major substantial rebuilding of equipment. *Yancey Bros., Inc. v. Am. Sur. Co. of New York*, 43 Ga. App. 740, 160 S.E. 100 (1931) [Westlaw]; *W. J. Bremer, Inc. v. United Bonding Ins. Co.*, 122 Ga. App. 183, 176 S.E.2d 633 (1970) [Westlaw]. As these courts state, while labor and material for incidental and current repairs are covered, major repairs involving the replacement of old parts with new parts are not covered in the absence of proof that the new parts were consumed by the work on the bonded project. The distinction is between items going into the work or contributing to the execution of the work which are chargeable to the bond, but not those which are major repairs that are really part of capital costs and not covered. *Western Cas. & Sur. Co. v. Fulton Supply Co.*, 60 Ga. App. 710, 4 S.E.2d 690

(1939) [Westlaw]; *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981) [Westlaw], *aff'd* 667 F.2d 30 (11th Cir. 1982) [Westlaw] (lien case).

b. Rentals

Payment bonds on public projects cover the rental of machinery furnished and used in the work. For example, a subcontractor's rental of steel forms used in holding concrete in place were covered by a Little Miller Act payment bond. *Am. Sur. Co. of New York v. Corr Serv. Erection Co.*, 47 Ga. App. 295, 170 S.E. 325 (1933) [Westlaw].

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4. Other

a. Attorneys' Fees

Claimants often assert attorneys' fees under O.C.G.A. § 13-6-11, contending the surety was stubbornly litigious and acted in bad faith. However, that code section is not applicable to sureties under any bond. *Ayers Enters., Ltd. v. Exterior Designing, Inc.*, 829 F. Supp. 1330 (N.D. Ga. 1993) [Westlaw].

b. Interest

The surety was held liable for interest on a rental contract in *Am. Sur. Co. of New York v. Corr Serv. Erection Co.*, 47 Ga. App. 295, 170 S.E. 325 (1933) [Westlaw].

The surety may be liable for pre-judgment interest of 7% under O.C.G.A. § 7-4-15 and O.C.G.A. § 7-4-2(a), where the claim is liquidated. Interest on an unliquidated claim commences upon the date the surety owes that sum. *Hendricks v. Blake & Pendleton, Inc.*, 221 Ga. App. 651, 472 S.E.2d 482 (1996) [Westlaw] (lien bond case). Claimants often assert interest at 18% under O.C.G.A. § 7-4-16 which allows the owner of a "commercial account" to charge interest in that amount. In *Turner Constr. Co. v. Elec. Distribs., Inc.*, 202 Ga. App. 726, 415 S.E.2d 325 (1992) [Westlaw], the court held that a surety on a bond to dissolve a lien was liable on the bond, not on a commercial account. The court said the claim on the bond is not an action on a commercial account, and since it is a claim on the bond therefore there is no liability for interest at 18%. However, since the claim was liquidated, so the surety was liable for interest at 7%.

c. Financing Charges

There are no Georgia cases addressing the surety's liability for financing charges. The Little Miller Act provides protection for labor, materials, machinery, and equipment in the prosecution of work. O.C.G.A. § 13-10-60 (state projects); O.C.G.A. § 36-91-90 (local government projects).

d. Insurance Premiums

Insurance premiums are not covered by the payment bond. *Seibels, Bruce & Co. v. Nat'l Sur. Corp.*, 63 Ga. App. 520, 11 S.E.2d 705 (1940) [Westlaw], a claim was made for workers' compensation premiums. The court reviewed the text of the Little Miller Act stating that the

purpose of the payment bond was to cover "work, tools, machinery, spills and materials." The claimant asserted that premiums should be covered since the contractor was required to have the insurance. The held insurance premiums did not fall within the terms of the bond. *Id*.

e. Loans

Loans are not covered under a statutory payment bond. *Gulf Ins. Co. v. GFA Grp., Inc.*, 251 Ga. App. 539, 554 S.E.2d 746 (2001) [Westlaw].

f. Delay Damages

There are no reported Georgia cases addressing the surety's liability for delay damages on a Little Miller Act payment bond. Georgia courts, which often follow the Federal cases, would likely adopt the rule set out in *U.S. ex rel. Pertun Constr. Co. v. Harvesters Grp., Inc.*, 918 F.2d 915 (11th Cir. 1990) [Westlaw]. This case holds that the Miller Act covers liability for the increase of out-of-pocket costs for labor or material caused by delay. However, this rule will not provide for the recovery of consequential damages such as home office overhead.

A well-drawn "no-damage-for-delay" clause is enforceable in Georgia, and the surety can use it to deny subcontractors' claims. *L & B Constr. Co. v. Ragan Enters., Inc.*, 267 Ga. 809, 482 S.E.2d 279 (1997) [Westlaw]. In this case, the agreement expressly stated that contractors' sole remedy for delay was an extension of time, that the contractor could not make a demand for damages or extended overhead, and that the contractor would not be entitled to payment or compensation of any kind direct or indirect arising from delay. The subcontractors' agreement had a flow-down clause incorporating all terms of the general contract. The court held that the bar against delay damages was valid and enforceable; and since it was incorporated into the subcontract, both the surety and general contractor were entitled to summary judgment on the delay claim. *Id*.

g. Profits

There are no Georgia cases dealing with claims of lost profit. Georgia courts presumably would follow the Federal cases holding the surety is not liable for a subcontractor's lost profits for wrongful termination. *U.S. ex rel. Pertun Constr. Co. v. Harvesters Grp., Inc.*, 918 F.2d 915 (11th Cir. 1990) [Westlaw]; *Arthur N. Olive Co., Inc. v. U.S. ex rel. Marino*, 297 F.2d 70 (1st Cir. 1961) [Westlaw]. As previously noted, since the Georgia statutes provide protection for work labor and materials supplied, a public works payment bond should not cover lost profits. *Supra*.

h. Extracontractual

The rules on a bad faith claim against a surety are set out in O.C.G.A. § 10-7-30. If the claimant provides the surety with a written demand, the surety refuses to pay within 60 days from receipt of the demand, and if there has been a bad faith refusal to pay, the surety may be liable to the claimant for an amount not to exceed 25% of the principal, plus attorney's fees. *Id*.

A somewhat similar bad faith statute on insurance policies has been held to be so similar that the rules for bad faith on an insurance case are equally applicable to sureties. *Columbus Fire & Safety Equip. Co., Inc. v. Am. Druggist Ins. Co., Inc.*, 166 Ga. App. 509, 304 S.E.2d 471 (1983)

[Westlaw]. The failure to wait 60 days before filing suit is an absolute bar to recovery of a bad faith penalty. *Blue Cross & Blue Shield, Inc. v. Merrell*, 170 Ga. App. 86, 316 S.E.2d 548 (1984) [Westlaw]; *Ayers Enters., Ltd. v. Exterior Designing, Inc.*, 829 F. Supp. 1330 (N.D. Ga. 1993) [Westlaw].

Bad faith claims are considered a penalty and must be strictly construed. *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340 (N.D. Ga. 2001) [Westlaw]; *Interstate Life & Accident Ins. Co. v. Williamson*, 220 Ga. 323, 138 S.E.2d 668 (1984) [Westlaw].

Bad faith is defined as a frivolous, arbitrary, unfounded refusal to pay. Where there are reasonable grounds to contest the claim there is no bad faith. *Reynolds v. State*, 265 Ga. App. 776, 462 S.E.2d 623 (1995) [Westlaw]. For example, where a claim was denied based upon the advice of a structural engineer and there was no evidence that the engineer's advice was patently wrong or that it had been used as a pretext to deny the claim, as a matter of law there could be no bad faith. Even though there may be a dispute about the validity of the expert's opinion, where it is not patently wrong, there is no bad faith to rely on the expert. *Montgomery v. Travelers Home & Marine Ins. Co.*, 360 Ga. App. 587, 859 S.E.2d 130 (2021) [Westlaw].

Outside of a claim for bad faith under O.C.G.A. § 10-7-30, Georgia does not permit extracontractual damages against a surety. O.C.G.A. § 13-6-10 states that unless otherwise provided by law, exemplary damages shall never be allowed in cases arising under contracts. In the case *In re Estate of Gladstone*, 303 Ga. 547, 814 S.E.2d 1 (2018) [Westlaw], the Probate Court found that the conservator had grievously violated fiduciary duties and was liable for punitive damages. It then held that the surety was jointly and severally liable for the acts of the conservator, including the punitive damages. The Supreme Court reversed, finding that the conservatorship statutes do not explicitly provide for punitive damages. There is no statute imposing punitive damages on a payment bond surety.

E. Contracts Excluded

All state and local government projects over $100,000 must be bonded, and none are excluded. O.C.G.A. § 13-10-60 (state projects); O.C.G.A. § 36-91-90 (local government projects). Where the governmental entity fails to obtain a bond, unpaid claimants have the right to a direct action against the government to recover their loss. *Atlanta v. United Elec. Co., Inc.*, 202 Ga. App. 239, 414 S.E.2d 251 (1991) [Westlaw].

F. Time for Suit

An action on the payment bond must be brought within one year after completion of the contract and acceptance of the public works. O.C.G.A. § 13-10-65 (state projects); O.C.G.A. § 36-91-95 (local government projects).

The project is completed and accepted for purpose of the Little Miller Act statute of limitations when the owner has occupied the project, even though additional final paperwork by the owner may not be concluded. *United States Fid. & Guar. Co. v. Rome Concrete Pipe Co., Inc.*, 256 Ga. 661, 353 S.E.2d 15 (1987) [Westlaw]; *Safeco Ins. Co. of Am. v. Clay-Ric, Inc.*, 191 Ga. App. 592, 383 S.E.2d 183 (1989) [Westlaw].

In *Strickland v. Arch Ins. Co.*, 718 Fed. App'x 927 (11th Cir. 2018) [Westlaw], work on a highway project had been completed and the project was being used well more than one year before the lawsuit. The claimant argued that the project was not completed and accepted as

required by the Little Miller Act statute of limitations, relying on an email from a Georgia Department of Transportation employee stating that the project had not achieved final acceptance and approval because paperwork was incomplete and testing of materials had not been concluded. This argument was rejected, and the court held that completion and acceptance did not turn on the public authority's public policy and procedure, but rather when the project was put to use. *Id.*

G. Remarks

The surety relationship is one of strict law and will not be extended by implication or interpretation. O.C.G.A. § 10-7-3. This rule contrasts with the treatment of suretyship in other jurisdictions as well as with that of insurance policies, where the language is construed strictly against the insurer.

Title 10, Chapter 7 of the Official Code of Georgia Annotated, provides general rules applicable to all sureties. These statutes may be consulted when considering the coverage provided by a Little Miller Act payment bond:

O.C.G.A.	Title
§ 10-7-1	Contract of suretyship or guaranty defined; liability of surety generally
§ 10-7-2	Nature of obligation of surety
§ 10-7-3	Suretyship not extended by implication
§ 10-7-4	Form of contract immaterial
§ 10-7-20	Effect of release of or compounding with surety
§ 10-7-21	"Novation" defined; effect on surety's liability
§ 10-7-22	Discharge of surety by increase of risk
§ 10-7-23	Refusal to deliver evidence of debt and securities on tender of amount of debt as discharging surety
§ 10-7-24	Refusal to sue principal after notice by surety as discharge
§ 10-7-25	Extending liability
§ 10-7-26	Promise to pay in ignorance of discharge
§ 10-7-27	Provisions of Uniform Commercial Code to control
§ 10-7-28	Process sued out and judgment against surety as such
§ 10-7-29	Judgment against principal and surety at same time

The right of a claimant to claim a lien or to make a claim on a payment bond in Georgia, may not be waived in advance. O.C.G.A. § 44-14-366(b). Any such waiver or release provided by a payment bond claimant must comply with the provisions of O.C.G.A. § 44-14-366(d) (interim payment) or O.C.G.A. § 44-14-366(e) (final payment). This statute provides a form, which must be substantially complied with, and includes requirements as to font. Whenever a claimant has executed a statutory release but has not been paid, the code provides for the filing of an Affidavit of Nonpayment with the Clerk of Superior Court for the county in which the property is located. O.C.G.A. § 44-14-366(g).

H. Case Annotations

Freight Charges

Freight charges are also covered by the Little Miller Act payment bonds. *Sommers Constr. Co. v. Atl. Coast Line R.R. Co.*, 62 Ga. App. 23, 7 S.E.2d 429 (1940) [Westlaw].

Payroll Service

A payroll service is not entitled to recover under the Little Miller Act, even though it is the statutory employer of the laborers. *Gulf Ins. Co. v. GFA Grp., Inc.*, 251 Ga. App. 539, 554 S.E.2d 746 (2001) [Westlaw]. In this case, the contractor, not the payroll service hired and fired employees, directed their work, and controlled their work.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

In the absence of any statute requiring a payment bond on private construction projects, Georgia applies its general rules of construction for suretyship. The surety relationship is one of strict law and will not be extended by implication or interpretation. O.C.G.A. § 10-7-3. This rule contrasts with the treatment of suretyship in other jurisdictions as well as with that of insurance policies, where the language is construed strictly against the insurer. To the contrary, Georgia law construes the bond strictly in the surety's favor. *Tucker Materials (Georgia), Inc. v. Devito Contracting & Supply, Inc.*, 245 Ga. App. 309, 535 S.E.2d 858 (2000) [Westlaw].

The express language of the bond will be enforced, and no construction is "required or even permissible when the language employed by the parties in the contract is plain, unambiguous, and capable of only one reasonable interpretation." *R.J. Griffin & Co. v. Cont'l Ins. Co.*, 230 Ga. App. 822, 497 S.E.2d 586 (1998) [Westlaw].

B. Time for Suit

Suit limitations clauses contained in private bonds are enforceable in Georgia. *Sam Finley, Inc. v. Interstate Fire Ins. Co.*, 135 Ga. App. 14, 15, 217 S.E.2d 358 (1975) [Westlaw]. In the absence of a stated limitations period, the applicable periods are six years for an undertaking simply in writing (O.C.G.A. § 9-3-24) or 20 years for a bond under seal (O.C.G.A. § 9-3-23). In each case, the statute runs from the date on which the claimant first could assert a claim under the bond, *i.e.*, when the bond claim has "matured." *Griffin v. Georgia-Pacific Corp.*, 177 Ga. App. 852, 341 S.E.2d 499 (1986) [Westlaw].

The most common payment bond forms provide a contractual limitations period and establish the accrual trigger. As noted, those provisions will be enforced as stated and construed strictly in favor of the surety. *Tucker Materials (Georgia), Inc. v. Devito Contracting & Supply, Inc.*, 245 Ga. App. 309, 535 S.E.2d 858 (2000) [Westlaw] (limitations accrual from last work "by anyone under the contract" not extended to last work by entities unrelated to contractor).

C. Case Annotations

Notice Requirements

As with Little Miller Act bonds, Georgia has implemented a notice of commencement procedure applicable to lower tier subcontractors and materialmen. O.C.G.A. § 10-7-31. If the general contractor (or owner as contractor) properly files a statutory notice of commencement, and if subcontractors or materialmen with no direct contractual relationship with the contractor fail to provide a proper statutory notice to contractor within 30 days of the contractor's notice or the first delivery of labor, materials, or equipment (whichever is later), then no right of action on the bond is permitted. *Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc.*, 279 Ga. App. 504, 632 S.E.2d 161 (2006) [Westlaw].

In *Sierra Craft, Inc. v. T. D. Farrell Constr., Inc.*, 282 Ga. App. 377, 638 S.E. 2d 815, 819 (2006) [Westlaw], a contractor sought declaratory judgment to limit the lien by a subcontractor's materials supplier to the amount specified in the notice to contractor which was provided pursuant to the notice of commencement procedures. The contractor also sought to have the payment bond substitute for a statutory lien-discharge bond and release the lien from the project property. The superior court found in favor of the contractor, holding that the contractor was entitled to declaratory relief, the notice of commencement substantially complied with the statute, the supplier's notice to contractor did not limit the amount of the supplier's claim under the payment bond, but that the payment bond did not satisfy the requirements of a lien-release bond.

Release of Claims

A release of claim on a private payment bond is only enforceable if given in compliance with O.C.G.A. § 44-14-366. When such a release is signed by the subcontractor or materialman, the claim is barred unless an affidavit of nonpayment is filed as provided in the statute. O.C.G.A. § 44-14-366(g). *ALA Constr. Servs., LLC v. Controlled Access, Inc.*, 351 Ga. App. 841, 833 S.E.2d 570 (2019) [Westlaw] (holding a contractor is entitled to summary judgment where its subcontractor failed to file the affidavit of nonpayment within the time provided by the statute).

Payment Conditions

Georgia enforces conditions precedent to payment by the bond principal, and those conditions likewise may be asserted by the payment bond surety. If the agreement between the principal and the bond claimant included an unambiguous "pay-if-paid" condition, the surety has no duty to pay on the bond unless the principal has been paid. *St. Paul Fire & Marine Ins. Co. v. Ga. Interstate Elec. Co.*, 187 Ga. App. 579, 370 S.E.2d 829 (1988) [Westlaw].

Lower Tier Subcontractors

Where a general contractor sought to exclude a claim from a lower tier subcontractor on a private payment bond that limited rights to subcontractors, the court held that since the term "subcontractor" was not defined, it would apply the Little Miller Act definition and allow a claim from any subcontractor in the chain of privity. *Tonn & Blank, Inc. v. D. M. Asphalt, Inc.*, 187 Ga. App. 272, 370 S.E.2d 30, 32 (1988) [Westlaw].

GUAM

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

On contracts awarded pursuant to the Guam Procurement Law, 5 Guam Code Ann., Ch. 5, and valued more than $25,000, the contractor must obtain a public payment bond in the full amount of the contract. 5 Guam Code Ann. § 5304(a)(2). This amount may be reduced by the Director of Public Works or head of a purchasing agency to 50% of the contract price if authorized by the regulations promulgated by the Policy Office. 5 Guam Code Ann. § 5304(b). The surety who posts the public payment bond must be authorized to do business in Guam or otherwise secured in a manner that is satisfactory to Guam. 5 Guam Code Ann. § 5304(a)(2). The bond is for the protection of all those who supply labor or material to the prime contractor or the subcontractors for the performance of the work in the prime contract. *Id*.

B. Tiers Covered

All those who furnished "labor or material" to the contractor or its subcontractors for the work provided in the contract may bring a claim against the public payment bond required by 5 Guam Code Ann. § 5304. 5 Guam Code Ann. § 5304(d).

C. Notice Required

Claimants who have a direct contractual relationship with a subcontractor, but no direct contractual relationship with the contractor whether express or implied, must provide written notice to the contractor within ninety (90) days after the claimant performed the last of the labor or furnished the last of the material upon which the claim against the public payment bond is made. *Id*. The notice must state with substantial accuracy the amount claimed, the name of the party to whom the material was furnished, supplied, or for whom the labor was done or performed and must be personally served or served by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts its business. *Id*.

D. Coverage

5 Guam Code Ann. § 5304 provides coverage to claimants for "labor or materials" furnished pursuant to the "work provided for in the contract." Notably, the statute does not mention equipment and unfortunately there is little to no reported case law interpreting the statute. In a somewhat analogous setting, Guam's mechanic lien statutes—adopted from California—are interpreted and applied to afford laborers and suppliers the "legislation's remedial purpose." *Apana v. Rosario*, 2000 Guam 7, 17 (Guam 2000) [Westlaw].

1. Labor

a. Professional Services

There is no reported Guam opinion interpreting whether professional services are considered "labor or material" under 5 Guam Code Ann. § 5304 and thus covered under public payment bonds.

b. Union Benefits

There is no reported Guam opinion interpreting whether union benefits are considered "labor or material" under 5 Guam Code Ann. § 5304 and thus covered under public payment bonds.

2. Material

There is no reported Guam opinion interpreting what constitutes "material" under 5 Guam Code Ann. § 5304. The plain language of the statute allows for a supplier of material to make a claim against the public payment bond. *Id*. Further, the statute only requires payment bonds for a "construction contract" that is awarded more than $25,000 for the protection of those who supply "labor and material to the contractor or its subcontractors for the performance of the work provided in the contract." *Id*. Notably, there is no requirement that the materials be furnished for the alteration, repair or construction of a project—only pursuant to an awarded contract. Thus, a supplier who entered a general supply contract (as opposed to a contract to furnish materials for a particular project) might be able to make a claim against a public payment bond.

3. Equipment

a. Repair

5 Guam Code Ann. § 5304 only provides a cause of action against a public payment bond for claimants who furnished "labor or material" to the contractor or its subcontractors for the work provided in the contract, as opposed to equipment itself. There is no reported Guam opinion expressly rejecting or authorizing a repairperson's claim against a public payment bond. Repair does require labor and materials that may provide an avenue of recovery.

b. Rentals

5 Guam Code Ann. § 5304 only provides a cause of action against a public payment bond for claimants who furnished "labor or material" to the contractor or its subcontractors for the work provided in the contract, as opposed to equipment itself. There is no reported Guam opinion expressly rejecting or authorizing a supplier of rental equipment's claim against a public payment bond.

4. Other

a. Attorneys' Fees

Guam follows the American Rule and does not allow for an award of attorneys' fees absent a recognized exception—such as an award authorized by statute, by contract, or pursuant to a court's inherent equitable authority. *Fleming v. Quigley*, 2003 Guam 4, 7 (Guam 2003) [Westlaw]; 7 Guam Code Ann. § 26601(f).

b. Interest

Amounts due to contractors will accumulate interest at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later. 5 Guam Code Ann. § 5475. The legal rate of interest in Guam is 6% per annum. 18 Guam Code Ann. § 47106; *Fid. Enters. v. Nat'l Union Fire Ins. Co.*, 2015 Guam 1, 17 n.1 (Guam 2015) [Westlaw].

c. Financing Charges

Unless financing charges are determined to be part of the cost of "labor or material" furnished for the "work provided in the contract" they would not be recoverable under the public payment bond. 5 Guam Code Ann. § 5304(d).

d. Insurance Premiums

Unless insurance premiums are determined to be part of the cost of "labor or material" furnished for the "work provided in the contract" they would not be recoverable under the public payment bond. 5 Guam Code Ann. § 5304(d).

e. Loans

There is no reported Guam opinion interpreting whether those who loan or advance money to a contractor or subcontractor provide "labor or material" under 5 Guam Code Ann. § 5304 and thus covered under public payment bonds. Under most Little Miller Act payment bonds, claims by lenders against a public payment bond will not be allowed. *See e.g.*, *Primo Team, Inc. v. Blake Constr. Co., Inc.*, 4 Cal. Rptr. 2d 701, 707–08 (Cal. Ct. App. 1992) [Westlaw]; *Integon Indem. Corp. v. Bull*, 842 S.W.2d 1, 4 (Ark. 1992) [Westlaw].

f. Delay Damages

There is no reported Guam opinion allowing delay damages as part of a public payment bond claim. Some jurisdictions hold delay damages are not part of the cost of materials and labor furnished, *see, e.g.*, *W.S.A., Inc. v. Stratton*, 680 F. Supp. 375, 377 (S.D. Fla. 1988) [Westlaw], while others hold the opposite. *See Mai Steel Service, Inc. v. Blake Constr. Co.*, 981 F.2d 414, 420–21 (9th Cir. 1992) [Westlaw]. Under 5 Guam Code Ann. § 5304, a court could allow a claim

against the public payment bond which includes the increased cost of the labor or materials because of a delay.

g. Profits

There is no reported Guam opinion allowing lost profits as part of a public payment bond claim. If the lost profit regards work which was not performed, it will likely not be considered "labor or material" furnished under 5 Guam Code Ann. § 5304 and thus unrecoverable. If the profits claimed are part of the contract price of work performed by the claimant, it seems likely that the claimant would be able to recover that amount against the public payment bond.

h. Extracontractual

There is no reported Guam opinion holding a public payment bond surety liable for punitive damages.

E. Contracts Excluded

Guam law contains no statutory exclusions for certain contracts that otherwise would require a public payment bond pursuant to 5 Guam Code Ann. § 5304.

F. Time for Suit

All suits brought upon a public payment bond must be brought in the Superior Court of Guam and must be commenced no later than one (1) year after the day on which the last of the labor was performed or material was supplied by the claimant. 5 Guam Code Ann. § 5304(e). The claimant cannot bring suit before the expiration of ninety (90) days after the day on which labor or material was last furnished by the claimant. 5 Guam Code Ann. § 5304(d). The obligee named in the bond need not be joined in the suit. *Id*. The terms of the public payment bond may not limit the statutory right to bring a suit within the limitations period. *M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.*, 2016 Guam 35, 68 (Guam 2016) [Westlaw].

G. Remarks

The case law in Guam regarding public payment bonds and the interpretation of "labor or material" within 5 Guam Code Ann. § 5304 ranges from sparse to nonexistent. The official comment to 5 Guam Code Ann. § 5304 states that the provisions within essentially follows the federal Miller Act. 5 Guam Code Ann. § 5304, *cmt.* 1. This could direct a court to consider federal Miller Act precedent in interpreting the statute.

Additionally, Guam adopted many of its statutes from California. Thus, Guam courts will look to California decisions when construing the statutory construction and effect of a particular provision. *Castro v. Peck*, 1998 Guam 2, 8 (Guam 1998) [Westlaw].

H. Case Annotations

Work Prior to the Execution of a Payment Bond

In *Apana*, 2000 Guam at 26 [Westlaw], the Court held that a payment bond containing no retroactive provisions did not cover claims for work performed prior to the execution of the bond. Surety contracts are not retrospective and liability for defaults occurring before execution will only attach if a surety's intent to be held liable is indicated. *Id.* at 24.

Equitable Subrogation

Guam recognizes a person who pays off an encumbrance may assume the same priority as the holder of the encumbrance so long as the subrogee made the payment to protect his own interest, did not act as a volunteer, was not primarily liable for the debt, paid the entire debt, and where the subrogation would not work an injustice to the rights of others. *Guam Hous. & Urban Renewal Auth. v. Pac. Superior Enters. Corp.*, 2001 Guam 8, 21 (Guam 2001) [Westlaw]. A surety relationship is one area where equitable subrogation applies. *Id*. at 22.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Guam does not require a payment bond on private projects. Private parties may still enter a common-law payment bond that is interpreted in accordance with contract law principles. *M Elec. Corp. v. Phil-Gets (Guam) Int'l Trading Corp.*, 2016 Guam 35, 65 (Guam 2016) [Westlaw]. Of course, to the extent the common-law payment bond conflicts with Guam's statutes, the statutes control. *Id*.

Title 18 of the Guam Code Ann., Chapter 32 generally defines the rights and obligations of sureties in Guam. Many of the provisions in this title (as well as the Guam Code Ann. in general) were adopted from California and Guam courts will look to California decisions when construing the statutory construction and effect of a particular provision. *Castro v. Peck*, 1998 Guam 2, 8 (Guam 1998) [Westlaw].

B. Time for Suit

An action upon a common-law payment bond must be brought within four years. 7 Guam Code Ann. § 11303.

C. Case Annotations

Liability Limited by Contract Terms

A surety's obligation is limited to the express terms of the contract. 18 Guam Code Ann. § 32201; *Castro*, 1998 Guam at 17 [Westlaw]. Consequently, in a breach of contract action, a surety cannot be held to more than what a contract prescribes as a penalty. *Id*.

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Haw. Rev. Stat. § 103D-324(a) and 103D-325(a), which are part of Hawaii's Procurement Code, set forth the payment bond form required for public projects in Hawaii. Hawaii has a unified Procurement Code (essentially Hawaii's Little Miller Act, codified at Haw. Rev. Stat. § 103D) that governs public works project for all State, County and City projects.

For projects regulated under Hawaii's Procurement Code, a performance bond and a labor and material payment bond must be provided for construction contracts that exceed $25,000, and the penal sum must be 100% of the contract amount. Haw. Rev. Stat. § 103D-324. Payment bonds are direct right of action bonds. Haw. Rev. Stat. § 103D-324(d) and (e). The bond is for the protection of every person who has furnished labor or materials to the contactor for the work provided in the contract. Haw. Rev. Stat. § 103D-324(d).

B. Tiers Covered

Hawaii's Procurement Code does not specifically identify the tiers covered under a payment bond. The Procurement Code provides that "labor" or "material" is the same as defined in Hawaii's mechanics' lien statute. Haw. Rev. Stat. § 507-41. The Hawaii Procurement Code does not explicitly limit which tiers are covered or not covered in relation to subcontractors or contractors. However, the legislative history of Hawaii's Procurement Code provides that the courts shall be guided by the federal Miller Act in interpreting the Procurement Code. There are no Hawaii court cases that addresses whether the tiers under the federal Miller Act or the broader definition under Hawaii's mechanics' lien statute would govern.

C. Notice Required

All claimants making a payment bond claim must give written notice by registered or certified mail to the contractor and surety. Haw. Rev. Stat. § 103D-324(d). Notably, the written notice may be served at *any* place the contractor or surety maintains an office or conduct business. Id. The written notice must be given within ninety (90) days after the claimant last furnished or supplied labor or materials. Id. There is no specific form that must be required to make a claim, but the written notice must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Id. This written notice requirement is a condition precedent before any suit may be properly initiated. Id.

D. Coverage

As discussed above, Hawaii's Procurement Code does not specify the number of tiers covered under a payment bond. Instead, those persons providing "labor" and "materials" as defined under Hawaii's mechanics' lien statute (Haw. Rev. Stat. § 507-41) are covered under a public works payment bond. Hawaii's mechanics' lien statute has been considered remedial in nature. *Haw. Carpenters' Tr. Funds v. Aloe Dev. Corp.*, 63 Haw. 566, 633 P.2d 1106 (1981) [Lexis].

1. Labor

a. Professional Services

Professional services have been classified as "labor" under Hawaii's mechanics' lien statute to the extent it includes furnishing the plans for or in the supervision of the improvement. Haw. Rev. Stat. § 507-41.

b. Union Benefits

"Labor" also includes union benefits (fringe benefits) under collective bargaining agreements. *Haw. Carpenters' Tr. Funds v. Aloe Dev. Corp.*, 63 Haw. 566, 633 P.2d 1106 (1981) [Lexis].

2. Material

Under Hawaii's Procurement Code, a public works payment bond covers "materials" as defined by Hawaii's mechanics' lien statute. Haw. Rev. Stat. § 507-41.

The lien statute provides that "furnishing of materials" includes the supply of "materials incorporated in the improvement or substantially consumed in construction operations or specially fabricated for incorporation in the improvement; building materials used during construction but not remaining in the improvement, diminished by the salvage value of the materials; transportation to bring the materials to the site of the improvement; tools, appliances, or machinery (but not including hand tools), used during the construction but not in excess of the reasonable rental value for the period of actual use". *Id.*

3. Equipment

a. Repairs

There are no reported Hawaii court decisions related to whether repair to equipment provided on a public works project is covered under a payment bond claim.

b. Rentals

Likewise, there are no reported Hawaii court decisions on whether suppliers of rental equipment are included within the definition of "materials" to assert a payment bond claim. However, under Hawaii's mechanics' lien statute, "machinery (but not hand tools) used during the

construction but not in excess of the reasonable rental value for the period of actual use" is covered. Haw. Rev. Stat. § 507-41. The plain language of Haw. Rev. Stat. § 507-41 appears to indicate that suppliers of rental equipment maybe able to assert a payment bond claim.

4. Other

a. Attorneys' Fees

There is no specific provision under Hawaii's Procurement Code that provides for the award of attorneys' fees related to a claim under a payment bond. However, since a payment bond is a form of contract or in the nature of assumpsit, attorneys' fees could be awarded under Haw. Rev. Stat. § 607-14. A fee award is limited to reasonable attorneys' fees, as determined by the court, not to exceed twenty-five percent (25%) of any judgment. *Id.*

b. Interest

Hawaii's Procurement Code does not address interest payable under a payment bond claim. However, interest may be awarded pursuant to Haw. Rev. Stat. § 636-16. Haw. Rev. Stat. § 636-16 provides that pre-judgment interest may be awarded at the court's discretion in civil cases from the date of breach until the date of judgment. *See also Ameron, Inc. v. Fireman's Fund Ins. Co.*, No. CIV-94-00487-HG, 1995 WL 905000, at *2 (D. Haw. May 1, 1995), *aff'd*, 103 F.3d 137 (9th Cir. 1996) [Lexis] (citing *Schmidt v. Bd. of Dirs. of the AOAO Marco Polo*, 73 Haw. 526, 534, 836 P.2d 479, 483 (1992) [Lexis]). Subcontractors could be entitled to interest at a higher rate under Hawaii's "prompt payment" statute unless there is a "bona fide dispute" regarding the debt. Haw. Rev. Stat. § 444-25; Haw. Rev. Stat. § 103-10.5.

When there is no express written contract fixing a rate, interest shall be allowed at the rate of ten percent (10%) a year for money due on a payment bond after it becomes due. Haw. Rev. Stat. § 478-2. Interest at the rate of ten percent (10%) per year shall be allowed on any judgment recovered before any court in the State of Hawaii, in any civil suit. Haw. Rev. Stat. § 478-3.

c. Financing Charges

There are no reported Hawaii cases allowing finance charges as part of a payment bond claim. Unless deemed part of "labor and materials" furnished for the work provided in the contract, finance charges would not be allowed under a payment bond claim. Haw. Rev. Stat. § 103D-324.

d. Insurance Premiums

There are no reported Hawaii cases allowing insurance premiums as part of a payment bond claim. Unless deemed part of "labor and materials" furnished for the work provided in the contract, insurance premiums would not be allowed under a payment bond claim. Haw. Rev. Stat. § 103D-324.

e. Loans

There are no reported Hawaii cases allowing loans to be a part of a payment bond claim. However, where a mortgage is recorded prior to the date of completion, and all or a portion of the money advanced under and secured by the mortgage is thereafter used for the purpose of paying for the improvement, the mortgagee shall be entitled, to the extent of the payments, to priority over liens of mechanics and materialmen, but no such priority shall be allowed unless the mortgage recites that the purpose of the mortgage is to secure the moneys advanced for the purpose of paying for the improvement in whole or in part. Haw. Rev. Stat. § 507-46.

f. Delay Damages

There are no reported Hawaii cases allowing delay damages as part of a payment bond claim. Unless deemed part of "labor and materials" furnished for the work provided in the contract, delay damages would not be allowed to file a payment bond claim. Haw. Rev. Stat. § 103D-324.

g. Profits

There are no reported Hawaii cases allowing profits as part of a payment bond claim. Unless deemed part of "labor and materials" furnished for the work provided in the contract, delay damages would not be allowed to file a payment bond claim. Haw. Rev. Stat. § 103D-324.

h. Extracontractual

Under Hawaii law, a surety owes a duty of good faith and fair dealing to its principals and obligees. *Bd. of Dir. Of AOAO Discovery Bay v. United Pacific Ins. Co.*, 77 Haw. 358, 884 P.2d 1134 (1994) [Lexis]. In Hawaii, suretyship falls within Hawaii's Insurance Code. Haw. Rev. Stat. § 431:1-210. Thus, case law regarding insurance companies would likely apply to surety companies, including the duty of good faith and fair dealing. *Best Place, Inc. v. Penn Am. Ins. Co.*, 82 Haw. 120, 920 P.2d 334 (1996) [Lexis]. However, the Insurance Code prohibits insuring against punitive damages unless specifically included. Haw. Rev. Stat. § 431:10-240.

E. Contracts Excluded

Under Hawaii's Procurement Code, payment bonds are required all contracts that exceeds $25,000 and are for construction. Haw. Rev. Stat. § 103D-324.

F. Time for Suit

Every person who has furnished labor or materials on a public works project, and who has not been paid within ninety days after last furnishing labor or materials, and who gives the statutory required notices, as set forth above, has the right to bring an action on the payment bond. Haw. Rev. Stat. § 103D-324(d). However, any such action must be brought no later than one year after the date on which the last of the labor was performed or material was supplied. Haw. Rev. Stat. § 103D-324(e).

G. Remarks

Unlike other jurisdictions, Hawaii's Procurement Code [Haw. Rev. Stat. § 103D] is not as robust in defining claims against payment bond claims. Further, since suretyship falls within the ambit of Hawaii's Insurance Code [Haw. Rev. Stat. § 431:1-210], surety companies should be aware of the requirements to act in good faith in dealing with principals and obligees. Punitive damages may be awarded in Hawaii for bad faith tort claims based on the breach of implied covenant of good faith and fair dealing by sureties if the plaintiff can prove by clear and convincing evidence that the surety has "acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Best Place, Inc. v. Penn Am. Ins. Co.*, 82 Haw. 120, 134, 920 P.2d 334, 348 (1996) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Payment bonds on private works projects are not subject to any specific statutory requirements in Hawaii. Instead, those payment bonds are subject to contract interpretation. *Van Dusen v. G.S. Shima Contracting, Inc.*, 4 Haw. App 261, 664 P.2d 753 (1983) [Lexis]. Accordingly, the penal sum of any payment bond is left up to the agreement of the parties. There is no set form for use in private works project for payment bonds. Some payment bond forms use an AIA format while others may use a Miller Act format. Similarly, notice requirements in private payment bonds are up to the parties to negotiate. Thus, payment bonds that mirror Hawaii's mechanics' lien statute [Haw. Rev. Stat. § 507-41] would create notice requirements that would be easy to follow.

B. Time for Suit

Again, since there is no form that is required for private works payment bonds, the deadline to file suit would be up to the parties to negotiate. However, the default provision for time to file suit would be governed by the laws related to contracts. In Hawaii, the general statute of limitations on contracts is six (6) years from the date of breach. Haw. Rev. Stat. § 657-1(1).

C. Case Annotations

Surety Not Liable for Damages Resulting in Delay

A surety has the right to stand upon a provision of a private works performance bond that it will not be liable for damages caused by delay in finishing the contract. *Mayer v. Alexander & Baldwin, Inc.* 56 Haw. 195, 196, 532 P.2d 1007, 1008 (1975) [Lexis].

Payment Bond Is To Be Strictly Construed against the Surety

A provision limiting the time for suit against a surety on its bond is to be strictly construed against the surety. *Honolulu Roofing Co. v. Felix*, 49 Haw. 578, 426 P.2d 298 (1967) [Lexis].

IDAHO

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Before a public works contract equal to or greater than $50,000 is executed, the contractor must furnish to the state or other political subdivision a payment bond that becomes binding upon the execution of the contract. Idaho Code § 54-1926. This public payment bond must amount to no less than 85% of the contract price and is solely for the protection of those supplying labor or materials, or renting, leasing, or otherwise supplying equipment to the contractor or subcontractors in the prosecution of the work provided for in the contract. Idaho Code § 54-1926(2). In lieu of a public payment bond, a contractor may give a government obligation as defined in Idaho Code § 54-1901(2)(h) to the official having authority to approve the surety bond. Idaho Code § 54-1926A(a). The government obligation must be in an amount "equal at fair market value" to the penal sum of the required surety bond and authorize the receiving official to collect or sell the obligation if the contractor defaults. *Id*.

Public payment bonds must be posted by surety companies authorized to do business in Idaho. Idaho Code § 54-1926. The state or contracting authority may not specify a particular surety company that must furnish the public payment bond. *Id*. The public payment bond must be filed with and made payable to the contracting authority awarding the contract. *Id*. If the contracting authority did not require a payment bond but one was required by statute, Idaho Code § 54-1928 provides claimants a right of action against the contracting authority in lieu of a public payment bond.

If the contracting authority requires a public payment bond more than 50% of the total contract amount, the contracting authority may not hold retainage in an amount greater than 5% of the contract amount and must release retainage within thirty (30) days of acceptance of the contractor's performance. Idaho Code § 54-1926(3). Likewise, a contractor may not hold retainage in an amount greater than 5% of a subcontract amount and must release retainage within thirty (30) days of acceptance of the subcontractor's performance. *Id*.

B. Tiers Covered

Those who furnished labor, material, or rented, leased, or supplied equipment in the prosecution of a contract for which a public payment bond was posted under Idaho's Little Miller Act and have a direct contractual relationship, express or implied, with the contractor or a contractual relationship with a subcontractor may sue on the payment bond. Idaho Code § 54-1927. Implied contracts, as used in Idaho Code § 54-1927, include contracts implied–in–fact and recovery in *quantum meruit* but does not include contracts implied–in–law and recovery for unjust enrichment. *Interform Co. v. Mitchell*, 575 F.2d 1270, 1279 (9th Cir. 1978) [Westlaw].

C. Notice Required

A claimant who does not have a direct contractual relationship, expressed or implied, with the contractor furnishing the public payment bond must give written notice to that contractor within ninety (90) days after the claimant last furnished labor, material, or equipment before filing suit against the public payment bond. Idaho Code § 54-1927. The notice period could begin to run after the date of the project's substantial completion, but only if the labor, material or equipment furnished after that date is required by the original contract and not furnished for repair or corrective work. *Evco Sound & Elecs., Inc. v. Seabord Sur. Co.*, 223 P.3d 740, 746 (Idaho 2009) [Westlaw]. The notice must specify the amount claimed and the name of the person to whom the labor, material, or equipment was furnished. Idaho Code § 54-1927.

Further, substantial compliance with the notice requirements that further the purpose of Idaho Code § 54-1927—to protect laborers or suppliers by obligating the contractor to satisfy unpaid claims—is sufficient. *Sch. Dist. v. Taysom*, 495 P.2d 5, 9 (Idaho 1972) [Westlaw] (finding substantial compliance with the notice requirement where claimant provided timely written notice stating the amount claimed with substantial accuracy although the claim did not itemize but aggregated a parent company's and subsidiary's claims and was higher than the amount sought a trial). Likewise, sending written notice by regular mail as opposed to registered or certified mail is not fatal where the written notice was received by the contractor. *Consol. Concrete Co. v. Empire W. Constr. Co.*, 596 P.2d 106, 108–09 (Idaho 1979) [Westlaw].

D. Coverage

Those who furnished labor or material or rented, leased or otherwise supplied equipment to the contractor or its subcontractors in the prosecution of the work under the contract have a right of action against a public payment bond. Idaho Code. §§ 54-1926(2), 54-1927.

Additionally, Idaho's Little Miller Act, taken from the federal Miller Act in 1965, is presumed to have been adopted with the construction of the federal Miller Act as it stood in 1965. *Evco Sound & Elecs., Inc.*, 223 P.3d at 745 [Westlaw]. Federal case law post–adoption provides guidance to Idaho courts interpreting Idaho's Little Miller Act. *See Beco Corp. v. Roberts & Sons Constr. Co.*, 760 P.2d 1120, 1128 (Idaho 1988) [Westlaw] *overruled on other grounds*, *Houghland Farms v. Johnson*, 803 P.2d 978, 979 (Idaho 1990) [Westlaw].

1. Labor

a. Professional Services

There is no reported Idaho opinion interpreting whether professional services are considered "labor or material" under Idaho's Little Miller Act and thus covered under public payment bonds.

b. Union Benefits

There is no reported Idaho opinion interpreting whether union benefits are considered "labor or material" under Idaho's Little Miller Act and thus covered under public payment bonds.

2. Material

Suppliers who furnished material pursuant to a contract for the "construction, alteration, or repair of any public building or public work or improvement" may bring a claim under the public payment bond. Idaho Code §§ 54-1926, 54-1927. Suppliers do not need to make a showing that the materials were substantially consumed on the project, only that the material was furnished for the prosecution of the work. *Weippe ex rel. Les Schwab Tire Ctrs. v. Yarno*, 528 P.2d 201, 204 (Idaho 1972) [Westlaw] (rejecting the "substantial consumption test."). In *Yarno*, the court held the tires and anti-freeze furnished for the project were necessary for the operation of a front-end loader and constituted materials under Idaho Code § 54-1927.

Further, even if materials are not lienable through a mechanics' lien, the supplier may still be able to find recourse against a public payment bond. *Evco Sound & Elecs., Inc.*, 223 P.3d at 745 [Westlaw] ("This Court has rejected the contention that liability for labor and materials under a payment bond should be co-extensive with the type of labor or materials that are lienable under the mechanics' . . . lien statutes.").

Of course, if the material is not used for the "construction, alteration or repair" of a public work, no bond is required. *Rogers v. Nez Perce Cnty.*, 364 P.2d 1049, 1050 (Idaho 1961) [Westlaw] (holding the "crushing and stockpiling of gravel for some future use" was not a contract for the "construction, alteration or repair" and no payment bond was required).

3. Equipment

a. Repair

There is no Idaho opinion interpreting whether a supplier who repairs equipment can make a claim under Idaho's Little Miller Act. Yet, other Idaho opinions provide some guidance. While interpreted as "materials" under Idaho's Little Miller Act, the tires furnished in *Yarno* were for the repair of a front-end loader and were essential for its operation. 528 P.2d at 203 [Westlaw]. A claimant may be able to pursue the payment bond for equipment repair, especially if the service included the furnishment of materials.

b. Rentals

Idaho's Little Miller Act specifically allows suppliers who "rented, leased, or otherwise supplied equipment in the prosecution of the work" to bring claims against the public payment bond. Idaho Code § 54-1927. The statute of limitations begins to run at the end of the project or at the time the equipment is last available for use on the project. *Interform Co. v. Mitchell*, 575 F.2d 1270, 1280 (9th Cir. 1978) [Westlaw].

4. Other

a. Attorneys' Fees

In an action brought upon a public payment bond or against a public body failing to require a public payment bond, the prevailing party shall recover a reasonable attorney fee to be taxed as costs upon each separate cause of action. Idaho Code § 54-1929; *Oldcastle Precast, Inc. v.*

Parktowne Constr., Inc., 128 P.3d 913 (Idaho 2005) [Westlaw]. The failure to grant attorneys' fees constitutes reversible error. *Interform*, 575 F.2d at 1280 [Westlaw]. Idaho Code § 54-1929 also provides attorneys' fees for the prevailing party on appeal. *Evco Sound & Elecs., Inc. v. Seabord Sur. Co.*, 223 P.3d 740, 750 (Idaho 2009) [Westlaw].

Similarly, reasonable attorneys' fees are recoverable in an action by a creditor or claimant of the contractor against a surety if the surety is provided notice of the claim at least sixty (60) days prior to action's filing. Idaho Code § 41-1839.

Absent other applicable statutory provisions, attorneys' fees are also available to a prevailing party in a civil action if the court finds the case was brought, pursued, or defended frivolously, unreasonable, or without foundation. Idaho Code § 12-121. If attorneys' fees are awarded pursuant to Idaho Code § 12-121, the award must be accompanied by written findings of fact stating the basis and reasons for the award. Idaho R. Civ. P. 54(e)(2). Similarly, attorneys' fees may be awarded if an appeal is brought, pursued, or defended frivolously, unreasonably, or without foundation. *Armand v. Opportunity Mgmt. Co.*, 315 P.3d 245, 255 (Idaho 2013) [Westlaw]. Nevertheless, if both parties prevail in part on appeal, the Court will not award attorneys' fees to either party. *Hurtado v. Land O'Lakes, Inc.*, 278 P.3d 415, 425 (Idaho 2012) [Westlaw].

b. Interest

Idaho's Little Miller Act does not contain an interest rate nor is there a reported Idaho opinion analyzing whether a surety is liable to a claimant for pre-judgment interest. Courts in other jurisdictions hold a surety liable for interest if the claimant demands payment from the surety. *See Hartford Accident & Ind. Co. v. Arizona Dept. of Transp.*, 172 Ariz. 564, 838 P.2d 1325 (Ariz. Ct. App. 1992) [Westlaw].

Absent a provision, pre-judgment interest is allowed at 12% per annum on money due by express contract, money after the same becomes due, money lent, money received to the use of another and retained beyond a reasonable time without the owner's consent, money due on the settlement of mutual accounts from the date the balance is ascertained, and money due upon open accounts three months from the date of the last item. Idaho Code § 28-22-104(1). Pre-judgment interest is awarded from the date the amount becomes due, even if that amount is not liquidated, but so long as it "is capable of mathematical computation." *Dillon v. Montgomery*, 67 P.3d 93, 96 (Idaho 2003) [Westlaw]; *AgStar Fin. Servs. v. Northwest Sand & Gravel, Inc.*, 483 P.3d 415, 427–430 (Idaho 2021) [Westlaw].

c. Financing Charges

Unless financing charges are determined to be part of the cost of "labor or material" or "otherwise supplied equipment" furnished "in the prosecution of the work[,]" they would not be recoverable under the statutory payment bond. Idaho Code § 54-1927.

d. Insurance Premiums

Unless insurance premiums are determined to be part of the cost of "labor or material" or "otherwise supplied equipment" furnished "in the prosecution of the work[,]" they would not be recoverable under the statutory payment bond. Idaho Code § 54-1927. In the context of a

mechanics' lien, Idaho's Supreme Court has held that unpaid insurance premiums does not constitute labor, is not consumed within the project, and is otherwise not lienable. *Great Plains Equip. v. Northwest Pipeline Corp.*, 979 P.2d 627, 636 (Idaho 1999) [Westlaw]. Nevertheless, Idaho's Supreme Court repeatedly holds liability under a public payment bond is not co-extensive with the type of labor or materials lienable under the mechanics' lien statutes. *See Evco Sound & Elecs., Inc. v. Seabord Sur. Co.*, 223 P.3d 740, 745 (Idaho 2009) [Westlaw].

e. Loans

There is no reported Idaho opinion interpreting whether those who loan or advance money to a contractor or subcontractor provide "labor or material" under Idaho's Little Miller Act and thus covered under public payment bonds. Under most Little Miller Act payment bonds, claims by lenders against a public payment bond will not be allowed. *See e.g.*, *Primo Team, Inc. v. Blake Constr. Co., Inc.*, 4 Cal. Rptr. 2d 701, 707–08 (Cal. Ct. App. 1992) [Westlaw]; *Integon Indem. Corp. v. Bull*, 842 S.W.2d 1, 4 (Ark. 1992) [Westlaw].

f. Delay Damages

There is no reported Idaho opinion allowing delay damages as part of a public payment bond claim. Some jurisdictions hold delay damages are not part of the cost of materials and labor furnished, *see, e.g.*, *W.S.A., Inc. v. Stratton*, 680 F. Supp. 375, 377 (S.D. Fla. 1988) [Westlaw], while others hold the opposite. *See Mai Steel Service, Inc. v. Blake Constr. Co.*, 981 F.2d 414, 420–21 (9th Cir. 1992) [Westlaw]. Under Idaho's Little Miller Act, a court could allow a claim against the public payment bond which includes the increased cost of the labor or materials because of a delay.

g. Profits

There is no reported Idaho opinion allowing lost profits as part of a public payment bond claim. If the lost profit regards work which was not performed, it will likely not be considered "labor or material" furnished under Idaho's Little Miller Act and thus unrecoverable. If the profits claimed are part of the contract price of work performed by the claimant, it seems likely that the claimant would be able to recover that amount against the public payment bond.

h. Extracontractual

There is no reported Idaho opinion holding a surety liable for punitive damages under a public payment bond. In a different setting, if an insurer "intentionally and unreasonably denies or delays payment" on a claim and harms the claimant in a way that contractual damages cannot fully compensate, the claimant can bring the tort of bad faith. *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014, 1017–18 (Idaho 1986) [Westlaw]. This tort turns on the special relationship between the parties and element of public interest, adhesion, and fiduciary responsibility. *Id.* at 1019. The Idaho Supreme Court declined to extend this tort to a lender-borrower relationship, based upon the lack of a "special-relationship." *Black Canyon Racquetball Club v. Idaho First Nat'l Bank, N.A.*, 804 P.2d 900, 905 (Idaho 1991) [Westlaw]. It is an open question in Idaho whether a surety-obligee's relationship rises to the level of a "special relationship."

E. Contracts Excluded

There are no statutory exclusions under Idaho Law that would exclude certain contracts, that otherwise would require the posting of a public payment bond, from the requirements of Idaho's Little Miller Act.

F. Time for Suit

An action on a public payment bond must be brought within one (1) year from the last date the claimant supplied material, labor, or equipment on the project in the county where the contract was or was to be performed. Idaho Code §§ 54-1927, 54-1928. If the claimant was a subcontractor for the prime contractor, the action must be brought within one (1) year after the date on which the final payment of the subcontract became due. Idaho Code § 54-1927. The action cannot be filed before ninety (90) days after the last date labor, materials, or equipment was furnished. *Id*. The express terms of the public payment bond may extend, but not shorten the time to commence a suit. *Consol. Supply Co. v. Babbitt*, 534 P.2d 466, 471 (Idaho 1975) [Westlaw]; *Weippe v. Yarno*, 486 P.2d 268, 269–70 (Idaho 1971) [Westlaw].

G. Remarks

Whereas Idaho parallels many states by considering federal precedent when interpreting their Little Miller Act, *see Evco Sound & Elecs., Inc. v. Seabord Sur. Co.*, 223 P.3d 740, 745 (Idaho 2009) [Westlaw]; *Beco Corp. v. Roberts & Sons Constr. Co.*, 760 P.2d 1120, 1128 (Idaho 1988) [Westlaw], Idaho distinguishes itself when considering the type of work that is lienable under a mechanics' lien compared to that which is claimable under a public payment bond. *Compare Evco*, 223 P.3d at 745 [Westlaw] (holding liability for work under a public payment bond is not co-extensive with the type of work which is lienable under a mechanics' lien) *with Arizona Gunite Builders, Inc. v. Continental Casualty Co.*, 459 P.2d 724, 725–26 (Ariz. 1969) [Westlaw] (construing mechanics' lien and public bond statutes in *pari materia*) *and Key Agency v. Continental Casualty Co.*, 155 A.2d 547, 551 (N.J. 1959) [Westlaw] ("[T]he Bond Act along with the Municipal Mechanics Lien Law . . . are in *pari materia* and hence must be construed together."). Indeed, Idaho has found liability under a public payment bond for labor and materials which were not lienable under a mechanics' lien. *Evco Sound & Elecs., Inc.*, 223 P.3d at 745 [Westlaw].

Additionally, contractors who fail to register when registration is required may not bring or maintain a payment action for work performed. Idaho Code § 54-5217(2); *ParkWest Homes LLC v. Barnson*, 238 P.3d 203, 208 (Idaho 2010) [Westlaw]. Exemptions exist, such as persons who perform labor or services as employees of unregistered contractors and suppliers. Idaho Code § 54-5205.

H. Case Annotations

Effect of Principal's Default on Surety

Generally, a principal's default will trigger a surety's liability. In Idaho, two exceptions exist to this rule. First, an uncompensated or "gratuitous" surety follow a narrow modification rule—any modification of the underlying agreement without the surety's consent will automatically release the surety from the undertaking. *Gebrueder Heidemann, K.G. v. A.M.R. Corp.*, 746 P.2d 579, 583 (Idaho Ct. App. 1987) [Westlaw]. In contrast, a compensated surety will not be released from an underlying contract modification unless the modification materially increased the surety's risk. *Id*. Note, *Gebrueder Heidemann, K.G.* was decided in the context of a debtor-creditor relationship where a creditor sought to collect from a guarantor, not in the context of a construction contract and a surety's liability under a public payment bond.

Equitable Subrogation

In Idaho, a surety has the right of subrogation to recover from its principal if the surety is required to satisfy the guaranteed obligation. *Hoopes v. Hoopes*, 861 P.2d 88, 91 (Idaho Ct. App. 1993) [Westlaw]. A surety must satisfy certain requirements prior to subrogating. First, the payment must be made pursuant to an obligation or to protect the surety's own interest as opposed to the surety making a payment as a "volunteer." *Id*. Next, the surety must not be primarily liable for the debt paid and the entire debt must be paid. *Id*. Finally, the subrogation must not work an injustice as to the rights of others. *Id*.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Idaho law does not require a payment bond on private projects. Of course, a party may obtain a "common-law bond" to protect the owner, contractor, subcontractors, or suppliers on a private project. Common-law bonds will be interpreted an any other contract, with the caveat that the agreement will be construed strongly in favor of the guarantors. *See J. R. Watkins Co. v. Clark*, 147 P.2d 348, 351 (Idaho 1944) [Westlaw].

B. Time for Suit

Idaho has a five-year limitation period for actions on a common-law bond. Idaho Code § 5-216. Like other contracts, a common-law bond may through its express terms extend, but not shorten the time to commence a suit. *Consol. Supply Co. v. Babbitt*, 534 P.2d 466, 471 (Idaho 1975) [Westlaw].

C. Case Annotations

Economic Loss Doctrine

Idaho bars negligence claims that result in purely economic loss because there is no duty to prevent economic loss to another. *Stapleton v. Jack Cushman Drilling*, 291 P.3d 418, 425 (Idaho

2012) [Westlaw]. This "economic loss doctrine" notably does not bar claims for property damage as it is not a pure economic loss. *Id*. Nevertheless, the economic loss doctrine does prevent the costs to repair and replace defective property that is the subject of the transaction between the parties as well as commercial loss for inadequate value and consequential damages. *Id*. Thus, an owner could not bring a negligence claim against a contractor who installed a defective well that sought damages of drilling a new well and the purchase of water due to the loss of use.

ILLINOIS

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Illinois' "Little Miller Act," the Illinois Public Construction Bond Act (Bond Act), 30 ILCS 550/1, establishes payment bond requirements for public projects in Illinois. The statute requires that contracts for public work of any kind to be performed in Illinois and costing over $50,000 shall require every contractor for the work to furnish a bond to the state or political subdivision thereof.

The Bond Act establishes certain venue requirements. Actions on bonds are required to be brought only in the judicial circuit in which the contract is to be performed. 30 ILCS 550/2.

Additionally, the Illinois code of civil procedure states that every action must be commenced in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining judgment against them or in the county in which the transaction or some part thereof occurred out of which the cause of action arose. 735 ILCS 5/2-101. The Illinois Building and Construction Contract Act also makes a contract that is subject to the laws of another state or that requires any litigation, arbitration or dispute resolution to take place in another state void as against public policy. 815 ILCS 665/10.

Lastly, the Illinois Court of Claims Act provides that the Illinois court of claims shall have exclusive jurisdiction over all claims against the state founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency and all claims against the state founded upon any contract entered into with the State of Illinois. 705 ILCS 505/8.

Additional statutes also require bonds for construction projects. The Illinois Public Building Commission Act, 50 ILCS 20/19 requires that contracts for the construction, repair, alteration, or improvement of any building, the demolition thereof, or removal of debris therefrom contain provisions requiring the contractor to provide a bond in such amount and with such surety as the Board of Commissions may determine.

The Illinois Metropolitan Water Reclamation District Act, 70 ILCS 2605/11.13, requires bonds for contracts relative to construction, rehabilitation, or repair of sanitary district works.

B. Tiers Covered

The Bond Act requires the surety to "pay all persons, firms and corporations having contracts with the principal or with subcontractors" claims due to them for "labor performed or materials furnished in the performance of the contract." 30 ILCS 550/1.

The Bond Act provides coverage to first- and second-tier claimants. 30 ILCS 550/1. No Illinois authority has upheld a Bond Act claim by a supplier to a subcontractor or fourth tier occupant in the contractual chain. *Aluma Sys., Inc. v. Frederick Quinn Corp.*, 206 Ill. App. 3d 828, 564 N.E.2d 1280 (Ill. Ct. App. 1990) [Lexis]. However, no authority specifically excludes third-

and fourth-tier claimants from coverage under the Bond Act either. *Id.* Because the Bond Act requires that all bonds guarantee payment to persons "having contracts with the principal or with subcontractors" it arguably follows that sub-subcontractors and suppliers to subcontractors are statutorily permitted to recover. Id. at 855, 564 N.E. 2d at 1298 [Lexis].

C. Notice Required

The Bond Act requires notice in order to recover. Any person having a claim for labor and/or material must file a verified notice of their claim with the officer, board, bureau, or department awarding the contract within 180 days after the date of the last item of work or the furnishing of the last item of materials. A copy of the verified notice must be furnished to the contractor within 10 days of filing the notice with the agency awarding the contract. 30 ILCS 550/2.

The notice must contain the (1) name and address of the claimant, (2) the name of the contractor for the government, (3) the name of the person, firm or corporation by whom the claimant was employed or to whom he furnished materials, (4) the amount of the claim, and (5) a brief description of the public improvement sufficient for identification. Defects in the notice will not deprive that claimant of their right to action unless it would prejudice the rights of an interested party.

Should the claimant fail to give notice 180 days after it supplied materials to the project, the claimant's lack of notice will be fatal to its claim. *See Crainville v. Argonaut Ins. Co.*, 469 F. Supp. 11, 13–14 (E.D. Ill. 1976) [Lexis]. A claimant will remain in compliance should it give notice to the surety within 180-days of the claimant's last work but then give notice to the government outside the 180-day period. *City of DeKalb ex rel. Int'l Pipe and Ceramics Corp. v. Sornsin*, 32 Ill. 2d 284, 205 N.E.2d 254 (Ill. 1965) [Lexis].

Work that is corrective or reparative will not toll the 180-day notice requirement. Under the Bond Act, corrective work and repair work are not considered the "last item of work" and thus are not considered when calculating the 180-day notice requirement. *MQ Constr. Co. v. Intercargo Ins. Co.*, 318 Ill. App. 3d 673, 742 N.E.2d 820 (Ill. Ct. App. 2000) [Lexis].

D. Coverage

All of the state's public works payment and performance bonds are governed by the Bond Act. The surety is free to contract with the state or political subdivision for additional liability that exceeds the statutory provisions. *Ill. State Toll Highway Comm'n. ex rel. Pattern Tractor & Equip. Co. v. M. J. Boyle & Co.*, 38 Ill. App. 2d 38, 186 N.E.2d 390, 396 (Ill. Ct. App. 1962) [Lexis].

1. Labor

a. Professional Services

There is no legal authority in Illinois on whether professional services are covered by the Bond Act. However, it is a well settled principle that design professional work that does not constitute labor or materials is not covered by the Miller Act. *U.S. ex rel. Thayer v. Metro Constr. Corp.*, 330 F. Supp. 386 (E.D. Va. 1971) [Lexis].

b. Union Benefits

Union benefits are covered as fringe benefits necessary to complete performance of a public works bond. *Valley View Sch. Dist. 365-U ex rel. IBEW Local 176 Health, Welfare, Pension, Vacation, & Training Trust Fund Trs. v. Hartford Fire Ins. Co.*, 2018 IL App (3d) 150477-U ¶ 23 (Ill. Ct. App. June 18, 2018) [Lexis]. The court in *Valley View* found authority from the Illinois Supreme Court holding in *Lake County Grading Co., LLC v. Village of Antioch*, holding that payment required under a construction contract is an element of performance covered by the Bond Act. 2014 IL 115805, 19 N.E.3d 615 (Ill. 2014) [Lexis]. The court found additional authority from Illinois' Prevailing Wage Act, which requires that public entities "require in all contractor's and subcontractor's bonds that the contractor or subcontractor include such provision as will guarantee the faithful performance of such prevailing wage clause as provided by contract or other written instrument." 820 ILCS 130/4(c).

2. Material/Machinery

A supplier of machinery may be entitled to recover under the bond even if the machinery is not entirely consumed in the project. *Ill. State Toll Highway Comm'n. ex rel. Patten Tractor & Equip. Co. v. M. J. Boyle & Co.*, 38 Ill. App. 2d 38, 186 N.E.2d 390, 397–98 (Ill. Ct. App. 1962) [Lexis].

3. Equipment

a. Repairs

The costs of parts and labor to repair a crane damaged by operator negligence were not covered under the Bond Act. *Arrow Contractors Equip. Co. v. Siegel*, 68 Ill. App. 2d 447, 216 N.E.2d 181, 188 (Ill. Ct. App. 1966) [Lexis].

b. Rentals

The Bond Act specifically includes rented items that are on the construction site and those rented tools that are used or consumed on the construction site in the performance of the contract as covered under the act. 30 ILCS 550/1. Courts in other jurisdictions have ruled that payment bonds do not cover claims for damage to or loss of equipment, unless such damage or loss was an expected result of its use, which generally means the equipment is "consumed" or suffered from normal wear and tear (as opposed to, for example, negligence). *See U.S. ex rel. Rent It Co. v. Aetna Cas. & Sur. Co.*, 988 F.2d 88, 90 (10th Cir. 1993) [Lexis] ("the repairs were not for ordinary wear and tear--they were for damage caused by Sid's negligent use of the equipment."); *but see Moran Towing Corp. v. M. A. Gammino Constr. Co.*, 363 F.2d 108, 115 (1st Cir. 1966) [Lexis] ("in the case of rented equipment, not only does the surety's obligation include the rental, but if the principal has undertaken to repair, or to assume the expense of ordinary wear and tear, its failure to perform in this respect may be a matter covered by the bond"). Courts applying Little Miller Acts have concluded the same. *See Harsco Corp. v. Gripon Constr. Corp.*, 301 A.D.2d 90, 97 (N.Y. Ct. App. 2002) [Lexis] ("absent express language to the contrary, the surety on a State

Finance Law § 137 bond is obligated to pay only for the unreturned rental equipment which the parties reasonably anticipated would be consumed in the work").

As part of this analysis, including as to whether the parties "expected" such damage, courts also look to the language of the underlying contract, specifically to determine whether any particular party assumed this risk. *See* *Transamerica Premier Ins. Co. v. Ober*, 894 F. Supp. 471, 484 (D. Me. 1995) [Lexis]; *U.S. ex rel. Wyatt & Kipper Eng'rs, Inc. v. Ramstad Constr. Co.*, 194 F. Supp. 379, 382 (D. Alaska 1961) [Lexis] ("The complaint does not appear to be founded upon negligence, as claimed by defendant, but rather upon the express covenant of the contract with respect to transporting the tools"); *U.S. ex rel. Gorski Assocs. v. Chem. Waste Mgmt.*, No. CIV. A. 93-2608, 1994 WL 45145, at *10–11 (E.D. Pa. Feb. 14, 1994) [Lexis] (destruction of property during excavation was damage that was 'expected as a normal incident to the project,' rendering the property 'consumable material.' Moreover, in the Purchase Order Contract provided that this consumption would be its responsibility).

4. Other

a. Attorneys' Fees

The Bond Act does not provide for attorney's fees. Illinois follows the "American Rule," providing that absent statutory authority or a contractual agreement, each party is responsible for their own attorney fees. *See* *Cent. Laborers' Pension Fund v. Fid. & Deposit Co. of Md.*, No. 2-17-0781, 2019 IL App (2d) 170781-U (Ill. Ct. App. April 12, 2019) [Lexis].

A court may refuse to apply language in the prime contract providing for attorney's fees to the claims of a subcontractor against a surety, even where the prime contract was incorporated by reference. *Capital Dev. Bd. ex rel. P. J. Gallas Elec. Contractors, Inc. v. G. A. Rafel & Co.*, 143 Ill. App. 3d 553, 493 N.E.2d 348 (Ill. Ct. App. 1986) [Lexis]. In *Central Laborers' Pension Fund v. Fidelity & Deposit Co. of Maryland*, the same court clarified that a surety may be liable if the bond incorporated the construction contract by reference and the contract allowed for attorney fees. 2019 IL App (2d) 170781-U [Lexis].

b. Interest

The Illinois Interest Act requires that creditors receive 5% interest per annum on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; or on money due on the settlement of account from the day of liquidating accounts between parties. 815 ILCS 205/2. Parties may agree to a higher rate of interest in written contract, limited to 9% per annum. 815 ILCS 205/4.

The Local Government Prompt Payment Act requires contractors that fail to make any payments to subcontractors, without reasonable cause, within 15 days after receipt of payment under a public construction contract to pay subcontractors and material suppliers 2% interest per month. 50 ILCS 505/9. The payments are calculated from the expiration of the 15-day period until fully paid. *Id.*

A claimant may recover prejudgment interest where it accrues after filing suit. *DOT ex rel. Moline Consumers Co. v. Am. Ins. Co.*, 199 Ill. App. 3d 1068, 557 N.E.2d 932 (Ill. Ct. App. 1990) [Lexis]; *Griffin Wellpoint Corp. v. Engelhardt, Inc.*, 92 Ill. App. 3d 252, 414 N.E.2d 941, 950 (Ill. Ct. App. 1980) [Lexis]; *Fisher v. Fid. & Deposit Co.*, 125 Ill. App. 3d 632, 466 N.E.2d 332 (Ill.

Ct. App. 1984) [Lexis]; *Capital Dev. Bd. ex rel. P. J. Gallas Elec. Contractors, Inc. v. G. A. Rafel & Co.*, 143 Ill. App. 3d 553, 493 N.E.2d 348, 353–54 (Ill. App. Ct. 1986) [Lexis].

A surety may be liable for prejudgment interest from the date final payment was due to the claimant under its contract with the principal. *Premier Elec. Constr. Co. v. Am. Nat'l Bank,* 276 Ill. App. 3d 816, 658 N.E.2d 877, 889 (Ill. Ct. App. 1995) [Lexis].

c. Financing Charges

There is no legal authority in Illinois on whether a claimant may recover finance charges relating to a payment bond claim. However, under the Miller Act, a clamant can recover accrued finance charges on an unpaid balance. *See U.S. ex rel. Debourgh Mfg. Co. v. GSC Constr., Inc.*, Case No. 4:16-CV-370(CDL), 2017 WL 5505012 (M.D. Ga. Nov. 16, 2017) [Lexis]; *U.S. ex rel. Big 4 Rents v. Ogamba*, No. C-96-4301-VRW, 1997 WL 414193 (N.D. Ca. July 14, 1997) [Lexis].

d. Insurance Premiums

There is no legal authority in Illinois on whether a claimant may recover insurance premiums under a payment bond. However, the majority view under the Miller Act limits the scope of the Miller Act to its intended meaning and workers' compensation and general liability insurance premiums are not "labor and materials" as those terms are defined in the Miller Act. *See U.S. ex rel. Cobb-Strecker-Dunphy & Zimmerman, Inc. v. M.A. Mortenson Co.*, 894 F.2d 311 (8th Cir. 1990) [Lexis].

e. Loans

There is no legal authority in Illinois on whether a claimant can recover on a loan under a payment bond. However, other courts have rejected attempts by a lender bank to sue under a Miller Act bond. *See U.S. ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070 (9th Cir. 1989) [Lexis]; *U.S. ex rel. First Continental Nat'l Bank & Trust Co. v. Western Contracting Corp.*, 341 F.2d 383 (8th Cir. 1965) [Lexis].

f. Delay Damages

Under the Illinois Insurance Code, any action by or against a company wherein there is in issue the liability of a company on a policy of insurance or the amount of the loss payable for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, plus an amount not to exceed any one of the following amount (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action. 215 ILCS 5/155.

In Illinois contracts for compensated surety are arguably treated as contracts of insurance. *Fisher v. Fid. & Deposit Co.*, 125 Ill. App. 3d 632, 641–42, 466 N.E.2d 332, 339-340 (Ill. App. Ct. 1984) [Lexis]. Insurers may enforce their legal rights so long as they maintain a duty of good faith and fair dealing when handling claims. *Id.* A successful cause of action for vexatious and

unreasonable delay must allege facts showing that a surety's conduct was willful, wanton, malicious, reckless, intentional, or in bad faith. *Id.* A court will examine the totality of the circumstances in determining vexatious delay. *Id.* The Illinois Insurance Code preempts common law actions for recovery of punitive damages for refusal to pay. *Id.* Bad faith involves insurer misconduct that is similar to unreasonable and vexatious misconduct, although courts have not recognized it as an independent common-law tort. *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 524–31 (Ill. 1996) [Lexis].

g. Profits

Plaintiff 's claim against surety for lost profits was properly dismissed for failure to comply with this Act's six-month limitations period, regardless of the fact that a performance bond provided that a surety would pay all valid claims and demands whatsoever, because, by operation of law, the public construction bond must comply with this Act. *Concrete Structures of Midwest, Inc. v. Fireman's Ins. Co.*, 790 F.2d 41 (7th Cir. 1986) [Lexis].

h. Extracontractual

The Illinois Insurance Code preempts common law actions for recovery of punitive damages for refusal to pay. *Fisher v. Fid. & Deposit Co.*, 125 Ill. App. 3d 632, 641–42, 466 N.E.2d 332, 339-340 (Ill. Ct. App. 1984) [Lexis]. Additionally, contracts for compensated surety are arguably treated as contracts of insurance. *Id.* For this reason, common law actions for punitive damages are unavailable remedies.

E. Contracts Excluded

Public works contracts under $50,000 are excluded from the Bond Act. 30 ILCS 550/1.

The Bond Act provides that when motor fuel tax funds, federal-aid funds, or other funds received from the state are used, a political subdivision may allow the contractor to provide a non-diminishing irrevocable bank letter of credit, in lieu of the bond required by the Bond Act, on contracts under $100,000. 30 ILCS 550/1. Any such bank letter of credit must still contain all provision required for bonds under the Bond Act. *Id.*

To reduce barriers for entry for smaller businesses, the statute contains an exemption under a 5-year pilot program, effective January 2023. Under this program, the Department of Transportation *may* allow a contractor to provide a non-diminishing irrevocable bank letter of credit in lieu of a bond for contracts under $500,000. *Id.*

F. Time for Suit

Under the Bond Act, no action may be brought later than 6 months after the acceptance by the state or political subdivision of the building project or work. 30 ILCS 550/2. When determining a date for acceptance, Illinois courts will first look for a definition of acceptance in the underlying contract. *Chi. Hous. Auth. v. U.S. Fid. & Guar. Co.*, 49 Ill. App. 2d 407, 199 N.E.2d 217 (Ill. Ct. App. 1964) [Lexis]. However, in *United City of Yorkville v. W. J. Lewis Construction Co.*, the court held that final payment on the engineer's certificate of completion constituted acceptance for purposes of the Bond Act. 48 Ill. App. 2d 463, 198 N.E.2d 863 (Ill. Ct. App. 1964) [Lexis].

A claimant may bring suit for breach of contract outside of the Bond Act statutory limitations period. In *Ardon Electric Co. v. Winterset Construction, Inc.*, the appellate court held that because the suit was for breach of contract and not on the bond, the Bond Act limitations period was not applicable. 354 Ill. App. 3d 28, 820 N.E.2d 21 (Ill. Ct. App. 2004) [Lexis].

G. Remarks

a. Mechanics' Lien Act

Under the Illinois Mechanics' Lien Act, § 23, a "person furnishing material or labor to a contractor having a contract for the improvement of a public work 'shall have a lien for the value thereof on the money, bonds, or warrants due or to become due the contractor having a contract with such county, township, school district, municipality or municipal corporation in the State under such contract." 770 ILCS 60/23.

Unlike the Bond Act, the Mechanics' Lien Act has no venue requirement. Because the Mechanics' Lien Act is a distinct remedy from the Bond Act, an obligee does not have standing to compel a surety to pay lien claims. *Nw. Water Com. v. Carlo V. Santucci, Inc.*, 162 Ill. App. 3d 877, 899, 516 N.E.2d 287, 302 (Ill. App. Ct. 1987) [Lexis].

It is undecided whether all items that are lienable pursuant to the Mechanics' Lien Act are also covered under the Bond Act. If a bond does not provide coverage broader than the statutory requirements of the Bond Act, items not consumed in the construction process are not covered under the bond. *Aluma Sys., Inc. v. Frederick Quinn Corp.*, 206 Ill. App. 3d 828, 853, 564 N.E.2d 1280, 1296 (Ill. App. Ct. 1990) [Lexis]. Because the Bond Act is interpreted to protect those furnishing labor or materials and to protect public funds, a court reasoned that the Mechanics' Lien Act is broad enough to cover the hauling of debris and delivery of raw materials. *Luise, Inc. v. Vill. of Skokie*, 335 Ill. App. 3d 672, 686, 781 N.E.2d 353, 364 (Ill. App. Ct. 2002) [Lexis].

b. Pay-When-Paid Clauses

Pay-when-paid clauses have been upheld in Illinois in favor of a contractor against a subcontractor where the owner was insolvent and failed to pay the contractor. *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.*, 132 Ill. App. 3d 325, 329–30 477 N.E.2d 30, 33–34 (Ill. App. Ct. 1985) [Lexis]. A payment bond surety, however, cannot rely on its principal's pay-when-paid defense where the terms of the subcontract were not incorporated by reference. *Brown & Kerr Inc. v. St. Paul Fire & Marine Ins. Co.*, 940 F. Supp. 1245, 1249 (N.D. Ill. 1996) [Lexis]. To allow such a scenario would run counter to the underlying purpose of the payment bond, *i.e.*, the assurance of payment to subcontractors. *Id.*; *see also* *Premier Elec. Constr. Co. v. Am. Nat'l Bank*, 276 Ill. App. 3d 816, 213 Ill. Dec. 128, 658 N.E.2d 877 (Ill. App. Ct. 1995) [Lexis].

c. Pay-If-Paid Clauses

In the typical pay-if-paid clause, the subcontractor will be paid *only if* the contractor is paid and thus ensures that each contracting party bears the risk of loss only for its own work. A properly construed pay-if-paid clause must have condition-precedent language that is clear and sufficient on its face to unambiguously demonstrate the parties' intent that the subcontractor would not be paid unless the contractor is paid. *Beal Bank Nev. v. Northshore Ctr. THC, LLC*, 2016 IL App (1st)

151697, 64 N.E.3d 201 (Ill. App. Ct. 2016) [Lexis]. Without clear intent to allocate the risk of nonpayment to the subcontractor, an Illinois court will not create such a risk. *Id.*

d. Preclusivity of Judgment

Before a judgment against its principal can preclusively establish liability against the surety, the surety is entitled to receive notice and an opportunity to defend. *United States ex rel. Frontier Constr., Inc. v. Tri-State Mgmt. Co.*, 262 F. Supp. 2d 893, 897 (N.D. Ill. 2003) [Lexis].

e. Third-Party Beneficiaries

The statutory language incorporated into every bond does not convert payment guarantees into performance guarantees. Thus, an obligee is not an intended third-party beneficiary of a payment bond. *Bd. of Educ. v. Hartford Accident & Indem. Co.*, 152 Ill. App. 3d 745, 752–54, 504 N.E.2d 1000, 1006 (Ill. App. Ct. 1987) [Lexis]. Additionally, because the Mechanics' Lien Act is a separate and distinct remedy from the Bond Act, an obligee does not have standing to compel a surety to pay lien claims. *Nw. Water Com. v. Carlo V. Santucci, Inc.*, 162 Ill. App. 3d 877, 516 N.E.2d 287 (Ill. App. Ct. 1987) [Lexis].

A third-party beneficiary contract action can be asserted by an unpaid subcontractor against a public entity where such public entity has failed to procure from the general contractor a payment bond as required by the Bond Act. *Shaw Indus. v. Cmty. Coll. Dist. No. 515*, 318 Ill. App. 3d 661, 741 N.E.2d 642 (Ill. App. Ct. 2000) [Lexis], *limited by Lake County Grading Co., LLC v. Antioch*, 2013 IL App (2d) 120474, 985 N.E.2d 638 (Ill. App. Ct. 2013) [Lexis], *rev'd*, 385 Ill. Dec. 683, 19 N.E.3d 615 (Ill. 2014) [Lexis].

f. Subrogation

A surety's subrogation rights to recover amounts paid for completion of a construction contract and pursuant to a performance and payment bond are subject to the federal government's right of setoff. *U.S. v. Maxwell (In re Pyramid Indus.)*, 170 B.R. 974 (Bankr. N.D. Ill. 1994) [Lexis].

Should the principal assign all of its right under future contracts to the surety, and the surety issue performance and payment bonds on behalf of the principal, the assignment will have granted the surety an unperfected security interest in contract proceeds until the principal is declared in default and the surety is required to perform under the bonds. The completing surety will have subrogated to the rights of the owner. *Capitol Indem. Corp. v. U.S.*, 41 F.3d 320, 325–26 (7th Cir. 1994) [Lexis].

H. Case Annotations

In *Lake County Grading Company, LLC v. Village of Antioch*, the Illinois Supreme Court established that a bond subject to the Bond Act necessarily includes both a payment obligation and a performance obligation. 2014 IL 115805, 19 N.E.3d 615 (Ill. 2014) [Lexis]. A developer obtained four subdivision bonds conditioned on completion of certain improvements. The Village of Antioch paid for the improvements from the proceeds of two bond issues. The plaintiff, a subcontractor, performed work on the improvements but asserted it was not fully paid. The

plaintiff sued the Village and alleged that the Village had failed to obtain payment bonds as required under the Bond Act. The plaintiff argued that it was the third-party beneficiary of the Village's obligation to obtain a payment bond and could thus sue the Village for breach of contract. The Village argued that the Bond Act provided that both payment and performance obligations were deemed included in the bond pursuant to Section 1 of the Bond Act, thus the Village had met its obligation under the statute and the plaintiff was not paid because it failed to give timely notice of its claim as required under Section 2 of the Bond Act.

The parties and court stipulated that the improvements were public works subject to the Bond Act. The court found that the "deemed to include" provision read into the bond a payment provision. The Village, therefore, did not breach its obligation to require a payment bond. The court reasoned that any bond given to comply with Section 1 of the Bond Act necessarily included both a performance and a payment obligation, even where one of those obligations was not specifically included in the actual terms of the bond.

§ 2.0 PRIVATE PAYMENT BONDS

Illinois has no statute requiring payment bonds for private works contracts.

A. Rules of Construction

It is in the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts. *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55, 949 N.E. 2d 639, 644 (Ill. 2011) [Lexis]; *First Nat'l Bank v. Malpractice Research*, 179 Ill. 2d 353, 359, 688 N.E.2d 1179, 1182 (Ill. 1997) [Lexis]. Consequently, the power to declare a private contract invalid on public policy grounds is exercised sparingly. *Phoenix*, 242 Ill. 2d at 55 [Lexis]; *Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 129, 828 N.E.2d 1175, 1180 (Ill. 2005) [Lexis].

"[A]n agreement creating a secondary obligation, *i.e.*, a suretyship, is a contract" and therefore courts construe bonds according to ordinary contract principles. *Liberty Mut. Ins. Co. v. Constr. Mgmt. Servs., Inc.*, No. 99 C 6906, 2004 WL 2271811 (N.D. Ill. Oct. 6, 2004) [Lexis] (internal citations omitted).

B. Time for Suit

The parties to a contract may agree to a shortened contractual limitation period to replace a statute of limitations, so long as it is reasonable. *Zerjal v. Daech & Bauer Constr., Inc.*, 405 Ill. App. 3d 907, 915, 939 N.E.2d 1067, 1075 (Ill. App. Ct. 2010) [Lexis]; *Medrano v. Prod. Eng'g Co.*, 332 Ill. App. 3d 562, 575, 774 N.E.2d 371, 382 (Ill. App. Ct. 2002) [Lexis]; *Bd. of Educ. v. Hartford Accident & Indem. Co.*, 152 Ill. App. 3d 745, 752–54, 504 N.E.2d 1000, 1006 (Ill. App. Ct. 1987) [Lexis].

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§ 1.0 PUBLIC PAYMENT BONDS

This chapter focuses on bonds issued for public works contracts. Indiana does not require contractors to furnish a bond for private projects. Depending on the type of public project, there are various statutory bond requirements. In general, Indiana has four public works bond statutes set forth in Indiana Code § 4-13.6-7-1 *et seq*. ("Title 4"); Indiana Code § 5-16-5-1 *et seq*. ("Title 5"); Indiana Code § 8-23-9-1 *et seq*. ("Title 8"); and Indiana Code § 36-1-12-1 *et seq*. ("Title 36").

- Title 4 projects involve the construction, alteration, or repair of a public building or improvement owned by the State of Indiana.
- Title 5 projects involve work performed under contract at the expense of the state or a commission created by law and not covered by Title 4.
- Title 8 projects involve the construction, improvement, or maintenance of a highway or bridge in the state highway system, or the construction or repair of a structure for the Department of Transportation.
- Title 36 projects are local public works projects paid for by a public fund or out of a special assessment.

A. Requirements for Bond

Amount of Contract[1]	**Amount of Bond**
Contracts > $200,000	Equal to the Contract Price
Contracts ≤ $200,000	No statutory bond requirement but *may* be required by public entity.

1. Title 4 Projects

For contracts exceeding $200,000, a payment bond *must* be provided in an amount equal to one hundred percent (100%) of the total contract price. Ind. Code § 4-13.6-7-6. The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price. *Id.*

For contracts less than or equal to $200,000, a payment bond *may* be required in an amount equal to any percentage but no more than 100% of the cost of the project; or a withheld retainage amounting to 10% of the value of all payments made to the contractor until the public work is substantially completed. Ind. Code § 4-13.6-7-6(f).

The bond shall include at least the following provisions:

(1) The contractor, its successors and assigns, whether by operation of law or otherwise, and all subcontractors, their successors and assigns, whether by operation of law or otherwise, shall pay all indebtedness that may accrue to any

[1] This chart is applicable to contracts governed by the general provisions of Titles 4, 5, 8, and 36. Public Private Partnership and Build-Operate-Transfer arrangements have separate requirements addressed specifically herein.

> person on account of any labor or service performed or materials furnished in relation to the public work.
> (2) The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.
> (3) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.
> (4) The provisions and conditions of Ind. Code § 4-13.6-7-6 shall be a part of the terms of the contract and bond.

Ind. Code § 4-13.6-7-6.

2. Title 5 Projects

For contracts exceeding $200,000, a combination performance and payment bond *must* be provided in an amount equal to the contract price. There is an exception to this requirement if the contract is entered into by a state education institution, is less than ($500,000), and the state educational institution agrees to waive the bonding requirement. Ind. Code § 5-16-5.5-2; Ind. Code § 5-16-5-2. There is a separate carve-out for the design services portion of a design-build project. Ind. Code § 5-30-8-4(b). There is no bond requirement for contracts which do not exceed $25,000. Ind. Code § 5-16-1-1.1.

The bond shall be deposited with the public body for the benefit of a person interested in and entitled to the bond. It shall be conditioned that: (1) a change, modification, omission, or addition in and to the terms or conditions of the contract, plans, specifications, drawings, or profile; or (2) any irregularity or defect in the contract or in the proceedings preliminary to the letting and awarding of the contract; does not affect or operate to release or discharge the surety. Ind. Code § 5-16-5-2(b).

3. Title 8 Projects

A payment bond *must* be provided in an amount equal to the contract price for contracts in excess of $200,000, or an amount set by the commissioner not less than the bidder's proposal or the contract price. Otherwise, a payment bond *may* be required for contracts not exceeding $200,000. Ind. Code § 8-23-9-8 & -9. The bond provided in this section must be in substantially the following form:

> KNOW ALL PERSONS BY THESE PRESENTS, THAT _____ as principal and _____ as surety, are firmly bound unto the state of Indiana in the penal sum of an amount equal to ____ percent of the principal's bid or the contract price, if the proposal is accepted for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and our joint and several heirs, executors, administrators, and assigns, firmly by these presents, this ____ day of _____, ____.
> THE CONDITIONS OF THE ABOVE OBLIGATIONS ARE SUCH That, Whereas, the principal is herewith submitting a bid and proposal for the erection, construction, and completion of _____ in accordance with the plans and

> specifications approved and adopted by the department, which are made a part of this bond:
>
> NOW, THEREFORE, if the department shall award the principal the contract for work and the principal shall promptly enter into a contract with the department in the name of the state of Indiana for the work and shall well and faithfully do and perform the same in all respects according to the plans and specifications adopted by the department, and according to the time, terms, and conditions specified in the contract to be entered into, and in accordance with all requirements of law, and shall promptly pay all debts incurred by the principal or any subcontractor in the construction of the work, including labor, service, and materials furnished, then this obligation shall be void; otherwise to remain in full force, virtue, and effect.
>
> IT IS AGREED that no modifications, omissions, or additions in or to the terms of such contract or in or to the plans or specifications therefor shall in any wise affect the obligation of such sureties on its bond.
>
> IN WITNESS WHEREOF, we hereunto set our hands and seals this ___ day of _____, 20__.

Ind. Code § 8-23-9-12.

4. Title 36 Projects

A payment bond *must* be provided in an amount equal to the contract price for contracts in excess of $200,000. Otherwise, a payment bond *may* be required for contracts not exceeding $200,000. Ind. Code § 36-1-12-13.1. A payment bond is not required under this Title if the capital improvement is by, for, or on behalf of the Indiana Stadium and Convention Building Authority created by Ind. Code § 5-1-17-6. Ind. Code § 36-1-12-13.1. After a public notice and hearing, the board may waive any payment bond requirement, if certain conditions are met. Ind. Code § 36-1-12-13.1.

The bond must state that it is for the benefit of the subcontractors, laborers, material suppliers and those performing services. The bond must specify that: (1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile; (2) a defect in the public work contract; or (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract; does not discharge the surety. Ind. Code § 36-1-12-13.1(b).

5. Build Operate Transfer ("BOT agreement") and Public-Private-Partnership ("P3" agreements")

If the agreement is between a governmental body and an operator to construct, operate, and maintain a public facility and to transfer the public facility back to the governmental body at an established future date, also known as a "BOT agreement," a payment bond in an amount not less than 100% of the cost to design and construct the public facility must be issued, regardless of the amount of the contract price. Ind. Code § 5-23-2-3; Ind. Code § 5-23-3-2.

If the agreement is a public-private agreement between the operator and the department that relates to the combination of the development, financing, or operation of a qualifying project and is entered into under Ind. Code § 8-15.7 *et seq.*, a payment bond must be issued in an amount

not less than 100% of the cost to design and construct the project, regardless of the amount of the contract price. Ind. Code § 8-15.7-2-15; Ind. Code § 8-15.7-5-1.5.

B. Tiers Covered

1. Title 4 Projects

The statute does not specifically define the tiers of claimants entitled to make a claim on the bond. However, the statute does define "subcontractor" and "supplier" so as to likely prevent a third-tier claimant from asserting a claim on a payment bond. Ind. Code § 4-13.6-7-6, Ind. Code § 4-13.6-1-18, Ind. Code § 4-13.6-1-20. Such an interpretation was favorably viewed by Indiana's Supreme Court when relying upon Title 4's definitions of subcontractor and supplier to resolve a related claim under Title 8. *See Alberici Constructors, Inc. v. Ohio Farmers Ins. Co.*, 866 N.E.2d 740 (Ind. 2007) [Lexis].

2. Title 5 Projects

The statute does not specifically define the tiers of claimants entitled to make a claim on the bond. Ind. Code § 5-16-5-2. Though, the applicable statue defines subcontractor "as any person, firm, limited liability company, or corporation who is a party to a contract with the contractor and who furnishes and performs on-site labor on any public building, work or improvement. It also shall include materialmen who supply contractors or subcontractors as contained in this chapter." Ind. Code § 5-16-5.5-1. Therefore, since the bond inures to the benefit of "subcontractors, laborers, suppliers and *those performing service who have furnished or supplied labor, material, or service*," it is possible a third-tier claimant may be entitled to make a claim on the bond. *See Service Steel Warehouse Co., L.P. v. United States Steel Corp.*, 182 N.E.3d 840 (Ind. 2022) [Lexis] (holding third-tier claimant was entitled to assert a mechanic's lien on a private project since statute provided lien rights to "all others . . . furnishing materials for the construction or repair of any building."); *see also MacDonald v. Calumet Supply Co.*, 19 N.E.2d 567 (Ind. Ct. App. 1939) [Lexis] (statute was intended to cover subcontractors, materialmen, laborers, and those furnishing service, not merely persons who have furnished materials to the general contractor).

3. Title 8 Projects

The statute does not specifically address which tiers can make a claim on the bond but caselaw prevents claims by third-tier parties. *See Alberici Constructors, Inc. v. Ohio Farmers Ins. Co.*, 866 N.E.2d 740 (Ind. 2007) [Lexis]; *see also State ex rel Lawson v. Warren Bros. Roads Co.*, 59 N.E.2d 912 (Ind. Ct. App. 1945) [Lexis] (one who supplies material directly to a materialman, who in turn supplies a subcontractor, is a stranger to the original contract and therefore cannot make a claim under the bond).

4. Title 36 Projects

The statute does not specifically address which tiers can make a claim on the bond. Ind. Code § 36-1-12-13.1. However, subcontractor is defined as "a person who is a party to a contract

with the contractor and furnishes and performs labor on the public work project. The term includes material men who supply contractors or subcontractors." Ind. Code § 36-1-12-1.2(3). This definition likely precludes claims on the bond by third-tier claimants. This conclusion is supported by the Indiana Court of Appeals in *Dow-Par, Inc. v. Lee Corp.* in which the Court concluded a lessor of equipment to a subcontractor does not fall within the class of laborers, materialmen, or suppliers covered by Title 36. 644 N.E.2d 150 (Ind. Ct. App. 1994) [Lexis].

C. Notice Required

1. Title 4 Projects

A claimant must, within 60 days after the last labor was performed or last material was furnished by the claimant, 1) file its verified claim with the public body; and 2) deliver a copy of the claim to the general contractor. Ind. Code § 4-13.6-7-10(a); *Elec. Specialties, Inc. v. Siemens Bldg. Tech., Inc.*, 837 N.E.2d 1052 (Ind. Ct. App. 2005) [Lexis]. The claim must state the amount due and give as much detail explaining the claim as possible. Ind. Code § 4-13.6-7-10(a). The claimant must provide notice of the claim to the contractor's surety and inform the Public Works Division and the contractor that the surety was notified. Ind. Code § 4-13.6-7-10(b).

The statutory remedies provided by Ind. Code § 4-13.6-7 *et seq.* are intended to supplement all other laws protecting labor, subcontractors, or suppliers rather than conflicting with them. Ind. Code § 4-13.6-7-12.

2. Title 5 Projects

A claimant must, within 60 days after the last labor was performed or last material was furnished by the claimant, 1) file with the public body duplicate verified statements of the amount due; and 2) deliver a copy of the claim to the contractor. Ind. Code § 5-16-5-2(d). Thereafter, the public body shall deliver one of the duplicate statements to the surety. However, the failure to deliver the statement to the surety *does not* affect the claimant's rights or operate as a defense for a surety. *Id.*

3. Title 8 Projects

A claimant may file a claim with the department by following the statutory procedure at any time within 60 days after last furnishing services and material to the project and within 30 days after acceptance of the improvement. Ind. Code §§ 8-23-9-26 to 8-23-9-39.

Additionally, a claimant may pursue a claim against the surety under a contractor's payment bond. To proceed against a payment bond, a claimant must, within one year after the acceptance of the labor, material, or services provided, deliver a statement of the amount due to the surety. Ind Code §§ 8-23-9-10; 8-23-9-33; 8-23-9-39.

4. Title 36 Projects

A claimant must, within 60 days after the last labor was performed or last material was furnished by the claimant, 1) file with the public body duplicate verified statements of the amount due; and 2) deliver a copy of the claim to the contractor. Ind. Code § 36-1-12-13.1(c). Thereafter,

the public body shall deliver one of the duplicate statements to the surety. However, the failure to deliver the statement to the surety *does not* affect the claimant's rights or operate as a defense for a surety. *Id.* The claimant may not file suit against the contractor's surety on the bond until 30 days after the required notice was submitted to the public body and contractor. Ind. Code § 36-12-13.1(d).

D. Coverage

1. Labor

a. Title 4 Projects

The payment bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work. Ind. Code § 4.13.6-7-6(a)(2).

b. Title 5 Projects

The payment bond by its terms shall be conditioned to directly inure to the benefit of subcontractors, laborers, suppliers of materials, and those performing service who have furnished or supplied labor, material, or service for the public work. Ind. Code § 5-16-5-2(a).

c. Title 8 Projects

The payment bond must cover a person, firm, limited liability company, or corporation to whom any money is owed for having performed labor or furnished material or other service, whether the work was performed for a contractor or subcontractor. Ind. Code § 8-23-9-26.

d. Title 36 Projects

The payment bond is binding on the contractor, the subcontractor, and their successors and assigns for the payment of all indebtedness to a person for labor and service performed, material furnished, or services rendered. The payment bond must state that it is for the benefit of the subcontractors, laborers, material suppliers, and those performing services. Ind. Code § 36-1-12-13.1.

2. Material

a. Title 4 Projects

The payment bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work. Ind. Code § 4.13.6-7-6(a)(2).

b. Title 5 Projects

The payment bond by its terms shall be conditioned to directly inure to the benefit of subcontractors, laborers, suppliers of materials, and those performing service who have furnished or supplied labor, material, or service for the public work. Ind. Code § 5-16-5-2(a).

c. Title 8 Projects

The payment bond must cover a person, firm, limited liability company, or corporation to whom any money is owed for having performed labor or furnished material or other service, whether the work was performed for a contractor or subcontractor. Ind. Code § 8-23-9-26.

d. Title 36 Projects

The payment bond is binding on the contractor, the subcontractor, and their successors and assigns for the payment of all indebtedness to a person for labor and service performed, material furnished, or services rendered. Ind. Code § 36-1-12-13.1.

3. Equipment

a. Repairs

Under Title 36, a claimant was not entitled to recover for equipment sold to claimant for use in the construction of the improvement, nor repair work performed on the equipment. *Montgomery v. So. Sur. Co. of Iowa*, 162 N.E. 31 (Ind. Ct. App. 1928) [Lexis].

b. Rentals

Unless deemed part of the cost of the labor, material, or service supplied in connection with the work performed as part of the improvement, the recovery of rental costs is not provided for in Titles 4, 5, 8, or 36.

4. Other

a. Attorneys' Fees

Titles 4, 5, 8, and 36 do not provide for the recovery of attorneys' fees.

b. Interest

Unless deemed part of the cost of the labor, material, or service supplied in connection with the work performed as part of the improvement, the recovery of interest is not provided for in Titles 4, 5, 8, or 36.

c. Financing Charges

Unless deemed part of the cost of the labor, material, or service supplied in connection with the work performed as part of the improvement, the recovery of finance charges is not provided for in Titles 4, 5, 8, or 36.

d. Insurance Premiums

Unless deemed part of the cost of the labor, material, or service supplied in connection with the work performed as part of the improvement, the recovery of insurance premiums is not provided for in Titles 4, 5, 8, or 36.

e. Loans

Unless deemed part of the cost of the labor, material, or service supplied in connection with the work performed as part of the improvement, the recovery of loans is not provided for in Titles 4, 5, 8, or 36.

f. Delay Damages

There is no reported Indiana opinion allowing delay damages as part of a payment bond claim. Under the statutes, if the cost of labor or materials provided by the claimant increased as a result of delay, the claim allowed under the payment bond may include delay-related cost increases.

g. Profits

In the unreported opinion *Murdock & Sons Constr., Inc. v. Goheen General Constr., Inc.*, the United States District Court for the Southern District of Indiana determined lost profits were not recoverable by a bond claimant when the bond was issued under Title 4. No. IP 99-1723-C-T/F, 2002 WL 243576 (S.D. Ind. Jan. 14, 2002) [Lexis]. This can be contrasted with *Ideal Heating Co., Inc. v. Falls & Noonan, Inc.* where the Indiana Court of Appeals interpreted Title 5 as providing a claimant with the right to recover the full contract price, including profit. 378 N.E.2d 946 (Ind. Ct. App. 1978) [Lexis].

h. Extracontractual

There is no reported Indiana opinion allowing extracontractual damages as part of a payment bond claim. Under the statutes, it is unlikely such a recovery would be possible since it would not relate to the cost of labor or materials provided by the claimant. *And see Posterity Scholar House, LP v. FCCI Ins. Co.*, No. 21A-PL-2731, 2023 WL 2291510, --- N.E.3d --- (Ind. Ct. App. Mar. 1, 2023) [Lexis] (holding common law duty of good faith does not extend to relationship between surety and obligee in the context of performance and payment bonds on a

private construction project; granting summary judgment to surety on obligee's claims for tortious bad faith).

E. Contracts Excluded

For contracts entered into under Title 5 by a state educational institution, the performance and payment bond requirements may not apply if: 1) the amount to be paid under the contract is less than five hundred thousand dollars ($500,000); and (2) the state educational institution agrees to waive the requirement. Ind. Code § 5-16-5-2; Ind. Code § 5-16-5.5-4. Title 5 also exempts the design services portion of a design-build project from bonding requirements. Ind. Code § 5-30-8-4(b). There is also no bond requirement under Title 5 for contracts which do not exceed $25,000. Ind. Code § 5-16-1-1.1.

For capital improvement contracts entered into by, for, or on behalf of the Indiana Stadium and Convention Building Authority, the board may waive any payment bond requirement if the board, after public notice and hearing, determines that: 1) an otherwise responsive and responsible bidder is unable to provide the payment bond; or the cost or coverage of the payment bond is not in the best interest of the project; and 2) that an adequate alternative is provided through a letter of credit, additional retainage of at least ten percent (10%) of the contract amount, a joint payable check system, or other sufficient protective mechanism. Ind. Code § 36-1-12-13.1.

F. Time for Suit

1. Title 4 Projects

Unless the bond providers a greater period of time, the statute of limitations is one year after the final settlement with the contractor. Ind. Code § 4-13.6-7-11.

2. Title 5 Projects

The claimant may not file suit against the contractor's surety on the bond until 30 days after the required notice was submitted to the public body and contractor. Ind. Code § 5-16-5-2(e). If the indebtedness is not paid in full after thirty (30) days, the person, may bring an action in a court of competent jurisdiction upon the bond. The action must be brought not later than sixty (60) days after the date of the final completion and acceptance of the public work. An action on the bond against a surety is barred if not brought within this time.

3. Title 8 Projects

A claimant cannot bring suit against the surety until 60 days after the claimant furnishes the statement but must bring suit within 18 months after the date of final acceptance of the highway or improvement. Ind. Code § 8-23-9-11.

4. Title 36 Projects

The claimant may not file suit against the contractor's surety on the bond until 30 days after the required notice was submitted to the public body and contractor. Ind. Code § 36-12-

13.1(d). The Court action must be brought not later than 60 days after the date of final completion and acceptance of the public work. *Id.*

In *ModuForm, Inc. v. Harry H. Verkler Contractor, Inc.*, the Indiana Court of Appeals considered the question of what constitutes "final completion and acceptance" as a matter of first impression. 681 N.E.2d 243, 248 (Ind. Ct. App. 1997) [Lexis]. The *ModuForm* court declined to find a declaration of project completion and readiness for occupancy the equivalent of a declaration that the project has reached final completion and acceptance. *Id.* Under *ModuForm*, only the latter will suffice to trigger the 60-day period for suit-filing. *Id.* at 249.

G. Remarks

In *Indiana Carpenters Central and Western Indiana Pension Fund v. Seaboard Surety Co.*, a pension and benefit plan brought suit against a Title 36 payment bond surety, asserting a claim for unpaid fringe benefits owed to the plan's members for work performed on a public works project. 601 N.E.2d 352, 353 (Ind. Ct. App. 1992) [Lexis]. The Indiana Court of Appeals held that the pension and benefit plan had standing to sue on the payment bond for unpaid fringe benefits, analogizing to case law interpreting the federal Miller Act. *See id.* at 354–355 (discussing *U.S. ex rel. Sherman v. Carter*, 353 U.S. 210 (1957) [Lexis]). *Indiana Carpenters* therefore suggests that the "reasoning and interpretation of the [federal Miller] Act" may be persuasive to Indiana courts construing the coverage of Indiana public works payment bonds. *Id.* at 354.

H. Case Annotations

Cases of note are discussed in the foregoing sections.

§ 2.0 PRIVATE PAYMENT BONDS

Indiana law does not require contractors to furnish a bond for private projects.

A. Rules of Construction

A common-law payment bond is interpreted according to the ordinary rules of contract law. *See Ohio Farmers Ins. Co. v. Indiana Drywall & Acoustics, Inc.*, 970 N.E.2d 674, 682 (Ind. Ct. App. 2012) [Lexis] (construing common-law payment bond according to its terms, rejecting recourse to parol or extrinsic evidence, and noting that, "where no ambiguity is present, the trial court is constrained by the 'four corners rule'"). "A surety's liability must be measured by the strict terms of his contract." *Id.* (citing *In re Kemper Ins. Cos.*, 819 N.E.2d 485, 490 (Ind. Ct. App. 2004) [Lexis]).

B. Time for Suit

A payment bond used for private construction may contain provision(s) limiting the time for suit. *See, e.g.*, *Cherokee Dev., Inc. v. Ohio Farmers Ins. Co.*, 959 N.E.2d 932 (Ind. Ct. App. Dec. 20, 2011) [Lexis] (unpublished table decision) (discussing AIA A312 Payment Bond

language limiting time for suit to one year). Otherwise, Indiana default statutes of limitation applicable to actions founded on written contract are likely to apply.

C. Case Annotations

Pay-if-Paid Clause Defense

In *BMD Contractors, Inc. v. Fid. and Deposit Co. of Maryland*, the United States Court of Appeals for the Seventh Circuit considered whether a surety on a private construction project could raise a pay-if-paid defense to a payment bond claim, on the grounds that such provision appeared in the bonded subcontract. 679 F.3d 643 (7th Cir. 2012) (construing Indiana law) [Lexis]. The *BMD* court confirmed that a properly drafted pay-if-paid clause is enforceable and not void as a matter of Indiana public policy; such a clause may be relied upon by a surety as a defense to a payment bond claim.

Extracontractual

In *Posterity Scholar House, LP v. FCCI Insurance Company*, the Indiana Court of Appeals held that the relationship between a bond obligee and surety was not akin to the "special relationship" between insured and insurer, and therefore upheld summary judgment in favor of the performance and payment bond surety on the obligee's claims for tortious bad faith. No. 21A-PL-2731, 2023 WL 2291510, --- N.E.3d --- (Ind. Ct. App. Mar. 1, 2023) [Lexis].

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Iowa Code § 573.5[2] establishes the payment bond amount required for public projects in Iowa. A contractor must provide a payment bond in an amount equal to 75 percent of the contract price, except where no part of the contract price is paid until after completion, in which case the bond needs to be in an amount of at least 25 percent of the contract price.

B. Tiers Covered

Any person, firm, or corporation providing materials, service or transportation may file an itemized, sworn, written statement of its claim for such. However, a person furnishing only materials to a subcontractor only furnishing materials may not make a claim against the retainage or bond and is not a protected person under the bond. Iowa Code § 573.7.

C. Notice Required

Claims may be filed any time before the expiration of thirty days immediately following completion and final acceptance of the improvement or any time prior to the public corporation paying the full contract price. In addition, the court may permit a claim to be filed during the pendency of an action where such belated filing does not materially delay the action. Iowa Code § 573.10; Iowa Code § 573.11. Note that special notice requirements exist for those not in direct privity with the general contractor or its agent. Iowa Code § 573.15.

D. Coverage

Any person, firm or corporation providing materials, service or transportation may file an itemized, sworn, written statement of its claim for the same. A person furnishing only materials to a subcontractor furnishing only materials (that is, supplier to a supplier) may not make a claim against a retainage or bond and is not a protected person under the bond. Iowa Code § 573.7 .

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[1] The authors acknowledge the prior work of Benjamin B. Ullem, John F. Fatino and Drew J. Gentsch, *Payment Bond Manual*, Iowa Chapter, 201–20 (Wayne D. Lambert, Todd R. Braggins and J. Blake Wilcox, eds., Am. Bar. Assn, 3d ed. 2006), from which this Iowa chapter is derived. The authors also wish to acknowledge and thank Nathan R. Britton for his research and updating relating to this chapter.

[2] All references to the Iowa Code are to Iowa Code (2021).

1. Labor

a. Professional Services

Iowa public payment bonds cover parties "having contracts directly with the principal or with subcontractors" with all just claims due to them "for labor performed or materials furnished, in the performance of the contract on account of which this bond is given." Iowa Code § 573.6. Professional services have not been classified as labor or materials under this statute.

b. Union Benefits

Payments made by subcontractors pursuant to collective bargaining agreements for the work of their employees on a public improvement project to union health, welfare, and pension trusts based on hours their employees worked are for labor within the meaning of Iowa Code § 573.7. *Dobbs v. Knudson, Inc.*, 292 N.W.2d 692, 695 (Iowa 1980) [Westlaw]. Although the right to make a lien claim for labor furnished on a public improvement is given in Iowa Code § 573.7 to the person who furnishes it, union health, welfare, and pension trusts, rather than the individual employees, may make the claim for those persons if they have a contractual right to do so. *Dobbs*, 292 N.W. 2d at 696 [Westlaw].

2. Material

In addition to its ordinary meaning, "material" may embrace feed, gasoline, kerosene, lubricating oils and greases, provisions and fuel, and the use of forms, accessories, and equipment, but does not include personal expenses or personal purchases of employees for their individual use. Iowa Code § 573.1.

3. Equipment

a. Repairs

Claims for labor and materials furnished in repairing the machinery of the contractor are not lienable, and claimants are not entitled to have the same established as liens against the funds in the hands of the county auditor. *Ottumwa Boiler Works v. M. J. O'Meara & Son*, 218 N.W. 920, 925 (Iowa 1928) [Westlaw]. While there are textual differences between the Iowa statute and the federal Miller Act, decisions from the federal courts regarding the Miller Act may be persuasive.

b. Rentals

Suppliers of rental equipment are entitled to a claim under the Public Improvement Statute. *Econ. Forms Corp. v. Cedar Rapids*, 340 N.W.2d 259, 264 (Iowa 1983) [Westlaw].

4. Other

a. Attorneys' Fees

A reasonable attorney fee may be awarded to a successful claimant on a public project. Iowa Code § 573.21.

b. Interest

Interest shall be paid on late payments. Iowa Code § 573.12(2)(a).

c. Financing Charges

Iowa has enacted a prompt pay act that requires that contractors and subcontractors on public project be paid within specific times. Interest accrues to contractors and subcontractors for late payments. Iowa Code § 573.12.

d. Insurance Premiums

Under the Iowa Code, workers' compensation insurance, and premiums and charges for such insurance, are considered "service." Iowa Code § 573.1. Any person, firm or corporation providing "service" can state a claim for such service. Iowa Code § 573.7.

e. Loans

A statute which grants to a subcontractor on public improvement a claim or lien on public funds "for labor performed or furnished materials" for the construction does not include a claim or lien for money loaned to such contractor to enable them to execute their contract. *Teget v. Polk Cnty. Drainage Ditch No. 40*, 210 N.W. 954 (Iowa 1926) [Westlaw].

f. Delay Damages

Parties can receive damages when delay was not to be expected. *Dickinson Co. v. Iowa State Dep't of Transp.*, 300 N.W.2d 112 (Iowa 1981) [Westlaw].

g. Profits

Lost profits are also a permissible item of damages so long as the profits are not based on conjecture and speculation. *Yost v. Council Bluffs*, 471 N.W.2d 836, 840 (Iowa 1991) [Westlaw].

h. Extracontractual

The determination of whether bad faith exists as a cause of action against a payment bond surety is far from a settled question under Iowa law. *See* Benjamin B. Ullem & John Fatino, *Defeating the Bad Faith Claim Against the Miller Act Surety*, Fidelity & Surety Law Committee Newsletter, 10–11 (Summer 2003).

E. Contracts Excluded

Contracts for twenty-five thousand dollars or less on a public project need not be accompanied by a bond. However, a bond may still be required by the contracting entity at its discretion. Iowa Code § 573.2.

F. Time for Suit

An action may be brought any time after the expiration of thirty days, but not later than sixty days following the completion and final acceptance of the public improvement. The action is brought in equity in the county where the improvement is located. Iowa Code § 573.16.

G. Remarks

Iowa has a special statute regarding abandonment. Iowa Code § 573.23. Contractors and subcontractors on a public project are due payments within specified time frames by statute, and interest accumulates to contractors and subcontractors for late payments. Iowa Code § 573.12(2).

H. Case Annotations

Conditional Acceptance

Conditional acceptance of the bid will result in no contract being formed and no liability under the bid bond. *Fairfield v. Harper Drilling Co.*, 692 N.W.2d 681 (Iowa 2005) [Westlaw].

Tripartite Nature of the Surety's Subrogation Rights

"The surety in cases like this undertakes duties which entitle it to step into three sets of shoes. When, on default of the contractor, it pays all the bills of the job to date and completes the job, it stands in the shoes of the contractor insofar as there are receivables due it; in the shoes of the laborers and material men who have been paid by the surety -- who may have had liens; and, not least, in the shoes of the government, for whom the job was completed." *First Fed. State Bank v. Malvern*, 270 N.W.2d 818, 820 (Iowa 1978) [Westlaw] (internal quotation omitted).

Accrual of Subrogation Rights

"In the case of a surety, the essential prerequisite to subrogation is the payment of the obligation by the surety. When he has done this, a court of equity may, and generally should, grant subrogation, by letting the surety step into the shoes of the creditor, as to any lien or equity the creditor may have against the obligor. The right to subrogation is not a contractual one. It is one established and recognized by equity as within its plenary power to effectuate justice. The very basis and foundation of the right rests upon performance of the obligation on the part of the surety. There can be no subrogation until the surety has performed. Then, and not until then, does any right to subrogation come into being." *Leach v. Com. Sav. Bank*, 213 N.W. 517, 520 (Iowa 1928) [Westlaw].

Whether Failure to Provide Insurance Transfers Burden to Surety

Sureties on a contractor's bond were not liable for damages caused by negligent acts of the contractor's employees when the contractor failed to obtain liability insurance and the county permitted the contract to go into effect without it. The court determined that adding liability to other persons would diminish the protection to those individuals for whose use and benefit the bond was required. *Schisel v. Marvill*, 197 N.W. 662 (Iowa 1924) [Westlaw].

Whether Obligee May Set Off Bonded Contract Against Other Principal-Obligee Debts or Obligations

"It was held in *Stadler Bros. & Co. v. Parmlee & Watts*, 10 Iowa 23 (1859), that if the bond was joint and several, the obligee might set off his damages against the demand in favor of one or all the obligors. But not so when the bond was joint only." *Branch of State Bank v. Morris*, 13 Iowa 136 (Iowa 1862) [Westlaw].

Incorporation of Specific Contract Terms By Reference

"[L]iability may not be predicated upon provisions of a statutory bond which are broader than and beyond the requirements of the statute providing for the bond, and under which the bond is given." *Ottumwa Boiler Works v. M.J. O'Meara & Son*, 218 N.W. 920, 924 (Iowa 1928) [Westlaw].

Statutory Bond

"[W]here the situation is such as to require a statutory bond, and the bond given by the contractor conforms in material and essential respects to the requirements of the statute, the parties will be held to have intended to make a statutory bond, notwithstanding the omission from the bond of other conditions required by the statute, or the inclusions of stipulations contrary to the statute." *Philip Carey Co. v. Md. Cas. Co.*, 206 N.W. 808, 810 (Iowa 1926) [Westlaw].

Outside of Municipality Authority

"We have held that one who contracts with a municipality . . . is bound at its peril to take cognizance of statutory limitations upon the authority of the government agency. Recovery is denied under these . . . public policy that the tax payer should be protected from the evasion of statutory prerequisites . . . and from the opportunity for fraud or collusion . . . " *Thompson v. L.J. Voldahl, Inc.*, 188 N.W.2d 377, 380 (Iowa 1971) [Westlaw].

Defenses

The surety may avail itself of the principal's defenses. *State v. Bi-States Constr. Co.*, 269 N.W.2d 455, 457 (Iowa 1978) [Westlaw].

Filing of Claim

Although the Iowa Supreme Court in a 1983 decision excused a contractor who filed his claim with the "wrong" public agent, a prudent claimant will ensure the claim is lodged with the proper authority. *Econ. Forms Corp. v. Cedar Rapids*, 340 N.W.2d 259, 264 (Iowa 1983) [Westlaw].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

On private commercial projects, the mechanic's lien statute contemplates a bond in a "good and sufficient" amount. Iowa Code § 572.33A.

B. Time for Suit

An action on a private project may be brought any time after the lien is perfected. Iowa Code § 572.24.

C. Case Annotations

Limitations on Damages

"Up to the face of a private bond the surety is liable for interest the same as the principal. For any other interest in excess of the face of the bond the surety can be held liable only for its own default." *Mechanicsville Tr. and Sav. Bank v. Hawkeye - Security Ins. Co.*, 158 N.W.2d 89, 93 (Iowa 1968) [Westlaw].

Whether Obligee May Set Off Bonded Contract Against Other Principal–Obligee Debts or Obligations

"It was held in *Stadler Bros. & Co. v. Parmlee & Watts*, 10 Iowa 23 (1859), that if the bond was joint and several, the obligee might set off his damages against the demand in favor of one or all the obligors. But not so when the bond was joint only." *Branch of State Bank v. Morris*, 13 Iowa 136 (Iowa 1862) [Westlaw].

Penal Sum Limitations Per Case Law

"While it does not appear that the Iowa courts have ruled on the matter with regards to a payment bond, in the context of a performance bond the court has stated that the limitations stated by the penal sum of the bond 'may be varied … to pay sums in excess of the penal sum.'" *Emps. Mut. Cas. Co. v. United Fire & Cas. Co.*, 682 N.W.2d 452, 457 (Iowa App. 2004) [Westlaw].

Defenses

The surety may avail itself of the principal's defenses. *State v. Bi-States Constr. Co*., 269 N.W.2d 455, 457 (Iowa 1978) [Westlaw].

KANSAS

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for the Bond

Any analysis of bonds under Kansas law begins with the foundational requirement that "a surety bond is to be construed in the light of the circumstances in which it is given, so as to effectuate its purpose." *Local No. 1179 v. Merchants Mut. Bonding Co.*, 613 P.2d 944, 946 (D. Kan. 2015) [Lexis] (but cautioning that "the obligation of a bond is to be measured by the bond itself and may not be extended by implication or enlarged by construction beyond the terms of the executed contract", citing *In re Smith's Estate*, 507 P.2d 189, 192 (1973) [Lexis]).

The Kansas version of the Little Miller Act is the Kansas Fairness in Public Construction Contract Act (the "Kansas Act"), codified at K.S.A. §§ 16-1901 through 16-1909. The Kansas Act has unique differences compared to other states' Little Miller Acts and on its face seems to be more stringent. In a contract covered by the Kansas Act, no right or duty prescribed may be waived or varied. K.S.A. § 16-1901. Should a contract do so, it shall be unenforceable. *Id.* The Kansas Act makes it illegal to waive the right of a subcontractor or public entity to file claim against a bond. K.S.A. § 16-1903.

Separate from the Kansas Act, the Kansas procedural chapter—K.S.A. Ch. 60 and Article 11 covering liens for labor and material— sets forth specific requirements for public works bonds. K.S.A. § 60-1111(a) requires a bond to the State of Kansas if the contract sum exceeds $100,000. The bond shall be "not less than the sum total in the contract, conditioned that such contractor or the subcontractor of such contractor shall pay all indebtedness incurred for labor furnished, materials, equipment or supplies, used or consumed in connection with or in or about the construction of such public building or in making such public improvements." *Id*.

Accordingly, under Kansas law, in essence, public works bonds are substitutes for mechanics' liens, and mechanics' lien rights accrue to those in privity with owner, contractor, or subcontractor to a contractor. *Id.*; *BRB Contractors, Inc. v. Akkerman Equip., Inc.*, 935 F. Supp. 1156 (D. Kan. 1996) [Lexis].

B. Tiers Covered

Kansas law provides broad protection to those performing work or providing materials, equipment or supplies for a public works project. The public works payment bond provides coverage for any person owed compensation for labor furnished, materials, equipment or supplies used or consumed in connection with or for such contract for construction, repairs or improvements. K.S.A. § 60-1111(a).

Any person due money for labor or material furnished, may bring an action on such bond for the recovery of such indebtedness but no action shall be brought on such bond after six months from the completion of such public improvements or public buildings. K.S.A. § 60-

1111(b). A claimant may be entitled to interest or attorneys' fees even though it is not specifically addressed by this statute. It may be inferred based upon the broad language used.

And immediate suppliers to second-tier subcontractors are entitled to bring suit on general contractors' public works bonds. K.S.A. § 60-1111(b); *see also* *Wichita Sheet Metal Supply, Inc. v. Dahlstrom and Ferrell Constr. Co.*, 783 P.2d 353 (Kan. Ct. App. 1989) [Lexis], *rev'd*, 792 P.2d 1043 (1990).

However, as is the case under the federal Miller Act, see § D(4), *infra*, there is an end point to the protections provided. Third-tier subcontractors may not be proper claimants under the Kansas Act. *See, e.g.*, *Dun-Par Engineered Form Co. v. Vanum Constr. Co.*, 310 P.3d 1072 (Kan. Ct. App. 2013) [Lexis].

C. Notice Required

K.S.A. § 60-1111 does not contain particular notice requirements. As a result, it is prudent to look to the bond for specific notice requirements that may govern the manner in which a claim must be presented.

D. Coverage

In general, it is appropriate to analogize rules applicable to mechanics' liens to contractors' public works bonds. K.S.A. § 60-1111; *Wichita Sheet Metal Supply, Inc. v. Dahlstrom and Ferrell Constr. Co.*, 792 P.2d 1043 (1990) [Lexis]; *Cedar Vale Co-op Exch., Inc. v. Allen Utils., Inc.*, 694 P.2d 903 (Kan. Ct. App. 1985) [Lexis], *rev. denied*, 237 Kan. 886 (1985). ("Contractors' bonds furnished on public works projects are substitutes for mechanics' liens.").

Any person due money for labor or material furnished, may bring an action on such bond for the recovery of such indebtedness but no action shall be brought on such bond after six months from the completion of such public improvements or public buildings. K.S.A. § 60-1111.

1. Labor

a. Professional Services

Under Kansas law, only the value of goods and services actually expended in connection with public improvements are recoverable against the public works payment bond. K.S.A. § 60-1111(a); *Hope's Architectural Prods., Inc. v. Lundy's Constr., Inc.*, 762 F. Supp. 1430 (D. Kan. 1991) [Lexis], *aff'd*, 1 F.3d 1249 (10th Cir. 1993). *Compare with* *Mark Twain Kansas City Bank v. Kroh Bros. Dev. Co.*, 14 Kan. App. 2d 714, 798 P.2d 511 (Kan. Ct. App. 1990) [Lexis] (where there was no "observable work on the property", preliminary, offsite engineering services did not entitle engineering firm claimant to a mechanics' lien).

Only subcontractors are able to recover against the general contractor's performance bond. K.S.A. 60-1111(a); *Blinne Contracting Co. v. Bobby Goins Enters., Inc.*, 715 F. Supp. 1044, 1048 (D. Kan. 1989) [Lexis].

b. Union Benefits

There are no reported Kansas opinions or statutes regarding union benefits in the context of public works payment bonds.

2. Material

K.S.A. § 16-1902 of the Kansas Act defines construction as "furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building… 'Construction' shall not mean the design, construction, alteration, renovation, repair or maintenance of a road, highway or bridge."

Accordingly, to recover for supplies provided, they must at least have been physically delivered *to the jobsite*, or more favorably, have been incorporated into the public improvements, in order to give rise to a valid payment bond claim—*i.e.*, such materials must be "used or consumed." This concept was addressed by the court in *J.W. Thompson Co. v. Welles Products Corp.*, 758 P.2d 738, 740 (1988) [Lexis] (relying on the statutory bond, which provided "said principal … or the subcontractor or subcontractors of said principal shall pay all indebtedness incurred for supplies, material or labor furnished, used or consumed in connection with or in or about the construction or making of the above described improvement.").

3. Equipment

a. Repair

The words "repair" and "equipment" are used throughout the Kansas Act, including in the definition of "Construction", which is defined as, "furnishing labor, *equipment*, material or supplies used or consumed for the design, construction, alteration, renovation, *repair* or maintenance of a building … 'Construction' shall not mean the design, construction, alteration, renovation, *repair* or maintenance of a road, highway or bridge." K.S.A. § 16-1902 (emphasis added).

Public works payment bonds cover any person to whom there is due any sum for labor furnished, materials, *equipment* or supplies used or consumed in connection with or for such contract for construction, *repairs* or improvements shall make a claim therefor with the director of purchases under K.S.A. § 60-1112. K.S.A. § 60-1111 (emphasis added).

b. Rentals

There are no reported Kansas decisions or statutes addressing whether rental charges are compensable components of a public payment bond claim. While there is a Kansas statute that defines "construction" to include equipment, it does not reference rentals. Public works payment bonds cover persons who are due payment for any equipment or supplies in connection with or for a contract for construction. K.S.A. 60-1112; K.S.A. 60-1111(a).

4. Other

a. Attorneys' Fees

Under Kansas law, for public-private agreements, each bond shall include a provision allowing the prevailing party in any action on the bond to recover reasonable attorneys' fees and expenses. K.S.A. § 16-1909; *see* *Russell v. Phoenix Assur. Co. of N.Y.*, 362 P.2d 430 (1961) [Lexis] (allowing attorneys' fees to public payment bond claimant under predecessor Act).

b. Interest

All contracts for public construction shall contain a provision for 18% interest on past due payments from owner to contractors (thirty days) or contractors to subcontractors (eight days), absent extenuating circumstances. K.S.A. §§ 16-1903; 16-1905.

If the owner fails to pay a contractor within the time period set forth in subsection (c), the owner shall pay interest computed at the rate of 18% per annum on the undisputed amount to the contractor. K.S.A. § 16-1903. Absent reported decisional law on the subject, one may infer that any interest plus the undisputed amount owed may exceed the penal sum of the bond. Kansas law defines undisputed payment to mean payments which all parties to the contract agree are owed to the contractor. K.S.A. § 16-1902.

c. Financing Charges

There are no reported Kansas opinions or statutes regarding financing charges in the context of payment bonds.

d. Insurance Premiums

Kansas law prohibits contractual provisions attempting to waive, release or extinguish rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance. However, a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance or a builder's risk policy. K.S.A. § 16-1903(b)(3).

e. Loans

There are no reported Kansas opinions or statutes regarding financing charges in the context of public payment bonds.

f. Delay Damages

Under Kansas law, provisions attempting to waive the right to collect damages for delays are prohibited. K.S.A. § 16-1907. Additionally, the Kansas Act provides suspension of performance rights if contractors and or subcontractors are not paid within seven days of the contractually negotiated payment deadline. During a suspension of performance dispute, the

contractor or subcontractor are entitled to suspend further performance until payment, including applicable interest, is made. The contract shall be increased by the suspending party's reasonable costs of demobilization, delay, and remobilization. K.S.A. § 16-1905.

g. Profits

There are no reported Kansas opinions or statutes regarding profits, or lost profits, in the context of public payment bond recovery.

h. Extracontractual

There are no reported Kansas opinions or statutes regarding extracontractual or bad-faith claims in the public payment bond context. Kansas law also does not recognize bad faith in the broader surety or insurance contexts.

E. Contracts Excluded

The Kansas Act does not apply to construction projects involving the Kansas Department of Transportation special provision to the standard specifications, K.S.A. § 16-1908. Also, as discussed herein, contracts in total sums less than $100,000 are not subject to the bonding requirements of K.S.A. § 60-1111(a).

F. Time for Suit

Suit on a payment bond must be brought within six months of completion of the project, and not the last day of the claimant's work. K.S.A. § 60-1111(b).

Additionally, suits on a public highway bond must be brought within one year from completion of the contract, but first the claimant must, within six months after completion of the contract, file with the Secretary of Transportation an itemized statement of the amount of the indebtedness. K.S.A. § 68-410.

Under Kansas law, there is a five-year statute of limitations for actions upon bonds applied to supplier's action to recover on bond filed to discharge his lien upon property for which he supplied materials, rather than one-year statute of limitations applicable to lien foreclosures. K.S.A. § 60-511.

G. Remarks

Applicability to Private Construction

The Kansas Act, unlike similar statutes in other states, applies to both public and private projects, although it is technically optional for private projects. *See* K.S.A. § 60-1110 (contractor or owner may execute and record a bond on a private project to prevent mechanics' liens from attaching).

Prompt Pay

Also, the Kansas Act provides suspension of performance rights if contractors are not paid within seven days of the contractually negotiated payment deadline. K.S.A. § 16-1905.

Non-Waivable Contract Provisions

Kansas statute specifically prescribes contract provisions which shall not be waived on projects for public improvements:

1. Right to sue (can include alternative dispute resolution as a prerequisite).
2. Claim against a payment bond.
3. Right of subrogation for losses or claims.
4. Payment within thirty days absent extenuating circumstances.
5. Request for payment to owner within seven days.
6. 18% interest on past due payments from owner to contractors or contractors to subcontractor.
7. Payment within seven days from owner to contractor.
8. Payment within seven days from contractor to subcontractor.
9. Right to collect damages for delays caused by another party.

K.S.A. §§ 16-1903; 16-1907.

Effect of Pay-if-Paid Clause

The Kansas Act distinguishes contracts for private construction from public works contracts with respect to the effect of conditional payment clauses. K.S.A. § 16-1803(a) provides in relevant part that "all persons who enter into a contract for private construction … shall make all payments pursuant to the terms of the contract." Further, K.S.A. § 16-1803(c) provides:

> Any provision in a contract for private construction providing that a payment from a contractor or subcontractor to a subcontractor is contingent or conditioned upon receipt of a payment from any other private party, including a private owner, is no defense to a claim to enforce a mechanic's lien or bond to secure payment of claims pursuant to the provisions of Article 11 of Chapter 60 of the Kansas Statutes Annotated, and amendments thereto.

For a broader discussion of paid-if-paid clauses, see generally *Faith Techs., Inc. v. Fid. & Deposit Co. of Md.*, No. 10-2375-MLB, 2011 WL 251451, 2011 U.S. Dist. LEXIS 7688 (D. Kan. Jan. 26, 2011) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Similar to the discussion above, and generally speaking for private payment bonds too, "[a] surety bond is to be construed in the light of the circumstances in which it is given, so as to effectuate its purpose." *Local No. 1179 v. Merchants Mut. Bonding Co.*, 613 P.2d at 946 [Lexis]. Common-law bonds are construed according to ordinary contract principles (applicable to insurance contracts), whereby "the terms … are to be construed according to their plain, ordinary,

and popular sense." *Resolution Tr. Corp. v. Cont'l Cas. Co.*, 799 F. Supp. 77, 82 (D. Kan. 1992) [Lexis] (internal citations omitted).

B. Time for Suit

a. Private Payment Bonds

Often confused with mechanics' lien statutory requirements for filing suit, private payment bonds do not have statutory requirements for filing suit. As a result, you must review the terms and conditions of the particular payment bond at issue to determine if there is a deadline for filing a claim and/or filing suit. The trigger date typically is the last furnishing of labor, materials, or supplies.

b. Mechanics' Liens

Because there often is an interplay between the right to file a mechanics' lien and the existence of a payment bond on the project, it is important to know the time requirements for filing suit on a mechanics' lien. To enforce a mechanics' lien (not a bond claim), the claimant must file suit within one year after the filing of the lien statement; otherwise, the lien rights expire. K.S.A. § 60-1105. Specific to bonds, Kansas law has a five-year statute of limitations for actions upon bonds applied to supplier's action to recover on bond filed to discharge his lien upon property for which he supplied materials, rather than one-year statute of limitations applicable to lien foreclosures. K.S.A. § 60-511.

On private construction projects, prime contractors must record the mechanics' lien notice within four months of the date materials, services, or labor were last furnished. K.S.A. § 60-1102(a). Within that four-month period, a claimant may file for a one-month extension. K.S.A. § 60-1102(c). All others must be recorded within three months. K.S.A. § 60-1103(a)(1).

Subcontractors must provide a warning letter or a copy of a statement by the owner saying the warning letter was received. K.S.A. § 60-1103a, but see K.S.A. § 60-1103b for different procedures for new residential property.

C. Remarks

K.S.A. § 16-1803 provides that the following private construction contract provisions shall not be waived:

1. Right to sue (can include alternative dispute resolution as a prerequisite).
2. Rights provided by Article 11 of Chapter 60 of the Kansas Statutes Annotated.
3. Right of subrogation.
4. Contractor or Subcontractors might have a right to payment even if the payor has not received payment.
5. Payment within thirty days except for retainage and absent extenuating circumstances.
6. Request for payment to owner within seven days.
7. 18% interest on past due payments from owner to contractors or contractors to subcontractor.
8. Payment within seven days from owner to contractor.
9. Payment within seven days from contractor to subcontractor.

KENTUCKY

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Kentucky's Little Miller Act establishes the payment bond form required for public projects. Ky. Rev. Stat. Ann. §§ 45A *et seq.*; *See also* Ky. Rev. Stat. Ann. § 341.317. Kentucky statutes state that if a construction contract is awarded in an amount in excess of $40,000, the contractor must furnish to the Commonwealth a payment bond in at least the amount of the original contract price. Ky. Rev. Stat. Ann. § 45A.190(2)(b). The surety must be authorized to do business in Kentucky. *Id.*

B. Tiers Covered

The Kentucky Little Miller Act only covers "persons supplying labor and material to the contractor or his subcontractors, for the performance of the work provided for in the contract." Ky. Rev. Stat. Ann. § 45A.190(2)(b).

Kentucky courts have interpreted this strictly. In *Safeco Insurance Co. of America v. W.B. Browning Construction Co.*, a window manufacturer who sold "off the shelf" windows through a distributor to an installation contractor was not afforded payment bond protection. 886 F.2d 807, 809 (6th Cir. 1989) [Lexis].

C. Notice Required

For a payment bond claim, no preliminary notice is required. However, within the later of 60 days of the last day of the month in which materials were provided or the date of substantial completion, the claimant must file a verified statement setting forth the amount due, the date on which work was last performed, and the name of the public improvement upon which it is claimed. Ky. Rev. Stat. Ann. § 376.230. The statement shall be filed in the county clerk's office of the county in which the seat of government of the owner is located. *Id.*

D. Coverage

In Kentucky, the state Little Miller Act requires that at a minimum, the payment bond afford coverage to two tiers of claimants supplying materials to the prime contractor to whom the contract was awarded, or to any of its subcontractors providing labor. Ky. Rev. Stat. Ann. § 45A.190(2)(b). Kentucky courts have narrowly defined the purpose of Kentucky's Little Miller Act as to only provide protection to laborers and suppliers and have refused to expand the construction of the statute to include other claims.

1. Labor

a. Professional Services

Kentucky law likely provides payment bond protection to professional engineers, licensed architects, licensed landscape architects, and similar design professionals as long as the services are performed in and for the public works project and as long as the design professional renders services to the prime contractor or its subcontractors. Ky. Rev. Stat. Ann. § 45A.190(2)(b). Unless deemed part of the cost of labor, materials, or supplies used in the construction, maintenance, or improvement of a public project, the recovery of professional services would not be allowed under a statutory payment bond. Ky. Rev. Stat. Ann. § 376.195.

b. Union Benefits

Unless deemed part of the cost of labor, materials, or supplies used in the construction, maintenance, or improvement of a public project, the recovery of union benefits is not allowed under a statutory payment bond. Ky. Rev. Stat. Ann. § 376.195.

2. Material

Per Kentucky's Little Miller Act, "materials" includes all materials used in the public improvement which shall remain as a part of the completed improvement, and all the materials substantially consumed, or the value thereof substantially destroyed in making the public improvement, including explosives, gasoline, oil, grease, form lumber and other similar articles. Ky. Rev. Stat. Ann. § 376.195(2). Materials not specifically ordered or purchased for used on the bonded project do not give rise to a payment bond claim. *U.S. Fid. and Guar. Co. v. Miller*, 549 S.W.2d 316 (Ky. Ct. App. 1977) [Lexis].

3. Equipment

a. Repairs

Repairs are considered "supplies" pursuant to Kentucky's Little Miller Act. Specifically, the "cost of labor, materials, and repair parts" supplied or furnished for keeping all machinery and equipment used in the performance of the work in good operating condition. Ky. Rev. Stat. Ann. § 376.195(4).

b. Rentals

Kentucky's Little Miller Act includes coverage for "the agreed or reasonable rental price of equipment and machinery used in performing the work to be done." Ky. Rev. Stat. Ann. § 376.195(4); *ABCO-BRAMER, Inc. v. Markel Ins. Co.*, 55 S.W.3d 841 (Ky. Ct. App. 2000), *review denied* (Oct. 17, 2001) [Lexis].

4. Other

a. Attorneys' Fees

For public construction contracts, a claimant may recover attorneys' fees, but recovery is limited to the public contract rate for attorneys' fees. Ky. Rev. Stat. Ann. § 371.415.

b. Interest

Unless deemed part of the cost of labor, materials, or supplies used in the construction, maintenance, or improvement of a public project, the recovery of interest is not allowed under a statutory payment bond. Ky. Rev. Stat. Ann. § 376.195.

c. Financing Charges

Unless deemed part of the cost of labor, materials, or supplies used in the construction, maintenance, or improvement of a public project, then the recovery of financing charges is not allowed under a statutory payment bond. Ky. Rev. Stat. Ann. § 376.195.

d. Insurance Premiums

Kentucky courts have held that insurance premiums are not labor, materials, or supplies, as such terms are used in the Kentucky lien statutes, therefore a payment bond would not cover insurance premiums absent express inclusion. *In re Zaepfel & Russell, Inc.*, 49 F. Supp. 709, 710 (W.D. Ky. 1941) [Lexis], *aff'd sub nom. Farmers State Bank v. Jones*, 135 F.2d 215, 215 (6th Cir. 1943) [Lexis].

e. Loans

Unless deemed part of the cost of labor, materials, or supplies used in the construction, maintenance, or improvement of a public project, the recovery of loans is not allowed under a statutory payment bond. Ky. Rev. Stat. Ann. § 376.195.

f. Delay Damages

Unless deemed part of the cost of labor, materials, or supplies used in the construction, maintenance, or improvement of a public project, the recovery of delay damages is not allowed under a statutory payment bond. Ky. Rev. Stat. Ann. § 376.195.

g. Profits

Unless deemed part of the cost of labor, materials, or supplies used in the construction, maintenance, or improvement of a public project, then the recovery of profits is not allowed under a statutory payment bond. Ky. Rev. Stat. Ann. § 376.195.

h. Extracontractual

The Insurance Code of Kentucky defines an insurer to include sureties. Ky. Rev. Stat. §§ 304.1-010 *et seq.* "Surety insurance' is also defined in the statute. Ky. Rev. Stat. § 304.5-060. Sureties are subject to the Unfair Claims Settlement Practices Act.

E. Contracts Excluded

Any contract for work to be performed on a public project valued for less than $40,000 would not require a payment bond. Ky. Rev. Stat. Ann. § 45A.190(2)(b).

F. Time for Suit

The statute of limitations for bringing an action against a surety is seven years. Ky. Rev. Stat. Ann. § 413.220(3). The seven years period is the maximum amount of time that the surety may be held liable on the bond. However, a bond or surety is only valid if there is an underlying claim. So, the claim must be brought within the time period that covered the underlying claim. *Gil Ruehl Mech., Inc. v. Hartford Fire Ins. Co.*, 164 S.W.3d 512, 515 (Ky. Ct. App. 2004) [Lexis]. Where, for example, the bond was to secure a mechanics lien, the limitation period for the bond would be that of the mechanics lien, which is twelve months from the date of filing. Ky. Rev. Stat. Ann. § 376.230.

However, contractors are given 30 days to protest claims filed. Ky. Rev. Stat. Ann. § 376.250(4). If a protest is submitted, the lien claimant must institute a suit for the enforcement of the lien and serve summons within 30 days after written notice of the protest is mailed to claimant. *Id.*

The suit to enforce a claim against the payment bond must be filed in the circuit court of the county where the seat of the government owning the improvement is located, and that court has exclusive jurisdiction over the action. Ky. Rev. Stat. Ann. § 376.250(5). There is a venue exception for public university projects; in those cases, venue is in the county where the university's main campus is located. *Id.*

G. Remarks

Kentucky provides two forms of payment protection on public projects, a claim against the payment bond and a lien on contract funds. Parties who furnish labor and/or materials to a general contractor or first-tier subcontractor may file either type of claim in the event of nonpayment. This includes equipment lessors; however, it does not include suppliers to suppliers.

In the 2022 Legislative Session, Kentucky's legislature has offered several amendments to current lien law and the statutes defining "labor" and "supplies." These changes have not been enacted.

H. Case Annotations

Effect of Conditional Payment Clause

In *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, the Supreme Court of Kentucky held that a "pay-if paid" contract provision does not violate public policy. 540 S.W.3d 770, 778 (Ky. 2017) [Lexis]. In this matter, the "pay-if paid language, coupled with the express use of 'condition precedent,' unequivocally allocated the risk of nonpayment by the Project owner to the subcontractor and relieved the contractor of the obligation to pay until payment was received. *Id.* at 785.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Kentucky law does not require payment bonds for private projects. Under Kentucky law, common-law surety bonds are construed according to ordinary contract principles. *See, e.g.*, *Comm'rs of Sinking Fund of Louisville v. Anderson*, 20 F. Supp. 217, 225 (W.D. Ky. 1937) [Lexis], *aff'd in part, rev'd in part sub nom. Am. Bonding Co. v. Anderson*, 110 F.2d 961 (6th Cir. 1940) [Lexis] ("The rule of *strictissimi juris* does not apply to a surety for compensation but such a one is entitled to have its contract interpreted by the ordinary rules of law and its liability cannot be enlarged beyond the scope of the terms of the contract and where the language of the bond is plain, there is nothing to construe."); *Royal Indem. Co. v. Int'l Time Recording Co. of N.Y.*, 75 S.W.2d 527, 527 (Ky. Ct. App. 1934) [Lexis] ("[T]he contract and the bond…must be read together in order to ascertain the intention of the parties and consequent liability or nonliability.").

B. Time for Suit

Kentucky's general statute of limitations includes civil actions on bonds in the class of procedures which must be initiated within 15 years after cause of action has accrued. Ky. Rev. Stat. Ann. § 413.090. However, sureties may shorten this time period. *Hargis v. Sewell's Adm'r*, 87 Ky. 63, 7 S.W. 557 (1888) [Lexis].

C. Case Annotations

Res Judicata

In *Kentucky Insurance Guaranty Association v. Dooley Construction Co.*, the Kentucky Court of Appeals affirmed that a surety has the same liability as its principal. 732 S.W.2d 887 (Ky. Ct. App. 1987) [Lexis]. Where the surety has notice and an opportunity to defend, the surety will be liable for a default judgment against the principal in the absence of fraud or collusion. *Id.* at 888. The surety is, of course, not bound by a default where the surety did not have notice. *Ohio Cas. Ins. Co. v. Ky. Nat. Res. and Env't Prot. Cabinet*, 722 S.W.2d 290, 295 (Ky. Ct. App. 1986) [Lexis].

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

The Louisiana Public Works Act, La. Rev. Stat. 38:2241 *et seq*. ("Public Works Act"), is *sui generis* and provides exclusive remedies to parties in public construction work. *Apex Bldg. Techs. Grp., Inc. v. Catco Gen. Contractors, L.L.C.*, 15-729 (La. App. 5 Cir. 03/30/16); 189 So. 3d 1209, 1212 [Westlaw]. The Public Works Act was enacted to protect parties who perform work on public contracts. *Gootee Constr., Inc. v. Atkins*, 2015-0376 (La. App. 4 Cir. 11/04/15); 178 So. 3d 629, 633 [Westlaw]. This protection is necessary because, unlike their counterparts in private construction projects, workers and suppliers engaged by a public authority cannot protect themselves with liens against public property since liens are unenforceable against public property. *Apex Bldg. Techs. Grp., Inc. v. Catco Gen. Contractors, L.L.C.*, 15-729 (La. App. 5 Cir. 03/30/16); 189 So. 3d 1209, 1212 [Westlaw]. Bonds furnished for public contracts are statutory bonds, and a court is required to look to the statute to find conditions of the bond; whatever is written into the bond which is not required by the statute must be read out of the bond, and whatever is not expressed in it which ought to have been incorporated into the bond must be read into it. La. Rev. Stat. 38:2241(C); *Jimco, Inc. v. Gentilly Terrace Apartments, Inc.*, 230 So. 2d 281, 283 (La. App. 4 Cir. 1970) [Westlaw].

Whenever a public entity enters a contract in excess of $5,000 for the construction, alteration, or repair of any public works, the contract must be in writing and signed by the parties. La. Rev. Stat. 38:2241(A)(1). However, when the contract is for emergency work as provided in La. Rev. Stat. 38:2212(D) and the work is less than $50,000, a written contract is not required. *Id*.

If the contract exceeds $25,000, the contractor must obtain a bond with a surety in a sum of not less than 50% of the contract price for the payment by the contractor or subcontractor to claimants. La. Rev. Stat. 38:2241(A)(2). The bond must also be recorded in the mortgage records of the parish where the work is to be done no later than 30 days after the work has begun. *Id*.

Note, the Louisiana Department of Transportation and Development ("DOTD") Public Works Act, La. Rev. Stat. 48:256.3 *et seq* ("DOTD-PWA"), exclusively governs payment bonds issued on public contracts with the DOTD. The provisions under La Rev. Stat. Ann § 48:256.3 are almost identical to the provisions under La. Rev. Stat. 38:2241 *et seq*. *Don Bihm Equip. Co. v. La. DOT & Dev.*, 2010-1997 (La. App. 1 Cir. 05/06/11); 64 So. 3d 897, 902 [Westlaw]. One notable difference between the Public Works Act and the DOTD-PWA is that in the former, any claimant *may* file a sworn statement after the maturity of his claim and within 45 days after the recordation of acceptance of the work. La. Rev. Stat. 38:2242(B). In the latter, however, the claimant *shall* file a sworn statement after the maturity of his claim and within 45 days after the recordation of acceptance of the work. La. Rev. Stat. 48:256.5(B).

B. Tiers Covered

The Public Works Act defines "Claimant" as any person to whom money is due pursuant to a contract with the owner, a contractor, or a subcontractor for doing work, performing labor, or furnishing materials or supplies for the construction, alteration, or repair of any public works, or for transporting and delivering materials or supplies to the jobsite of the job, or for furnishing oil, gas, electricity, or other materials or supplies for use in machines used in the construction, alteration, or repair of any public works. La. Rev. Stat. 38:2242(A). Professionals such as surveyors, engineers, architects, and their professional subconsultants, are also claimants under the Public Works Act if they are employed by either the owner, contractor, or subcontractor in connection with the building of the public work. *Id.*

Louisiana jurisprudence has excluded various parties as claimants under the Public Works Act. For example, a materialman who contracted with supplier (*i.e.*, another materialman) may not assert a statutory claim under the Public Works Act. *Thurman v. Star Elec. Supply, Inc.*, 307 So. 2d 283, 287 (La. 1975) [Westlaw]. In addition, the owner is not a "claimant" under the Public Works Act, and therefore has no right of action under the statutory payment bond. *No Fault Tennis & Track, LLC v. A-1 Asphalt Paving & Repair, Inc.*, 04-1297 (La. App. 5 Cir. 03/29/05); 900 So. 2d 983, 984 [Westlaw].

C. Notice Required

Under the Public Works Act, a claimant may file a sworn statement of the amount due him in the mortgage records of the parish where the work was performed within 45 days after the acceptance of the work by the owner or the notice of default by the contractor or subcontractor. La. Rev. Stat. 38:2242(B).

If the claimant is a lessor of movables, the claimant must deliver a copy of the lease to the owner no more than 10 days after the movables are first placed at the site of the immovable for use in the work. La. Rev. Stat. 38:2242(C)(1).

In addition, if a materialman who has not been paid by a subcontractor fails to send a notice of nonpayment to the general contractor and the owner, then the materialman shall lose his right to file a privilege on the property. La. Rev. Stat. 38:2242(F). Under this provision, a materialman is required to provide notice on or before 75 days from the last day of the month in which the material was delivered, regardless of whether the certified mail was actually delivered, refused, or unclaimed satisfies the notice provision hereof or no later than the statutory lien period, whichever comes first.

However, a supplier of materials may have a right of action against the general contractor and its surety even if the supplier files a sworn statement and sends notice prior to the owner's notice of acceptance. *Nu-Lite Elec. Wholesalers, LLC v. Axis Constr. Grp., LLC*, 2017-1204 (La. App. 1 Cir. 04/09/18); 249 So. 3d 10, 12 [Westlaw].

If a claimant who has a direct contractual relationship with a subcontractor but not the contractor seeks to maintain his right of action against the contractor or the surety, the claimant must comply with the notice and recordation requirements of La. Rev. Stat. 38:2242(B) and give written notice to the contractor within 45 days from the recordation of the notice of acceptance by the owner or notice by the owner of default. La. Rev. Stat. 38:2247. This notice must state with substantial accuracy the amount claimed and the name of the party to whom the material was supplied or for whom the labor or service was performed. *Id*. In addition, the notice must be served

by registered or certified mail, in an envelope addressed to the contractor at any place he maintains an office in the state of Louisiana. *Id*.

Claimants should exercise diligence to ensure that they adhere to the applicable notice requirements to preserve their privilege under the Public Works Act. To do so, claimants should understand the difference between the applicable notice requirements. In *Electric Supply Co. v. Great American Insurance Co.*, 42727 (La. App. 2 Cir 12/12/07), 973 So. 2d 827, 828 [Westlaw], the Louisiana Second Circuit Court of Appeal affirmed a trial court's judgment that cancelled a materialman's lien because the materialman did not comply with the notice requirements of La. Rev. Stat. 38:2242(F). In so doing, the court distinguished the notice requirements of La. Rev. Stat. 38:2242(F) from the notice requirements of La. Rev. Stat. 38:2247:

> The notice of nonpayment in Subsection (F) is to be given to the owner and contractor to preserve the right to file a claim, while the notice referenced in La. R.S. 38:2247 is to be given to the contractor to preserve the right of action against the contractor or the surety. In addition, the notice required in Subsection (F) would be untimely if it was given before a claim was filed but after 75 days had elapsed since the last day of the month in which material was delivered, even if the 45-day statutory lien period had not elapsed. The notice requirement found in La. R.S. 38:2247 references only the 45-day statutory lien period provided in La. R.S. 38:2242(B).

Id. at 830.

D. Coverage

As previously stated, the goal of the Public Works Act is to protect workers on public projects. The Public Works Act is to be strictly construed; therefore, the privileges granted therein may not be extended beyond the text of the statute. *Bossier Par. Sch. Bd. v. Richard LeBlanc Architects, Inc.*, 45632 (La. App. 2 Cir. 09/22/10); 48 So. 3d 355, 358 [Westlaw].

1. Labor

a. Professional Services

A claimant under the Public Works Act is any person who performs work, labor, or furnishes materials for the construction, alternation, or repair of a public work. La. Rev. Stat. 38:2242(A). In addition, an architect or engineer not in privity with the contractor or subcontractor may not assert a claim or privilege on the funds due to the contractor or subcontractor. La. Rev. Stat. 38:2242(E).

b. Union Benefits

There is no case law that prevents the recovery of union benefits if the underlying contract allows for such recovery. A contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations of the contract. *Comm. Brokers, Inc. v. John J. Hazard Drayage & Constr Co.*, 2019-0638 (La. App. 4 Cir. 04/29/20); 299 So.3d 644, 654 [Westlaw]. Therefore, if the underlying contract includes the recovery of insurance premiums, the payment bond claimant may recover said amounts. However, one case has held that an action by

the pension funds to collect funds that the employers failed to submit as required by a collective bargaining agreement pursuant to La. Rev. Stat. Ann. § 38:2241 et seq., was preempted by the Employee Retirement Income Security Act ("ERISA"). *Laborers Nat'l Pension Fund v. Woodrow Wilson Constr. Co*, 581 So. 2d 387, 390 (La. App. 4 Cir. 1991) [Westlaw]. In so doing, the Louisiana Fourth Circuit Court of Appeal reasoned that the Public Works act relates to ERISA by its terms, which provides an alternative method to enforce the collection of contributions owed to plans.

2. Material

Pursuant to La. Rev. Stat. 38:2242(A)(1), a claim can be based on material which is consumed or incorporated into the project, even on a rental basis by written contract with the owner. *Rowley v. Mid-Continent Cas., Inc.*, No. Civ. A 03-3629, 2004 U.S. Dist. LEXIS 5119, 2004 WL 614500 (E.D. La. Mar. 26, 2004) [Westlaw]. The following materials or supplies are the basis of a Public Works Act claim:

1. Materials or supplies for the construction, alteration or repair of the project;
2. Materials delivered to the jobsite; and
3. Materials for use in machines used in the construction, alteration, or repair of any public project, including materials leased or rented for the project subject to a written contract.

La. Rev. Stat. 38:2242(A)(1). Louisiana courts have applied the Public Works Act to distinguish materials that may or may not be subject to a statutory claim.

3. Equipment

a. Repairs

In *United States Pollution Control, Inc. v. National American Insurance Co.*, 95-153 (La. App. 3 Cir. 08/30/95); 663 So. 2d 119, 120 [Westlaw], the surety appealed a summary judgment ruling that a subcontractor was a proper claimant under the payment bond. On appeal, the surety noted that the statutory bond must cover (1) all work done for the construction; (2) all labor performed for the construction; (3) all material or supplies furnished for the construction; (4) for transportation and delivery of materials or supplies to the site of the job by a for hire carrier; and (5) for furnishing materials or supplies for use in machines used in the construction. *See Javeler Constr. Co. v. Fed. Ins. Co.*, 472 So. 2d 258, 262 (La. App. 1 Cir. 1985) [Westlaw]. As such, the surety argued that the subcontractor, who performed environmental waste clean-up services on the project, did not qualify as a "claimant" under the Public Works Act because those services did not fall under the five basic categories of a bond coverage. However, the Louisiana Third Circuit Court of Appeal rejected that argument and held that a hazardous waste disposal company that removed waste from an environmental cleanup site was a proper claimant under the Public Works Act because the company contracted with the general contractor and the removal of hazardous waste was considered a "repair."

b. Rentals

The Public Works Act affords a right to a claimant to whom money is due for the lease or rental of movable property used at the site of the immovable leased to the owner, contractor, or

subcontractor by written contract. La. Rev. Stat. 38:2242(A). To be entitled to assert a claim, the lessor of movables must deliver a copy of the lease to the owner no more than 10 days after the movables are placed at the site of the immovable for use in the work. La. Rev. Stat. 38:2242(C)(1). However, the claim or privilege granted to the lessor of movables is limited to and secures only the rentals that accrue during the time the movable is located at the site of the immovable for use in the work. La. Rev. Stat. 38:2242(C)(2). As such, a movable shall be deemed not located at the site of the immovable for use in a work after:

(a) The work is substantially complete or abandoned; or
(b) The notice of termination is filed; or
(c) The lessee has abandoned the movable, or use of the movable in a work is completed or no longer necessary, and the owner or contractor gives written notice to the lessor of abandonment or completion of use.

Id.

In *Cole's Construction Co. v. Knotts*, the court reasoned that although the contractor rented equipment from the subcontractor to complete a public project, the subcontractor was not a claimant under the Public Works Act because the contractor and subcontractor failed to establish a written contract. 619 So. 2d 876, 878 (La. App. 3 Cir. 1993) [Westlaw].

4. Other

a. Attorneys' Fees

There is no case law that prevents the recovery of attorneys' fees if the underlying contract allows for such recovery. A contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations of the contract. *Com. Brokers, Inc.*, 2019-0638 (La. App. 4 Cir. 04/29/20); 299 So. 3d 644, 654 [Westlaw]. Therefore, if the underlying contract includes the recovery of attorneys' fees, the payment bond claimant may recover said amounts.

In addition to contractual attorneys' fees, the Public Works Act provides that after amicable demand for payment has been made on the principal and surety and 30 days have elapsed without payment being made, any claimant recovering the full amount of his timely and properly recorded or sworn claim shall be allowed 10% attorney's fees which shall be taxed in the judgment on the amount recovered. La. Rev. Stat. 38:2246. Moreover, if the trial court finds that the action was brought by any claimant without just cause or in bad faith, the trial judge shall award the principal or surety a reasonable amount as attorneys' fees for defending such action. *Id*. In *Service Steel Warehouse Co., L.P. v. McDonnel Group, LLC*, the court rendered the 18% attorney's fee provision of the underlying contract invalid because the Public Works Act, La. Rev. Stat. 38:2246, expressly limits attorney's fees to 10%. No. 14-1416, 2016 U.S. Dist. LEXIS 3032, at *20, 2016 WL 128152 (E.D. La. Jan. 11, 2016) [Westlaw].

b. Interest

There is no case law that prevents the recovery of interest if the underlying contract allows for such recovery. A contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations of the contract. *Com. Brokers, Inc.*, 2019-0638 (La. App. 4 Cir. 04/29/20); 299 So. 3d 644, 654 [Westlaw]. Therefore, if the underlying contract includes the recovery of interest, the payment bond claimant may recover said amounts.

In addition, any public entity that fails to make any progressive payment within 45 days following receipt of a certified request for payment by the public entity without reasonable cause shall be liable for reasonable attorney fees and interest charged at 0.5% accumulated daily, not to exceed 15%. La. Rev. Stat. 38:2191(B)(1). Any public entity that fails to make any final payments after formal final acceptance and within 45 days following receipt of a clear lien certificate by the public entity shall be liable for reasonable attorney fees and interest charged at 0.5% percent accumulated daily, not to exceed 15%. *Id*. The purpose of this statute is to ensure the prompt payment of obligations arising under public contracts when they become due and payable. *Woodrow Wilson Constr. LLC v. Orleans Par. Sch. Bd.*, 2017-0936 (La. App. 4 Cir. 04/18/18); 245 So. 3d 1, 7 [Westlaw]. In claims against the surety on the payment bond, the Public Works Act does not provide for awards of interest. *See Serv. Steel Warehouse Co., L.P. v. McDonnel Grp., LLC*, No. 14-1416, 2016 U.S. Dist. LEXIS 3032, at *20, 2016 WL 128152 (E.D. La. Jan. 11, 2016) [Westlaw].

c. Financing Charges

There is no case law that prevents the recovery of financing charges if the underlying contract allows for such recovery. A contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations of the contract. *Com. Brokers, Inc.*, 2019-0638 (La. App. 4 Cir. 04/29/20); 299 So. 3d 644, 654 [Westlaw]. Therefore, if the underlying contract includes the recovery of financing charges, the payment bond claimant may recover said amounts.

For example, in *Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority*, a university that leased land to a finance authority sought to recover lease payments and utility charges from the finance authority's contractor. Although the Louisiana First Circuit Court of Appeal recognized the university as a claimant on the public contract within the meaning of the Public Works Act and the amounts owed, the court nevertheless dismissed the claim because the university failed to file suit within the one-year limitation period of La. Rev. Stat. 38:2247. 984 So. 2d 72, 2008 La. App. LEXIS 1297 (La. App. 1 Cir. 2008) [Westlaw].

d. Insurance Premiums

A contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations of the contract. *Com. Brokers, Inc.*, 2019-0638 (La. App. 4 Cir. 04/29/20); 299 So. 3d 644, 654 [Westlaw]. Therefore, if the underlying contract includes the recovery of insurance premiums, the payment bond claimant may recover said amounts.

e. Loans

While financing companies and/or banks are not expressly considered claimants under the Louisiana Public Works Act, there is no case law that prevents these types of entities from recovering under the Louisiana Public Works Act if a true claimant has contractually assigned their claims to the financing company. For example, in *Voiron Construction Co. v. Metric Constructors, Inc.*, the surety and its principal attempted to argue that a claim could not be brought

by a claimant (third tier subcontractor) as that claim had already been assigned *via* a factoring agreement, the court implicitly acknowledged that the plaintiff claimant's rights may have assigned to the factoring company, while still denying the motion as the defendants failed to provide evidence that the contract subject to the assignment was the one under which the plaintiff brought its claims against the defendants. The court also noted that if the claim was assigned, then the factory company, who was not a party to the action, could join the action. No. CIV. A. 99-721, 99-2599, 1999 U.S. Dist. LEXIS 20107, 1999 WL 1277540 (E.D. La. Dec. 22, 1999) [Westlaw].

f. Delay Damages

A contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations of the contract. *Com. Brokers, Inc.*, 2019-0638 (La. App. 4 Cir. 04/29/20); 299 So. 3d 644, 654 [Westlaw]. Therefore, if the underlying contract allows recovery for delay damages, the payment bond claimant may recover said amounts under the stator bond.

However, the Louisiana Public Works Act prohibits "no damage for delay" clauses in contracts for publicly bid projects. If the clause seeks to waive, release, or extinguish the contractor's rights to recover delay damages when the delay is caused in whole, or in part, by acts or omissions within the control of the public entity, the clause is considered unenforceable. La. Rev. Stat. 38:2216(H). In *F. H. Myers Construction Corp. v. State*, the court applied La. Rev. Stat. 38:2216(H) to render the provision of the general contract which allowed damages to the contractor only if the state was 100% at fault because the provision imposed a stricter requirement for delay damages than the statute allowed. 2013-2153 (La. App. 1 Cir. 06/18/14); 2014 WL 3702302 [Westlaw].

g. Profits

Lost profits are recoverable in an action for breach of contract where the amount can be proved with reasonable certainty. *Pattridge v. Starks*, 50351 (La. App. 2 Cir. 02/24/16); 189 So. 3d 1112, 1121, 50351 (La. App. 2 Cir. 02/24/16); 189 So. 3d 1112, 1121 [Westlaw]. Therefore, if the underlying contract pursuant to the statutory bond allows for profit under the contract sum, the claimant may seek to recover profit within its statutory claim.

h. Extracontractual

In *Southern Environmental Management and Specialties, Inc. v. City of New Orleans*, a subcontractor brought an action against the contractor, owner, and surety on the payment bond, seeking bad faith penalties against the surety under the Louisiana Insurance Code. 2022-0018 (La. App. 4 Cir 05/11/22); 339 So. 3d 1234, 1237 [Westlaw]. The trial court granted summary judgment dismissing that claim, and the subcontractor appealed. On appeal, the subcontractor argued that that *Pierce Foundations., Inc. v. JaRoy Construction, Inc.*, 2015-0785 (La. 05/03/16); 190 So.3d 298 [Westlaw] allowed for application of penalties under the Insurance Code to claims against the surety arising under Louisiana Public Works Act.

However, the Louisiana Fourth Circuit rejected that argument and held that the "immunity provision" of the Public Works Act limits the surety's liability to what is set out in the statute only. Specifically, the court noted that, "given the insurance penalties provisions are located outside the Public Works Act— and in the Louisiana Insurance Code— the insurance penalties provisions, as

we held in *Metro* [633 So.2d 838 (La. App. 4 Cir. 2/25/94) [Westlaw]], are not applicable to the statutory surety[.]" *Id*.

E. Contracts Excluded

If the contract does not exceed $25,000, the contractor is not required to obtain a bond for the payment of bond claimants. *See* La. Rev. Stat. 38:2241(A)(2). The type of contract (*e.g.*, lump sum, cost-plus) and the type of project delivery system (*e.g.*, design-build, construction management at risk) do not affect the requirement to obtain bond coverage.

In addition, a materialman who contracted with supplier (*i.e.*, another materialman) may not assert a statutory claim under the Public Works Act, so those contracts can be considered excluded. *T.M. Thurman v. Star Elec. Supply, Inc.*, 307 So. 2d 283, 287 (La. 1975) [Westlaw].

F. Time for Suit

The Public Works Act distinguishes the limitation period for actions brought by public entities and actions brough by claimants. For public entities, any action against the contractor on the contract or on the bond, or any action against the contractor and/or the surety on the bond shall prescribe 5 years from substantial completion, acceptance of the work, or notice of default. La. Rev. Stat. 38:2189. It is well-settled Louisiana jurisprudence that this deadline to file is peremptive, not prescriptive. *Bossier Par. Sch. Bd. v. Richard LeBlanc Architects, Inc*., 45632 (La. App. 2 Cir 09/22/10), 48 So. 3d 355, 357 [Westlaw]; *State v. McInnis Bros. Constr*., 97-0742 (La. 10/21/97), 701 So. 2d 937, 946 [Westlaw]; *Bd. of Supervisors v. Agric. Fin. Auth*., 2007-0107 (La. App. 1 Cir 02/08/08), 984 So. 2d 72, 85 [Westlaw]; *Plaquemines Par. Gov't v. Burk-Kleinpeter Inc.*, 2015-1152 (La. App. 4 Cir 03/09/16) [Westlaw]; *Orleans Par. Sch. Bd. v. Scheyd, Inc.*, 98-2989 (La. App. 4 Cir 06/16/99), 737 So. 2d 954, 957 [Westlaw]. In addition, this peremptive period applies to contract and tort claims asserted by a public entity against the contractor or surety. *Orleans Par. Sch. Bd.*, 737 So. 2d 954, 957 [Westlaw].

However, claimants under the Public Works Act (*e.g.*, subcontractors, materialmen, and laborers) have a different deadline to file suit. A claimant preserves his right of action on the bond if suit is filed against the surety and/or contractor within one year from the registry of acceptance of the work or notice of default of the contractor. La. Rev. Stat. 38:2247.

Claimants should remember that the one-year prescriptive period governs a payment bond claim, and if the bond includes a different prescriptive period, that provision will be invalidated. For example, in *E. L. Burns Co. v. Cashio*, the Louisiana Supreme Court held that a statutory payment bond may not extend the prescriptive period to file suit from one year to two years. 302 So. 2d 297, 299 (La. 1974) [Westlaw]. In so doing, the Louisiana Supreme Court reasoned that the prescriptive period set forth in La. Rev. Stat. 38:2247 may not be extended by private agreement (*i.e.*, the terms of the bond) because the Public Works Act is a prohibitory law founded on the public order. *Id*. at 302.

G. Remarks

Statement of Claim and Privilege Unnecessary for Claim Against Surety

In 2016, the Louisiana Supreme Court held in *Pierce Foundations., Inc. v. JaRoy Construction, Inc.*, that a subcontractor in contractual privity with a general contractor did not have to file a lien on a public works contract in order to pursue a lawsuit against the surety. 2015-0785 (La. 05/03/16); 190 So. 3d 298 [Westlaw]. There, a first-tier subcontractor filed suit against the general contractor and its surety long before the filing of the notice of acceptance or default—and without filing a sworn statement of claim in the mortgage records. The Supreme Court found that La. Rev. Stat. 38:2242 and La. Rev. Stat. 38:2247, concerning filing a public works lien, use "confusing—even conflicting—language," because the first provision uses the permissive "may" when talking generally about filing a lien and the second the restrictive term "requirements" when describing whether a lien must be filed to have a "right of action" on the Public Works Act bond. In other words, while section La. Rev. Stat. 38:2242 provides that a claimant "may" file a sworn statement of the amount claimed, La. Rev. Stat. 38:2247 suggests that a claimant is required to comply with La. Rev. Stat. 38:2242's notice and recordation "requirements" in order to proceed against the bond. The *Pierce* majority ultimately held that the first-tier subcontractor's failure to file a lien resulted in the loss of its privilege against the public owner, but did not affect a subcontractor's right to proceed directly against the contractor and its surety. This holding was important because, under this specific set of facts, it preserved a first-tier subcontractor's right to pursue the surety, even absent a filed Public Works Act lien.

Accrual of Lien Filing Period

In *Gootee Construction, Inc. v. Atkins*, ("*Gootee I*"), the Louisiana Fourth Circuit found a Public Works Act lien was premature under La. R.S. 38:2242 because it was filed prior to the recordation of acceptance by the project's owner and not "within" the 45-day window running from recordation of acceptance. 2015-0376 (La. App. 4 Cir. 11/04/15); 178 So. 3d 629 [Westlaw]. The *Gootee I* opinion did not expressly consider the subcontractor's rights against the surety bond. Soon thereafter, the Louisiana Supreme Court granted writs and ordered the Louisiana Fourth Circuit to reconsider its ruling "in light of" *Pierce*. The Fourth Circuit was thus presented with a golden opportunity to revise its decision in *Gootee I* —or expand or contract the reach of Supreme Court's ruling in *Pierce*.

On reconsideration, the Louisiana Fourth Circuit did not revise its holding in *Gootee I*, distinguished *Pierce*, and held tight to its view that the lien-filing period does not begin to run until notice of acceptance or default is filed. See *Gootee Constr., Inc. v Atkins*, 2015 0376 (La. App. 4th Cir. 12/21/16), 207 So. 3d 485, 487, *writ denied*, 2017-0138 (La. 3/31/17), 217 So. 3d 360 ("*Gootee II*") [Westlaw].

H. Case Annotations

Paid-if-Paid Contractual Defense Unavailable to Sureties

In *Glencoe Education Foundation, Inc. v. Clerk of Court*, the general contractor and its surety sought review of claims submitted by two subcontractors on the project. 2010-1872 (La.

App. 1 Cir. 05/06/11); 65 So. 3d 225, 226 [Westlaw]. The contracts with the subcontractors contained pay-if-paid clauses that shielded the general contractor and its surety from liability for payments to subcontractors prior to payment by the school to the general contractor. Treating the construction of the school building as a public works project, the court concluded that the surety could not rely on the pay-if-paid clauses. On appeal, the Louisiana First Circuit affirmed. In so doing, the court reasoned that allowing a surety to assert a pay-if-paid clause to defeat payment to a subcontractor while the school escaped liability to the subcontractors by relying on the payment bond would render protections for laborers and suppliers on public works projects set forth in the Public Works Act meaningless.

Subcontractor Payment Bonds

It should be noted that a subcontractor's payment bond should not be considered a statutory payment bond under the Public Works Act. In *Law Enforcement District of Jefferson Parish v. MAPP Construction, LLC*, the Louisiana Fifth Circuit Court of Appeal held that a subcontractor was not required to obtain a bond for its performance on a public project under the Public Works Act; therefore, the subcontractor's bond was conventional rather than statutory. 16-220 (La. App. 5 Cir 06/30/16), 196 So. 3d 896 [Westlaw]. In so doing, the court cited to *State ex rel. Guste v. Simoni, Heck & Assocs.*, 331 So. 2d 478 (La. 1976) [Westlaw], wherein the Louisiana Supreme Court interpreted the scope of the term "contractor" under the Public Works Act and has found that, "[u]nder the terms of La. R.S. 38:2189, the...prescriptive period obviously applies to the liability of the general contractor and his surety on the public construction contract." *Id.* at 485. In *MAPP*, The Louisiana Fifth Circuit applied this interpretation and held that the prescriptive period within the subcontractor bond applied rather than the five-year peremptive period outlined by La. Rev. Stat. 38:2189.

Email Insufficient for Notice Requirement

In *84 Lumber Co. v. Continental Casualty Co.*, a sub-subcontractor filed two statements of claims against the general contractor and the subcontractor, alleging nonpayment. 914 F.3d 329, 331 (5th Cir. 2019) [Westlaw]. The trial court dismissed the claim against the general contractor and its surety because the sub-subcontractor emailed its notice of claim to the general contractor's attorney, rather than submitting the notice via certified or registered mail as required by La. Rev. Stat. 38:2247. In response, the sub-subcontractor appealed.

On appeal, the sub-subcontractor cited various cases where the court preserved the claim where the claimant did not submit the notice by certified or registered mail. However, the Louisiana Fifth Circuit rejected this argument. In so doing, the court distinguished the cases cited by the sub-subcontractor, and the court reiterated that the sub-subcontractor failed to issue a notice of claim to the general contractor by registered or certified mail as required by La. Rev. Stat. 38:2247. In addition, the court emphasized the importance of complying with the Public Works Act by referencing *Interstate Sch. Supply Co. v. Guitreau's Constr. & Consulting Co.*, 542 So. 2d 138 (La. App. 1 Cir. 1989) [Westlaw], where the Louisiana First Circuit ruled that a subcontractor could not assert its action because the notice was sent one day after the statutory deadline.

Although *84 Lumber* remains good law, the Louisiana Legislature recently amended its notice requirements for claimants under the Private Works Act to preserve their claims and privileges. In so doing, the Private Works Act would likely recognize an email as sufficient notice.

As such, we expect that the Public Works Act will also receive an amendment that recognizes notices sent via email sufficiently satisfy the Public Works Act.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

For private projects, a payment bond is a statutory bond governed by the Private Works Act, La. Rev. Stat. 9:4801 *et seq*. ("Private Works Act"). The purpose of the Private Works Act is to protect certain claimants who engage in construction projects and lack privity of contract with the project owner. *Roy Anderson Corp. v. 225 Baronne Complex, L.L.C.*, 2018-0962 (La. App. 4 Cir 09/25/19); 280 So. 3d 730, 741 [Westlaw]; *Buck Town Contractors & Co. v. K-Belle Consultants, LLC*, 2015-1124 (La. App. 4 Cir. 04/06/16); 216 So. 3d 981, 984 [Westlaw]. As such, the provisions of the Private Works Act governing statutory bonds are incorporated into the payment bond as if set forth therein. La. Rev. Stat. 9:4812(D). A payment bond issued under the Private Works Act serves as security to respond to claims made only by claimants listed in La. R.S. 9:4802(A). *Roy Anderson Corp.*, 280 So. 3d 730, 742. Contrary to the Public Works Act, a payment bond under the Private Works Act must be in the full amount of the underlying contract. La. Rev. Stat. 9:4812(D). Because the Private Works Act is in derogation of general contract law, it must be strictly construed. *Hibernia Nat'l Bank v. Belleville Historic Dev., L.L.C.*, 2001-0657 (La. App. 4 Cir 03/27/02); 815 So. 2d 301, 305 [Westlaw]. Courts, however, must not overlook the legislative intent and fundamental aim of the act, which is to protect materialmen, laborers and subcontractors who engage in construction and repair projects. *Id*. As such, strict construction cannot be so interpreted as to permit purely technical objections to defeat the real intent of the statute, which is to protect materialmen, laborers and subcontractors who engage in construction projects. *Id*.

In addition, the contractual provisions of the underlying contract must not contradict the Private Works Act. Therefore, whenever a statutory bond is given, whatever is in the bond that is not required by law should be read out of it, and whatever is not expressed in the bond and should have been included in it, should be read into it. *Bowles & Edens Co. v. H & H Sewer Sys., Inc*., 346 So. 2d 1283, 1285 (La. App. 3 Cir. 1977) [Westlaw].

Under the Private Works Act, contractors, laborers, materials suppliers, equipment lessors, engineers, architects, and surveyors who are in privity of contract with the owner are granted a privilege on the immovable upon which work is performed as security for their contractual claims against the owner. La. Rev. Stat. 9:4801. Those who are not in privity of contract with the owner but instead have a contractual relationship with either a contractor or a subcontractor of any tier are given personal claims against both the owner and the contractor, as well as a privilege upon the immovable to secure their statutory claims against the owner. La. Rev. Stat. 9:4802.

The Private Works Act grants a claim to the following persons:

(1) Subcontractors, for the price of their work— La. Rev. Stat. 9:4802(A)(1);
(2) Laborers or employees of the contractor or a subcontractor—La. Rev. Stat. 9:4802(A)(2);
(3) Sellers, for the price of movables sold to the contractor or a subcontractor that become component parts of the immovable—La. Rev. Stat. 9:4802(A)(3);
(4) Lessors, for the rent of movables used at the site of the immovable and leased to the contractor or a subcontractor by written contract— La. Rev. Stat. 9:4802(A)(4);

and

(5) Professional consultants engaged by the contractor or a subcontractor, and the professional sub-consultants of those professional consultants, for the price of professional services rendered in connection with a work that is undertaken by the contractor or subcontractor—La. Rev. Stat. 9:4802(A)(5).

Claimants must file their statement of claim or privilege ("lien") to preserve their statutory right. Under the general rule, a claimant pursuant to La. Rev. Stat. 9:4801 or La. Rev. Stat. 9:4802 must file its lien no later than 60 days after the filing of the notice of termination of work or the notice of substantial completion or abandonment. La. Rev. Stat. 9:4822(A). If a notice of contract is properly and timely filed, a claimant under R.S. 9:4802 must file a lien and deliver a copy to the owner no later than 30 days after the filing of a notice of termination or six months after substantial completion if a notice of termination is not filed. La Rev. Stat. 9:4822(B). For general contractors who preserved their privilege, they must file a lien no later than 60 days after the filing of the notice of termination or six months after substantial completion if a notice of termination is not filed. La. Rev. Stat. 9:4822(C).

B. Notice Provisions

The Private Works Act outlines various notice requirements for claimants. For professional consultants engaged by the owner, and their subconsultants, or professional consultants engaged by the contractor or subcontractor, and their subconsultants, those claimants must deliver written notice to the owner within thirty days after the date of being engaged in connection with the work to be entitled a claim. La. Rev. Stat. 9:4804(A). Notice is not required under this section, however, by a claimant who is in direct contractual privity with the owner. *Id*.

To be entitled to a claim and the privilege to secure that claim, the lessor of movables must deliver to the contractor, and to the owner if notice of contract has been timely filed, a notice that the lessor has leased or intends to lease movables to a contractor or subcontractor for use in the work. La. Rev. Stat. 9:4804(B)(1). If the notice is delivered more than 30 days after movables leased by the lessor are first placed at the site of the immovable, the claim and privilege of the lessor shall be limited to rents accruing after the notice is given. *Id*. No notice is required to a person who is a party to the lease. *Id*.

Within 15 days after receipt of a request from the owner or contractor, the lessor having a claim and privilege shall provide the person making the request with a description sufficient to identify all movables that have been placed at the site of the immovable for use in the work. La. Rev. Stat. 9:4804(B)(2). A lessor's failure to give a timely and accurate response to a request shall extinguish the lessor's claim and privilege to the extent of any damages suffered by the person making the request as a result of the failure or inaccuracy. *Id*.

If notice of contract has been timely filed, the seller of a movable sold to a subcontractor shall deliver to the owner and contractor notice of nonpayment of the price of the movable no later than 75 days after the last day of the calendar month in which the movable was delivered to the subcontractor. La. Rev. Stat. 9:4804(C). A seller who does not deliver to both the owner and contractor notice of nonpayment of the price of a movable when required to do so shall not be entitled to a claim or privilege for the price of the movable. *Id*.

Lastly, before any down-stream subcontractor has a right of action against the contractor or surety, the down-stream subcontractor must give notice to the contractor at least 30 days prior to the institution of an action against the contractor, stating with substantial accuracy the amount

claimed and the name of the other subcontractor for whom the labor or service was done or performed. La. Rev. Stat. 9:4804(D).

C. Time for Suit

A claimant who has properly preserved his privilege by filing a lien must bring suit within one year after the date of filing and, to preserve the effectiveness of the lien against third persons, must file a notice of pendency of the action in the mortgage records before expiration of that one-year period. La. Rev. Stat. 9:4823(A); La. Rev. Stat. 9:4833(E). The failure to file a timely notice of pendency does not extinguish the privilege as against the owner; rather, it merely makes the privilege ineffective as to third parties.

The surety's liability, except as to the owner, is extinguished as to each person who fails to institute an action asserting his claims or rights against the owner, the contractor, or the surety no later than one year after the expiration of the time specified in R.S. 9:4822 for the person to file his lien. La. Rev. Stat. 9:4813(E). Moreover, the Louisiana Supreme Court has interpreted this one year deadline as a peremptive period. *Metro. Erection Co. v. Landis Constr. Co.*, 627 So. 2d 144, 148 (La. 1993) [Westlaw].

D. Case Annotations

Paid-if-Paid Defense Unavailable to Statutory Bond

In *Bear Industries v. Hanover Insurance Co.*, , a supplier filed suit against a subcontractor and the general contractor's surety under the Private Works Act for nonpayment of materials. 2017-0301 (La. App. 1 Cir 01/04/18); 241 So. 3d 1159 [Westlaw]. The Louisiana First Circuit held that a surety to a statutory bond may not assert a pay-if-paid provision of its principal's contract as a defense to third party claims. The court reasoned that allowing a surety to assert a pay-if-paid defense would render the protections afforded by the Private Works Act meaningless. *Id*. at 15.

MAINE

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

The Public Works Surety Bond Law of 1971—modeled after the federal Miller Act and codified at Title 14, section 871, of the Maine Revised Statutes—governs public payment bonds in Maine. "The statute serves as a replacement for a materialman's right to obtain a mechanic's lien because one cannot secure a mechanic's lien on state property." *Vacuum Sys., Inc. v. Washburn*, 651 A.2d 377, 379 (Me. 1994) [Lexis].

Section 871(3) requires that a contractor must furnish a payment bond to the State, political subdivision, quasi-municipal corporation, or other public authority before the contracting body awards a contract in excess of $125,000 for the construction, alteration, or repair of any public building, or other public improvement or public work. The payment bond must be for the full prime contract amount. *Id*.

Bonds for contracts on behalf of the State must be payable to the State and deposited with the contracting authority; all other public payment bonds must be payable to and deposited with the contracting body awarding the contract. 14 M.R.S. § 871(3).

Section 871(3) also grants contracting authorities the discretion to require bid security to ensure that a contractor bidding on a project is bondable.

B. Tiers Covered

The term "claimant," as used in section 871, is defined to include individuals, associations, corporations, and partnerships. 14 M.R.S. § 871(2). Section 871(3)(B) provides that the payment bond is "solely for the protection of claimants supplying labor or materials to the contractor or the contractor's subcontractor in the prosecution of the work provided for in the contract."

Claimants in privity with a subcontractor, but not the prime contractor, will lose their right of action on the payment bond if they fail to provide the statutorily-required notice to the contractor. These notice requirements are discussed below. *See infra* § 1.0(C).

Under section 871(4), when the claimant has not been paid in full within ninety (90) days after they last furnished or supplied labor or materials to the contractor or its subcontractor, the claimant may bring an action on the payment bond in the claimant's own name for the unpaid amount at the time the action is commenced.

Section 871(6) requires that the claimant bring its payment bond action in the county where the contracted work is located.

C. Notice Required

The notice requirements that a claimant must satisfy are set forth in Title 14, section 871(4). If the claimant has a direct contractual relationship with the contractor's subcontractor, but is not

with the contractor, then the claimant must provide written notice to the contractor within ninety (90) days from the final date on which the claimant performed labor or furnished or supplied the material giving rise to the claim. The written notice must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed.

The claimant must send the written notice via registered or certified mail to any place the contractor maintains an office or conducts business, or to the contractor's residence. 14 M.R.S. § 871(4). However, Maine's highest court (the Law Court) has held that written notice served by first class mail and actually received within the ninety (90) day notice period will be sufficient under section 871. *Washburn*, 651 A.2d at 380 [Lexis].

While additional notice may be required under the terms of the payment bond, absent a showing of prejudice from lack of separate notice, a claimant's compliance with 14 M.R.S. § 871(4) will be sufficient to preserve that statutory payment bond claim. *Chadwick-BaRoss, Inc. v. T. Buck Constr., Inc.*, 627 A.2d 532, 535 (Me. 1993) [Lexis].

When final quantity estimates are unavailable, section 871(4) provides that the notice period for a material supplier will expire ninety (90) days after the contracting authority determines the final quantity estimates. The statute is silent as to when the supplier will be notified of this determination. Accordingly, the supplier "must be diligent in inquiring as to when the contracting authority makes its final estimate determinations for purposes of complying with the notice requirement." *Hall v. U.S. Fid. & Guar. Co.*, 436 A.2d 863, 865 (Me. 1981) [Lexis].

D. Coverage

Payment bonds issued pursuant to 14 M.R.S. § 871(3) broadly cover "labor or materials to the contractor or the contractor's subcontractor," so long as the labor or materials were supplied "in the prosecution of the work provided for in the contract." However, "a claim for payment pursuant to a payment bond does not incorporate all the contractual remedies a supplier may have against a customer, but merely seeks payment for materials supplied to the job." *Chadwick-BaRoss, Inc.*, 627 A.2d at 536 [Lexis].

1. Labor

a. Professional Services

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover professional services.

b. Union Benefits

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover union benefits.

2. Material

A payment bond covers materials actually supplied for the work set forth in the prime contract. *Chadwick-BaRoss, Inc.*, 627 A.2d at 536 [Lexis].

In a case predating Maine's enactment of 14 M.R.S. § 871, the Law Court held that the "substantial consumption" rule applicable to mechanics' lien cases should apply equally to a supplier's payment bond claim. *Carpenter v. Susi*, 152 Me. 1, 9–11, 121 A.2d 336, 340–41 (1956) [Lexis]. Though the issue has not been revisited in the context of section 871, it is likely that Maine Courts would apply the same rule today. *Accord Transamerica Premier Ins. Co. v. Ober*, 894 F. Supp. 471, 483 (D. Me. 1995) [Lexis] ("Courts have defined 'material' under the Miller Act provision permitting recovery to all those 'supplying labor and material' as items which a supplier would reasonably believe would be consumed, or substantially consumed, in the project and which have no utility or economic value to the contractor after the project's completion.").

3. Equipment

a. Repairs

Losses sustained to a supplier's capital equipment are generally not recoverable under a payment bond. *Ober*, 894 F. Supp. at 483 [Lexis]. Other repairs may be covered if they are directly related to the contract work and would not reasonably be expected to have utility outside of the project. *See id.*

b. Rentals

The Public Works Contractors' Surety Bond Law expressly includes equipment rentals in the term "materials." 14 M.R.S. § 871(3)(B).

4. Other

a. Attorneys' Fees

A prevailing supplier has no statutory right to recover costs and attorneys' fees in an action on a payment bond. *Chadwick-BaRoss, Inc.*, 627 A.2d at 536 [Lexis].

The Maine Law Court has opined, albeit in dicta, that "[f]ees may be awarded against a surety who has in some way improperly resisted or obstructed the recovery of the claim against it." *Chadwick-BaRoss, Inc.*, 627 A.2d at 536 n.4 [Lexis] (citing *Thomas Laughlin Co. v. Am. Sur. Co.*, 114 F. 627, 628 (1st Cir.1902) [Lexis]).

b. Interest

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover interest. However, in *Carpenter v. Massachusetts Bonding & Insurance Co.*, which predated the Public Works Surety Bond Law of 1971, the Law Court held that a subcontractor was entitled to interest on its claims against a surety defendant beginning from the date the contractor and its surety failed to pay the subcontractor. 161 Me. 1, 8–10 (1965) [Lexis]. In summarizing the principles of interest as applied to surety bonds, the court explained that a party is entitled to interest from the time the defendant has a legal duty to pay. *Id.* at 9–10 (collecting cases).

c. Financing Charges

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover financing charges.

d. Insurance Premiums

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover insurance premiums.

e. Loans

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover loans.

f. Delay Damages

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover delay damages.

g. Profits

Maine courts have not addressed whether payment bonds issued pursuant to 14 M.R.S § 871 cover profits.

h. Extracontractual

Chapter 43 of the Maine Insurance Code—which is codified in Title 24-A of the Maine Revised Statutes—deals specifically with surety insurance contracts and provides that surety contracts are subject to the "applicable provisions" of Tite 24-A. 24-A M.R.S. §§ 3101–3105. Section 2436-A of the Insurance Code provides a civil action for damages resulting from actions taken by the plaintiff's "own insurer." Whether the surety is a payment bond obligee's "own insurer, such that an obligee can maintain a claim against it for unfair claims settlement practices under 24-A M.R.S. § 2436-A, remains an open question in Maine. *See* *Fed. Ins. Co. v. Me. Yankee Atomic Power Co.*, 183 F. Supp. 2d 76, 89–90 (D. Me. 2001) [Lexis]; John J. Aromando, *The Surety's Liability for "Bad Faith": Claims for Extra–Contractual Damages by an Obligee Under the Payment Bond*, 47 ME. L. REV. 389 (1995) [Lexis].

The Law Court has suggested that a surety's tortious conduct in relation to a payment bond claim may be grounds for a claimant to raise additional claims. *Chadwick-BaRoss, Inc.*, 627 A.2d at 536 n.4 [Lexis] (citing *Thomas Laughlin Co. v. Am. Sur. Co.*, 114 F. 627, 628 (1st Cir.1902) [Lexis]).

When a contractor fails to pay subcontractors and suppliers, and a third party steps in to pay those parties before a surety is required to under the payment bond, the paying party may have an equitable subrogation claim against the surety for unjust enrichment based on those payments. *See* *Me. Yankee Atomic Power Co.*, 183 F. Supp. 2d at 86 [Lexis].

E. Contracts Excluded

The Public Works Contractors' Surety Bond Law does not require a payment bond for any public contract with a value of $125,000 or less. 14 M.R.S. § 871(3). Contracts awarded pursuant to any invitation for bids issued prior to the statute's enactment are also excluded from the payment bond requirements of section 871. *Id*. § 871(5).

Additionally, 5 M.R.S. § 1745 authorizes the Director of the Maine Bureau of General Services to contract with a non-bonded party in the event that a properly-advertised public improvement project receives no proposal from qualified, bonded individuals.

F. Time for Suit

Title 14, section 871(4), provides that a claimant may not bring suit after one (1) year from the last date on which the claimant performed the labor or supplied the materials for which payment is sought. An exception exists for a material supplier when final quantity estimates are unavailable such that the amount of the claim cannot be ascertained. In those circumstances, the claimant must bring its suit within one (1) year from the date the final quantity estimates are determined.

Pending arbitration arising from the payment dispute will not automatically toll the statutory limitation period. *Vacuum Sys., Inc. v. Bridge Constr. Co.*, 632 A.2d 442, 444 (Me. 1993) [Lexis].

G. Remarks

Certified Copies of Contracts and Bonds

Section 871(4) mandates that, when a contracting body receives a written application from a person or entity stating that (1) they have supplied labor or materials for work on a public contract but have not received payment, (2) they are being sued on a payment bond, or (3) they are the surety on the payment bond, then the contracting body (via the agent in charge of its office) must furnish a certified copy of the bond and corresponding contract to the applicant. Applicants are financially responsible for the contracting body's reasonable costs (which are determined by the contracting body) in preparing the documents. In an action on the payment bond, certified copies are prima facie evidence of the contents, execution, and delivery of the original contract and bond. 14 M.R.S. § 871(4).

Irrevocable Letter of Credit in Lieu of Payment Bond

Section 871(3-A) provides an alternative to payment bonds on public projects. Specifically, subsection 3-A grants contracting authorities the discretion to accept an irrevocable letter of credit in lieu of the payment bond. The letter of credit must be: "(1) Issued in favor of the State or other contracting authority by a federally insured financial institution; (2) In a form satisfactory to the State or other contracting authority; and (3) In an amount equal to the full amount of the contract." *Id.* § 871(3-A)(A). To be an acceptable alternative to a surety bond, the entity issuing the irrevocable letter of credit must satisfy certain criteria set forth in subsection 3-A(B) of the statute. *See id*. § 871(3-A)(B). Any letter of credit set to expire prior to the accepted completion of work

must be replaced and the new letter must be delivered to the contracting body thirty (30) days prior to the expiration date. *Id.* § 871(3-A)(C).

H. Case Annotations

Case law in Maine addressing public payment bonds is limited and the reported cases involving claims under 14 M.R.S. § 871 were addressed in the preceding sections of this Chapter. Because the Public Works Contractors' Surety Bond Law was modeled after the federal Miller Act, Maine courts will turn to federal precedent when presented with issues of first impression under the State statute. *Washburn*, 651 A.2d at 379 [Lexis]. Thus, federal precedent continues to serve as a useful guidepost for payment bond claims brought pursuant to 14 M.R.S. § 871.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Contractors in Maine are not required to furnish payment bonds for private projects. Therefore, Maine courts will apply general contract law principles when interpreting private payment bond agreements.

Under common law, "[w]hat the contractor has agreed to perform is what the bond assures." *Foster v. Kerr & Houston, Inc.*, 133 Me. 389, 179 A. 297, 300 (1935) [Lexis]. Although courts will not read into the agreement any additional obligations, payment bonds will be construed most strongly against the party agreeing to act as surety in exchange for consideration. *McFarland v. Rogers*, 134 Me. 228, 184 A. 391, 392 (1936) [Lexis].

B. Time for Suit

Maine does not have a statute of limitations expressly covering private payments bonds and there is little authority in Maine regarding the time limit for bringing surety bond claims. Civil actions in Maine generally must be commenced within six years after the cause of action accrues, 14 M.R.S. § 752, but "personal actions on contracts or liabilities under seal" must be brought within twenty years, *id.* § 751.

In *Inhabitants of Town of Alexander v. Maine Bonding & Casualty Co.*, Maine's high court addressed whether the six-year or twenty-year limitations period applied to an action brought to recover amounts due upon certain surety bonds statutorily required to be furnished by a tax collector upon assuming office. 274 A.2d 439 (Me. 1971) [Lexis]. The court, noting the lack of harmony in decisions of other jurisdictions, concluded that the twenty-year limit applied to the action against the surety, because the surety's liability arose from the suretyship contract. *Id.* at 440–41. Notably, however, the court emphasized that the bond at issue was a sealed instrument and statutorily required to be furnished. *Id.* at 439, 441. The case has not been cited and the issue has not been revisited by the court in the more than fifty years since it was decided.

In any event, bond provisions setting forth the time for suit are enforceable, except that insurance contracts may not limit the time for filing suit against non-Maine insurers to a period less than two years from the date the cause of action accrues. 24-A M.R.S. § 2433.

C. Case Annotations

In *Jenkins, Inc. v. Walsh Brothers, Inc.*, the Law Court held that the surety posting the payment bond would not be jointly and severally liable for the judgment entered against a general contractor in a prompt pay case. 2002 ME 168, ¶¶ 14–17, 810 A.2d 929 [Lexis]. In an earlier appeal in the same case, the court expressly concluded that the sole claim against the surety had been voluntarily dismissed by the subcontractor plaintiff. *Id.* ¶ 14. Because the plaintiff did not challenge the original judgment that failed to award relief against the surety in the first appeal, and further failed to request reconsideration of the court's opinion in *Jenkins I* [Lexis], the Law Court held that the trial court erred in awarding judgment against the insurer upon remand and vacated the judgment accordingly. *Id.* ¶¶ 15–17. Although the Law Court did not address the merits of the claim against the insurer in either decision, the *Jenkins* cases serve as a reminder of the importance of actively pursuing any claim for recovery against the surety.

MARYLAND

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Maryland's Little Miller Act, codified in the Maryland State Finance and Procurement Article, Md. State & Fin. Proc. Art. §§ 17-101 *et seq.*, sets forth the requirements for payment security on state public works projects. Such security may take the form of a payment bond executed by a surety company authorized to do business in Maryland, cash, or "other security that is satisfactory to the public body awarding the contract." Md. State & Fin. Proc. Art. § 17-104(a).

Prior to awarding a public construction contract exceeding $100,000, the public body must require the contractor to provide payment security in an amount equal to at least 50 percent of the contract price. For public contracts greater than $50,000 but less than $100,00, the public body *may* require payment security in an amount not exceeding 50 percent of the contract price. Md. State & Fin. Proc. Art. § 17-103; *and see* Md. State & Fin. Proc. Art. § 17-101(d) (defining "public body").

B. Tiers Covered

The Maryland Little Miller Act restricts the protection of the payment security to those who supply labor or materials directly to the prime contractor, its subcontractor, or its sub-subcontractor. Md. State Fin. & Proc. Art. § 17-108. *And see Atl. Sea–Con, Ltd. v. Robert Dann Co.*, 321 Md. 275, 293, 582 A.2d 981 (1990) (holding supplier to a materialman too remote to obtain the protection of the prime contractor's payment bond).

C. Notice Required

Notice requirements under the Maryland Little Miller Act vary according to claimant tier. Claimants in direct privity with the general contractor are not subject to notice requirements in order to preserve rights against the payment bond or other payment security. However, pursuant to Md. State Fin. & Proc. Art. § 17-108(b)(1), a claimant not in direct privity with the general contractor is required to give written notice to the contractor "within 90 days after the labor or materials for which the claim is made were last supplied in the prosecution of work covered by the security." The notice must be sent via certified mail to the contractor's residence or place of business and state with substantial accuracy the amount claimed and to whom the labor or materials was supplied. Md. State Fin. & Proc. Art. § 17-108(b)(2).

Relative liberality characterizes case law construing Maryland Little Miller Act notice requirements. *See, e.g.*, *Viscount Constr. Co. v. Dorman Elec. Supply Co.*, 68 Md. App. 362, 511 A.2d 1102 (1986) [Lexis] (supplier's later delivery of missing label of approval, where equipment had originally been supplied without this label, sufficient to constitute delivery of "material" for notice timeliness purposes); *Ins. Co. of N. Am. v. Genstar Sone Prods. Co.*, 338 Md. 161, 656 A.2d

1232 (1995) [Lexis] (materials sent to repair a defect held to relate to original contract such that notice supplied within 90 days of repair work timely); *State Roads Comm'n v. Contee Sand & Gravel Co.*, 308 F. Supp. 650, 652 (D. Md. 1970) [Lexis] (notice by ordinary mail deemed sufficient, despite statutory directive to use registered mail); *Westinghouse Elec. Corp. v. Minnix*, 259 Md. 305, 269 A.2d 580 (1970) [Lexis] (rejecting restrictive interpretation of notice provision that would have required a specific statement that the supplier was looking to the contractor for payment). *But see CTI/DC, Inc. v. Selective Ins. Co. of Am.*, 392 F.3d 114 (4th Cir. 2004) [Lexis] (finding notice not properly given under the Maryland Little Miller Act where supplier's letter did not identify subcontractor with whom supplier had contracted; the contractor's actual knowledge and a later, compliant notice sent beyond statutory deadline did not salvage the noncompliant notice).

D. Coverage

The Maryland Little Miller Act is liberally construed to effect the purpose of the statute—namely, "to protect subcontractors and materialmen on State or other public projects where they have no lien on the work done." *Stauffer Constr. Co. v. Tate Eng'g, Inc.*, 44 Md. App. 240, 244–45, 407 A.2d 1191 (1979) [Lexis], *cert denied*, 286 Md. 753 (1980).

Generally speaking, the "payment security" required by the Act is defined as "security to guarantee payment for labor and materials, including leased equipment, under a contract for construction." Md. State Fin. & Proc. Art. § 17-101(b).

Maryland courts will generally look to decisions construing the federal Miller Act to provide guidance in interpreting the Maryland Little Miller Act, as the laws' "basic coverage, purpose and procedures remain substantially the same." *Allied Bldg. Prods. Corp. v. United Pac. Ins. Co.*, 77 Md. App. 220, 226, 549 A.2d 1163 (1988) [Lexis]; *see also Viscount Constr. Co. v. Dorman Elec. Supply Co.*, 68 Md. App. 362, 366, 511 A.2d 1102 (1986) [Lexis]; *Gen. Fed. Constr., Inc. v. D.R. Thomas, Inc.*, 52 Md. App. 700, 709, 451 A.2d 1250 (1982) [Lexis].

1. Labor

a. Professional Services

In the absence of published case authority on point, federal Miller Act case law is likely to be persuasive.

b. Union Benefits

In the absence of published case law on point, federal Miller Act precedent is likely to be persuasive.

2. Material

In *Allied Building Products Corp. v. United Pacific Insurance Co.*, the Maryland Court of Special Appeals reversed the trial court's grant of summary judgment in favor of a material supplier where there was competing evidence about whether the supplier had, in fact, delivered the quantity of materials claimed. 77 Md. App. 220, 233–37, 549 A.2d 1163 (1988) [Lexis].

3. Equipment

Federal Miller Act authority will likely be persuasive in the absence of case law construing public payment bond claims for equipment rental and repair. However, it should be noted that "leased equipment" is specifically included in the definition of "payment security" required by the Maryland Little Miller Act. See Md. State Fin. & Proc. Art. § 17-101(b).

4. Other

a. Attorneys' Fees, Interest, and Financing Charges

The Maryland Little Miller Act does not specifically provide for recovery for such damages.

Maryland case law provides that interest is recoverable in a payment bond claim when the claim is for a liquidated amount due; however, interest runs only from the time the bond claim is made and the claimant's demand refused. *Peerless Ins. Co. v. Bd. of Cnty. Comm'rs for Prince George's Cnty.*, 248 Md. 439, 442, 237 A.2d 15 (1968) [Lexis] ("Interest would be due either from the undisclosed date of demand for payment of the claim and refusal by the appellant to pay the claim, or, in any event, from the date of filing the suit."); *see also R. T. Woodfield, Inc. v. Montgomery Cnty. Bd. of Educ.*, 252 Md. 33, 39, 248 A.2d 895 (1969) [Lexis]; *Mullan Contracting Co. v. IBM Corp.*, 220 Md. 248, 261, 151 A.2d 906 (1959) [Lexis].

b. Insurance Premiums

In the absence of published case law on point, federal Miller Act precedent is likely to be persuasive.

c. Loans

In the absence of published case law on point, federal Miller Act precedent is likely to be persuasive.

d. Delay Damages and Profits

See *Gen. Fed. Constr. Inc. v. D.R. Thomas, Inc.*, 52 Md. App. 700, 714, 451 A.2d 1250 (1982) [Lexis] (holding claimant entitled to recover delay damages actually accrued pursuant to "contractual arrangement" but denying recovery of anticipated profit from such damages).

e. Extracontractual

In Maryland, there is no precedent that allows a cause of action for bad faith sounding in tort against a surety. *See Inst. of Mission Helpers of Baltimore Cnty v. Reliance Ins. Co.*, 812 F. Supp. 72, 76 (D. Md. 1992) [Lexis].

In the 2021 legislative session, Senate Bill 372 was proposed to extend certain insurance bad-faith standards to writers of surety bonds. The bill did not advance.

E. Contracts Excluded

The Maryland Little Miller Act does not apply to public construction contracts that do not exceed $50,000, nor does it apply to private construction projects. See Md. State & Fin. Proc. Art. § 17-103.

F. Time for Suit

An action on a payment bond required by the Maryland Little Miller Act must be filed within one year after the public body finally accepts the work performed under the contract. Md. State Fin. & Proc. Art. § 17-109(b). The date of final acceptance is a mixed question of law and fact that is highly case-specific. *See, e.g.*, *Gen. Fed. Constr. Inc. v. D.R. Thomas, Inc.*, 52 Md. App. 700, 702, 451 A.2d 1250 (1982) [Lexis] (final acceptance deemed to have occurred when the contractor received the last inspection certificate); *U.S. Fid. & Guar. v. Hamilton and Spiegel, Inc.*, 241 Md. 133, 135–36, 215 A.2d 735 (Md. 1966) [Lexis] (architect's issuance of a certificate of completion pursuant to contract requirements deemed final acceptance); *Joseph J. Hock, Inc. v. Baltimore Contractors, Inc.*, 252 Md. 61, 249 A.2d 135 (1969) [Lexis] (contract did not call for certificate of completion issued by architect, and owner's release of final payment constituted final acceptance).

The venue for an action on the payment security is the appropriate court of the county where (1) the contract was executed and performed; or (2) the contractor has its principal place of business. Md. State Fin. & Proc. Art. § 17-109(a).

Claimants must wait until at least 90 days after the date on which labor or material was last supplied before filing suit. *See* Md. Sate Fin. & Proc. Art. § 17-108.

G. Remarks

The Maryland Little Miller Act prohibits a contractor from including a provision in an executory contract with a subcontractor or supplier that waives the right to sue on a payment bond. Further, a waiver of Maryland Little Miller Act rights will not be inferred. In *Allied Building Products Corp. v. United Pacific Insurance Co.*, the surety claimed that a joint-check arrangement whereby the contractor would not be liable for any materials purchased over $100,000, supplanted a supplier's Little Miller Act rights. 77 Md. App. 220, 549 A.2d 1163 (1988) [Lexis]. The Maryland Court of Special Appeals disagreed, stating "only a clear and express waiver will terminate a supplier's rights under a Little Miller Act payment bond, and that the taking of additional security by itself does not constitute a waiver of a bond claim." *Id.* at 230–31.

The Little Miller Act further provides that a contractual conditional payment clause (*i.e.*, a "pay-if-paid" provision) does not operate as a waiver of a claimant's right to seek recovery against the payment bond. Md. State Fin. & Proc. Art. § 17-108(d)(2).

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

As the Maryland Court of Special Appeals summarized in *National Union Fire Insurance Co. v. Wadsworth Golf Construction Co.*: "A surety bond is a contract and is to be construed as such…As with all contracts, a suretyship contract is interpreted by its terms[.]" 160 Md. App. 257, 268, 863 A.2d 347 (2004) [Lexis] (internal citations and quotations omitted). In Maryland, as elsewhere, a surety's liability is not to be extended beyond the terms of its contract. *See Baltimore v. Fid. & Deposit Co. of Md.*, 282 Md. 431, 441, 386 A.2d 749 (1978) [Lexis]. Nonetheless, case law suggesting that bond terms are to be construed most strongly against compensated sureties has been cited with favor by Maryland courts. *See, e.g.*, *Nat'l Union Fire Ins. Co. v. David A. Bramble, Inc.*, 388 Md. 195, 205–08, 879 A.2d 101 (2005) [Lexis].

B. Time for Suit

Under Maryland law, parties may contract for reasonable limitations period, and there is no published authority suggesting a contractual limitations period contained in a private payment bond has been held unenforceable on public policy grounds. In the absence of a contract clause limiting the time for suit, a private payment bond claim would likely be subject to the state's twelve-year limitations period for bonds. Md. Courts & Judicial Procs. Art. § 5-102(2).

C. Case Annotations/Remarks

Waivers of the Right to Sue on Contractor's Bond

Pursuant to Md. Real Prop. Art. § 9-113(a), clauses in private construction contracts which purport to waive or require a subcontractor to waive the right to sue on a contractor's bond are unenforceable.

Effect of Conditional Payment Clause

"A provision in an executory contract between a contractor and a subcontractor that is related to construction, alteration, or repair of a building, structure, or improvement and that conditions payment to the subcontractor on receipt by the contractor of payment from the owner or any other third party may not abrogate or waive the right of the subcontractor to … sue on a contractor's bond." Md. Real Prop. Art. § 9-113(b).

Timeliness of Surety Response to Claim

In *National Union Fire Insurance Co. v. David A. Bramble, Inc.*, the Court of Appeals of Maryland construed AIA payment bond language providing that the surety must answer a claim within 45 days of receipt. 388 Md. 195, 879 A.2d 101 (2005) [Lexis]. The court upheld the judgments of the Court of Special Appeals in favor of the claimants, concluding that the relevant sureties had waived their right to dispute the claim where, despite sending multiple claim

acknowledgments, the sureties had failed to answer the claim within 45 days or delineate which portions of the claim were disputed. *Id.* at 210–13, 879 A.2d at 109–10.

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

The Massachusetts Little Miller Act, Massachusetts General Laws, Chapter 149, Section 29, requires a payment bond in an amount not less than half of the total contract price to secure payment for labor or materials furnished in the construction, repair, or demolition of public buildings or other public works in the Commonwealth of Massachusetts when the amount of the contract is more than $25,000.00.

B. Tiers Covered

A claimant under c. 149, § 29 is any party who has not been paid in full for labor, materials, equipment, appliances, or transportation used or employed in connection with the bonded project, regardless of whether or not the claimant has a direct contractual relationship with the principal. All tiers of subcontractors and suppliers are covered by c. 149, § 29. *See* *Peters v. Hartford Accident and Indem. Co.*, 377 Mass. 863, 389 N.E. 2d 63 (1979) [Lexis]; *Trs. of Sheet Metal Workers' Local Union No. 17 v. U.S. Fire Ins. Co.*, 73 Mass. App. Ct. 1117, 899 N.E.2d 919 (2009) [Lexis]; *N-Tek Constr. Servs., Inc. v. Hartford Fire Ins. Co.*, 89 Mass. App. Ct. 186, 47 N.E.2d 435 (2016) [Lexis].

C. Notice Required

Chapter 149, § 29 does not require claimants in direct privity with the bond principal to furnish any notice of claim. Claimants without a direct contractual relationship with the principal must provide written notice to the bond principal within sixty-five days after the day on which the claimant last furnished the labor, materials, equipment, appliances, or transportation covered by the bond. Compliance with the notice requirement is a condition precedent to a claimant maintaining an action pursuant to c. 149, § 29. *C&I Steel, LLC v. Peabody Constr. Co.*, 22 Mass. L. Rptr. 402, 2007 WL 1540228 at *8, 2007 Mass. Super. LEXIS 141 (Mass. Super. 2007) [Lexis]. The notice must state with substantial accuracy the amount claimed and identify the party for whom it was provided. *See* *N-Tek Constr. Serv., Inc. v. Hartford Fire Ins. Co.*, 89 Mass. App. Ct. 186, 47 N.E.2d 435 (2016) [Lexis]; *Bastianelli v. Nat'l Union Fire Ins. Co.*, 36 Mass. App. Ct. 367, 631 N.E.2d 566 (1994) [Lexis]; *Worcester Air Conditioning Co., Inc. v. Com. Union Ins. Co.*, 14 Mass. App. Ct. 352, 439 N.E.2d 845 (1982) [Lexis]. A claimant is not required to separate elements of labor, material, or equipment into discrete units and submit multiple notices. *City Rentals, LLC v. BBC Co.*, 79 Mass. App. Ct. 559, 947 N.E.2d 1103 (2011) [Lexis]. If the claim is for "specially fabricated materials" the clamant must provide the principal with written notice of the placement and amount of the order for such materials within twenty (20) days after receiving the final written approval to use the subject material. If required, notice of a claim arising under c. 149, § 29 must be issued to the principal by registered or certified mail, or by any other manner

through which civil process may be served. Though in practice, courts liberally construe the manner in which notice is delivered, with actual and timely notice commonly deemed compliant. *See* *Cinder Prods. Corp. v. Schena Constr. Co.*, 22 Mass. App. Ct. 927, 492 N.E.2d 744 (1986) [Lexis].

D. Coverage

A payment bond issued pursuant to c. 149, § 29 covers labor and materials furnished to the project, including lumber and materials specially fabricated for the project. The bond further covers transportation charges for materials, and sums due for the rental or hire of vehicles or equipment. A c. 149, § 29 bond also covers sums due trustees based on labor performed for health and welfare plans, supplementary unemployment benefit plans, and other fringe benefits provided for in collective bargaining agreements.

1. Labor

Consistent with the liberal construction afforded c. 149, § 29, the word "labor" is not limited to laborers in the ordinary sense, and includes skilled supervision. *See* *Look v. City of Springfield*, 292 Mass. 515, 198 N.E. 662 (1935) [Lexis]; *N-Tek Constr. Serv., Inc. v. Hartford Fire Ins. Co.*, 89 Mass. App. Ct. 186, 47 N.E.2d 435 (2016) [Lexis].

a. Professional Services

There are no reported decisions directly addressing c. 149, § 29 coverage for professional services, such as architecture or design. Such claims will be governed by the terms of c. 149, § 29. Fundamentally, claimants under c. 149, § 29 must have a contract with the bond principal or one of its subcontractors/sub-subcontractors. Traditionally, professional services were provided most commonly to the project owner through the design-bid-build delivery method, and therefore would not qualify for payment bond coverage. However, with the recent proliferation of design-build contracts, work that may now be delegated to a subcontractor/sub-subcontractor otherwise constituting professional services (*e.g.*, design or engineering services) is likely to be covered by c. 149, § 29 provided all the terms of the statute are met.

Chapter 149, § 29 is an extension of M.G.L. c. 254 governing mechanics liens. It is notable that c. 254 was amended in 2011 to extend lien rights to design professionals. *See* M.G.L. c. 254, § 2C.

b. Union Benefits

Chapter 149, § 29 broadly covers union benefits based on labor performed for health and welfare plans, supplementary unemployment benefit plans, and other fringe benefits payable in cash and provided for in collective bargaining agreements between organized labor and the bonded contractor or its subcontractors. Such benefit claims are not preempted by ERISA. *See* *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136 (1st Cir. 2000) [Lexis].

2. Material

Chapter 149, § 29 provides coverage for materials used or employed in the project, including any material specially fabricated at the order of the contractor or subcontractor for use

as a component part of the project so as to be unsuitable for use elsewhere, even though such material has not been delivered and incorporated into the project but only to the extent that such specially fabricated material is in conformity with the contract, plans, and specifications, or any duly made changes thereto. Though not entirely settled, Massachusetts courts have ruled that materials entitled to coverage under c. 149, § 29 do not need to have been actually incorporated into the as-built project, but only have been furnished "by virtue of" a contract. *See* *Advanced Kiosks v. LM Holdings, LLC*, 25 Mass. L. Rptr. 357, 2009 WL 1448948, 2009 Mass. Super. LEXIS 105 (Mass. Super. 2009) [Lexis].

3. Equipment

a. Repairs

Chapter 149, § 29 does not expressly provide for, and there are no reported decisions addressing coverage for, the cost of repairing equipment otherwise compensable under c. 149, § 29.

b. Rentals

Chapter 149, § 29 expressly provides coverage for the cost of "rental or hire of vehicles, steam shovels, rollers propelled by steam, or other power, concrete mixers, tools and other appliances and equipment" (including transportation of such rented equipment) employed in the project. *See* *Bayer & Mingolla Constr. Co. v. Deschenes*, 348 Mass. 594, 205 N.E.2d 208 (1965) [Lexis].

4. Other

a. Attorneys' Fees

Chapter 149, § 29 mandates that an award in favor of a claimant "shall include reasonable legal fees based upon the time spent and the results accomplished as approved by the court." Though the fees must be objectively reasonable, the amount of the award rests in the discretion of the trial judge, Massachusetts courts have awarded c. 149, § 29 legal fees substantially in excess of the amount of the underlying claim. *See* *City Rentals, LLC v. BBC Co.*, 79 Mass. App. Ct. 559, 947 N.E.2d 1103 (2011) [Lexis]; *J.P. Constr. Co., Inc. v. Stateside Builders, Inc.*, 45 Mass. App. Ct. 920, 699 N.E.2d 358 (1998) [Lexis]. The fee-shifting provision of c. 149, § 29 is designed to achieve the legislative goal of expeditious payments to subcontractors and suppliers by placing the expense of litigation on a bond principal and its surety if a rightful claim is denied. *City Rentals*, 947 N.E.2d at 1110 [Lexis]. A claimant's entitlement to an award of legal fees pursuant to c. 149, § 29 extends to fees incurred on appeal. *See* *Central Ceilings, Inc. v. Suffolk Constr. Co.*, 91 Mass. App. Ct. 231, 75 N.E.3d 40 (2017) [Lexis].

However, legal fees incurred in prosecuting a claim through arbitration pursuant to a mandatory arbitration clause in the underlying contract with the bond principal are not recoverable from the surety pursuant to c. 149, § 29. *Sun Fire Protection & Eng'g., Inc. v. D.F. Pray, Inc.*, 73 Mass. App. Ct. 906, 899 N.E.2d 114 (2009) [Lexis] (citing *Floors, Inc. v. B.G. Danis of New England, Inc.*, 380 Mass. 91, 401 N.E.2d 839 (1980) [Lexis]).

b. Interest

Chapter 149, § 29 does not directly provide for the payment of interest to claimants. However, pursuant to M.G.L. c. 231, 6C (Interest Added to Damages in Contract Actions), interest shall be added by the court to an award in favor of a claimant at the contract rate if established, or at the rate of twelve percent (12%) per annum from the date of the breach or demand. If the date of the breach or demand is not established, interest shall run from the date of commencement of the action. Applying c. 231, § 6C, Massachusetts courts will hold sureties liable for interest on amounts owed beginning the sixty-fifth day after payment was due from the bond principal, rather than the date the surety learned of the principal's default. *See John W. Egan Co., Inc. v. Major Constr. Mgmt. Corp.*, 46 Mass App. Ct. 643, 709 N.E.2d 66 (1999) [Lexis]. If the underlying contract expressly provides for payment of interest, the rate and other terms pertaining to the interest obligation detailed in the contract will be applicable to the surety. *Yanofsky v. Marinucci Bros. & Co.*, 351 Mass. 698, 218 N.E.2d 405 (1966) [Lexis].

c. Financing Charges

Chapter 149, § 29 does not expressly provide coverage for, and there are no reported decisions addressing, financing charges.

d. Insurance Premiums

Chapter 149, § 29 does not provide coverage for insurance premiums. *See Bay State Dredging & Contracting Co. v. W.H. Ellis & Son Co.*, 235 Mass. 263, 126 N.E. 468 (1920) [Lexis].

e. Loans

Chapter 149, § 29 does not expressly provide coverage for, and there are no reported decisions addressing, loan costs.

f. Delay Damages

Chapter 149, § 29 does not expressly provide coverage for, and there are no reported decisions addressing, delay damages.

g. Profits

Chapter 149, § 29 does not expressly provide coverage for, and there are no reported decisions addressing, lost profits.

h. Extracontractual

M.G.L. c. 93A, the Massachusetts consumer protection statute, establishes a cause of action against sureties resulting from "unfair or deceptive" acts or practices. *See R. W Granger & Sons, Inc. v. J&S Insulation, Inc.*, 435 Mass. 66, 754 N.E.2d 668 (2001) [Lexis]. Chapter 93A is applicable to the handling of payment bond claims arising under c. 149, § 29. Chapter 93A allows a successful plaintiff to recover attorneys' fees and provides for the possibility of double or treble damages.

As it pertains to sureties, Chapter 93A has a companion statute, M.G.L. c. 176D, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the business of insurance." A violation of Chapter 176D will commonly be deemed a violation of c. 93A. Chapter 176D details acts that insurance companies, including surety companies, are forbidden to commit, including the failure by a surety to "effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." M.G.L. c. 176(D), § 3(9)(f). Chapter 176D requires a surety to act promptly upon communications with respect to claims, requires that it maintain "reasonable standards for prompt investigation of claims" and it must affirm or deny coverage of claims within a "reasonable time after proof of loss statements have been completed." Nonetheless, Massachusetts courts have held that a claim for damages will only arise if a reasonable investigation would have determined that liability was clear. *Gaffney v. AAA Life Ins. Co.*, 4 F. Supp. 2d 38 (D. Mass. 1998) [Lexis].

A surety cannot insist on a judicial determination of liability and damages before agreeing to pay a claim if liability and damages are reasonably clear. *R. W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 435 Mass. 66, 754 N.E.2d 668 (2001) [Lexis]. When determining whether liability has become reasonably clear, a court will decide "whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for a good reason, that the [surety] was liable to the plaintiff." *Demeo v. State Farm Mut. Auto Ins. Co.*, 38 Mass. App. Ct. 955, 649 N.E.2d 803 (1995) [Lexis].

The limitation period for Chapter 93A claims is four (4) years, much longer than the one (1)-year limitation period established by c. 149, § 29. Claimants who are otherwise time-barred under c. 149, § 29 occasionally bring stand-alone Chapter 93A claims against sureties as a means of overcoming the one (1)-year limitation period.

A surety is not liable for extracontractual damages awarded against the bond principal as the c. 149, § 29 obligation is limited to payment for labor, materials, and equipment. *C&I Steel, LLC v. Travelers Cas. and Sur. Co. of Am.*, 70 Mass. App. Ct. 653, 876 N.E.2d 442 (2007) [Lexis].

E. Contracts Excluded

Chapter 149, § 29 applies only to public works contracts exceeding $25,000.00. *See Salem Bldg. Supply Co. v. J.B.L. Constr. Co., Inc.*, 10 Mass. App. Ct. 360, 407 N.E.2d 1302 (1980) [Lexis].

F. Time for Suit

All c. 149, § 29 claimants must file a lawsuit in the Superior Court within one (1)-year after the day on which such claimants last furnished labor, materials, equipment, or transportation. The one (1)-year period runs from the last date the claimant completed its contracted work, not the particular work included in the claim. *N.B. Kenney Co., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 70 Mass. App. Ct. 736, 876 N.E.2d 1175 (2007) [Lexis]. Any work performed by a claimant within the one (1)-year period, including minor repair work, will toll the limitation period for an additional year. *See Otis Elevator Co. v. Westchester Fire Ins. Co.*, 50 Mass. App. Ct. 712, 741 N.E.2d 80 (2001) [Lexis]. Such repair work must only have been performed in good faith and for the purpose of completing the contract, even if done with the ulterior purpose of tolling the limitation period. *See Armco Drainage & Metal Prods., Inc. v. Framingham*, 332 Mass. 129, 123 N.E.2d 471 (1954) [Lexis] (citing *Carter v. Commonwealth*, 290 Mass. 97, 194 N.E. 915 (1935) [Lexis]; and *Peerless Unit Ventilation Co. v. D'Amore Constr. Co.*, 283 Mass. 121, 186

N.E. 280 (1933) [Lexis]). While seemingly liberal, the standard is not without limitation. In *Vo v. Suffolk Construction Co.*, the court ruled that the "repair" work in question did not extend the one (1)-year limitation period given there was nothing wrong with the initial work, neither the contractor nor the owner requested that the claimant return and perform repairs, and the sole motive for performing the subsequent work was extending the limitation period. 2007 WL 5271542 (Mass. Super. 2007).

G. Remarks and Case Annotations

1. Jurisdiction

Chapter 149, § 29 provides for adjudication of claims in the Massachusetts Superior Court, though litigation is occasionally pursued in either the Massachusetts District Court or the United States District Court if prescribed jurisdictional and amount in controversy requirements are met. *See Pub. Works Supply Co. v. Kevton Corp.*, 2004 Mass. App. Div. 167, 2004 WL 2403772 (2004) [Lexis].

2. Venue

If either the payment bond or the bonded contract contain a forum selection clause requiring a particular venue, such a clause is enforceable by either the claimant or the surety. In the absence of a forum selection clause, venue is proper in any county where either the claimant or surety reside. *See Ionics, Inc. v. Liberty Mut. Ins. Co.*, 2002 WL 31956998, 2002 Mass. Super. LEXIS 484 (Mass. Super. 2002) [Lexis] (citing *Arrow Plumbing and Heating, Inc. v. N. Am. Mech. Servs. Corp.*, 810 F. Supp. 369 (D.R.I. 1993) [Lexis]).

3. Jury Trial

A claimant under c. 149, § 29 is not entitled to a jury trial. Though the statute does not expressly preclude a jury trial, it requires claimants to file a petition "in equity." Historically, claims brought in the Massachusetts Superior Court in equity are tried without a jury.

4. Speedy Trial

The court is obligated to advance for "speedy trial" claims brought pursuant to c. 149, § 29 at the request of any party. However, "speedy trial" is not defined in c. 149, § 29 and there is no language in the statute providing specific guidance. In practice, the Superior Court usually assigns cases involving a c. 149, § 29 claim to its litigation "Fast Track," which aspires to reach trial within approximately eighteen (18) months after the complaint is filed.

5. Default Judgment Not Binding on Surety

Under Massachusetts law, a default judgment against a principal is generally not binding on a surety. *Treasurer and Receiver Gen. v. Macdale Warehouse Co.*, 262 Mass. 588, 160 N.E. 434 (1928) [Lexis]. *But see U.S. ex rel. N&T Mechanical Contractors, Inc. v. Veterans Constr. LLC*, No. 10-11120-WGY, 2011 WL 2076345, 2011 U.S. Dist. LEXIS 56318 (D. Mass. 2011) [Lexis].

6. Liberal Construction

Chapter 149, § 29 is considered a remedial statute and will be broadly construed to provide relief for those providing labor, materials, and equipment to public construction projects. *See Aggregate Indus.–Ne. Region, Inc. v. Hugo Key and Sons, Inc.*, 90 Mass. App. Ct. 146, 57 N.E.3d 1027 (2016) [Lexis]; *John W. Egan Co., Inc. v. Major Constr. Mgmt. Corp.*, 46 Mass App. Ct. 643, 709 N.E.2d 66 (1999) [Lexis]; *M. Lasden, Inc. v. Decker Elec. Corp.*, 372 Mass. 179, 360 N.E.2d 1068 (1977) [Lexis]; *Ross v. Planet Ins.* Co., 361 Mass. 852, 279 N.E.2d 690 (1972) [Lexis]; *Warren Bros. Roads* Co. *v. Joseph Rugo, Inc.*, 355 Mass. 382, 245 N.E.2d 243 (1969) [Lexis].

7. Incorporation of Chapter 149, § 29

The terms of c. 149, § 29 are considered to be included in every payment bond furnished to fulfill the statutory requirement, even if the language of the statute is not actually detailed in the payment bond itself. *See Martin Fireproofing Corp. v. Aetna Ins.* Co., 346 Mass. 498, 194 N.E.2d 101 (1963) [Lexis]. The court will "read in" and default to any terms of the statute that are not expressly included in the bond, and any resulting conflicts will be resolved in favor of the claimant.

8. Waiver of Claims Is Not Enforceable

A subcontractor's advance waiver of claims against a c. 149, § 29 payment bond is unenforceable as against public policy. *Costa v. Brait Builders Corp.*, 463 Mass. 65, 972 N.E.2d 449 (2012) [Lexis].

9. Pay-When-Paid

Under Massachusetts law, a pay-when-paid provision is generally enforceable by the surety, but only if it is clearly stated in the contract and provides that payment from the owner is a condition precedent to payment by the contractor principal. *See A.J. Wolfe* Co. *v. Baltimore Contractors, Inc.*, 355 Mass. 361, 244 N.E. 2d 717 (1969) [Lexis]; *Canam Steel Corp. v. Bowdoin Constr. Corp.*, 34 Mass. App. Ct. 943, 613 N.E.2d 121 (1993) [Lexis].

With respect to public construction projects, the enforceability of a pay-when-paid provision is complicated by the Massachusetts filed sub-bid law, pursuant to which seventeen designated subcontractor trades are required to file their bids directly with the public owner. *See* M.G.L. c. 149, § 44F(1). The contractor is entitled to then utilize those filed sub-bids in preparing its general contract bid to the owner. As a general proposition, Massachusetts law treats the relationship between a general contractor and a non-filed sub-bidder on a public project the same as it would on a private construction project, and the surety is entitled to rely on a pay-when-paid clause. However, when the claimant is a designated filed sub-bidder, entitlement to payment is regulated by M.G.L. c. 30, § 39F, which distinguishes between periodic and final payments. Section 39F(1)(a), dealing with periodic payments, states (in relevant part) that "forthwith after the general contractor receives payment ... the general contractor shall pay each subcontractor ..." In contrast, § 39F(1)(b), dealing with final payments, states (in relevant part) that "not later than the 65th day after each subcontractor substantially completes his work ... the entire balance due under the subcontract ... shall be due [to the subcontractor] ..." With respect to periodic payments, c. 30, § 39F(1)(a) can be interpreted as a statutory pay-when-paid provision, as the general

contractor is not obligated to remit payment to the subcontractor until "after the general contractor receives payment." This is not the case, however, with respect to final payments, as the application of a contractual pay-when-paid provision has been found to be contrary to c. 30, § 39F(1)(b), and therefore void. *See* *Bayer & Mingolla Indus., Inc. v. A.J. Orlando Contracting Co., Inc.*, 6 Mass. App. Ct. 1, 370 N.E.2d 1381 (1978) [Lexis].

10. Obligee Not a Claimant

An owner/obligee is not a proper claimant on a c. 149, § 29 payment bond. *Groveland Mun. Light Dep't v. Philadelphia Indem. Ins. Co.*, 496 F. Supp. 3d 582 (D. Mass. 2020) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

There is no requirement for a payment bond on private construction projects in Massachusetts, though M.G.L. c. 149, § 29A (the private counterpart to c. 149, § 29) allows persons furnishing labor or materials to bring suit on a bond in accordance with its provisions. As with public projects, courts will broadly construe c. 149, § 29A to afford security to subcontractors. *M. Lasden, Inc. v. Decker Elec. Corp.*, 372 Mass. 179, 360 N.E.2d 1068 (1977) [Lexis]; *Powers Regulator Co. v. U.S. Fid. & Guar. Co.*, 7 Mass. App. Ct. 913, 388 N.E.2d 1205 (1979) [Lexis]. Payment bonds on private projects in Massachusetts are construed as contracts. As such, the liability of a surety is to be ascertained from the terms of the written instrument by which its obligation is expressed, construed according to the usual rules of interpretation. *Gordon & Dilworth v. Abbott*, 258 Mass. 35, 154 N.E. 523 (1926) [Lexis].

B. Time for Suit

Payment bonds on private projects in Massachusetts are construed as contracts. As such, unless otherwise specified in the bond itself, M.G.L. c. 260 § 2 requires that an action be commenced within six (6) years after the cause of action accrues.

C. Case Annotations

Forum Selection

A party suing on a bond must show strict compliance with its terms. *Simplex Time Recorder Co. v. Fed. Ins. Co.*, 37 Mass. App. Ct. 947, 641 N.E.2d 1358 (1994) [Lexis]. Where a surety bond provided that suit could be brought only in county where construction project was situated, claimant had no right to bring suit elsewhere. *Rossi Sheet Metal Works v. Am. Emps. Ins. Co.*, 439 F.Supp. 895 (D.R.I. 1977) [Lexis].

Arbitration

Where subcontract expressly provided for arbitration of any disputes arising out of or relating to the subcontract and where subcontract was incorporated by reference in payment bond given by subcontractor to general contractor, surety company had implicitly agreed to that method of determining the contractual liability of its principal and, therefore, the surety could avoid the

result of arbitration only by showing fraud or collusion. *Powers Regulator Co. v. U. S. Fid. & Guar. Co.*, 7 Mass. App. Ct. 913, 388 N.E.2d 1205 (1979) [Lexis].

MICHIGAN

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§ 1.0 PUBLIC PAYMENT BONDS

Michigan has two statutes that govern public projects. Mich. Comp. Laws § 129.201 *et seq*., known as the Contractor's Bond for Public Buildings or Works Act (the "Public Works Bond Act" codified at Mich. Comp. Laws §§ 129.201–129.212), applies to all non-highway public projects in excess of $50,000.00. Mich. Comp. Laws § 570.101 *et seq*., known as the Public Buildings and Public Works Act (the "State Highway Public Works Bond Act" codified at Mich. Comp. Laws §§ 570.101–570.105), applies only to contracts of the state highway commissioner (currently known as the Michigan Department of Transportation ("MDOT")).

A. Requirements for Bond

Under the Public Works Bond Act, before any contract exceeding $50,000.00 for the construction, alteration, or repair of any public building or public work or improvement of a "governmental unit" is awarded, the proposed contractor shall furnish a payment bond, which becomes binding upon the contract's award to the proposed contractor. Mich. Comp. Laws § 129.201. The payment bond shall be in an amount fixed by the governmental unit, but not less than 25% of the contract amount. Mich. Comp. Laws § 129.203. It is solely for the protection of claimants supplying labor or materials to the principal contractor or its subcontractors in the prosecution of the contract work. *Id*. The bond must be executed by a surety company authorized to do business in the State of Michigan. Mich. Comp. Laws § 129.204; DIFS Insurance and Financial Services Search.

Under the State Highway Public Works Bond Act, there is no monetary threshold for requiring a payment bond, only that the State require "sufficient security" via the bond for the payment by the contractor of all subcontractors and for the payment for all labor and materials. Mich. Comp. Laws § 570.101. The payment bond shall be in such amount as shall be approved by the board of officers or agents acting on behalf of the State of Michigan. Mich. Comp. Laws § 570.103.

B. Tiers Covered

The Public Works Bond Act protects "claimants" who supply labor and/or materials to the principal contractor or his subcontractors to be used or reasonably required for use in the prosecution of the work provided for in the contract—*i.e.*, first- and second-tier claimants. *See* Mich. Comp. Laws § 129.203, Mich. Comp. Laws § 129.206. "Claimant" has been interpreted broadly to include trust funds seeking unpaid fringe benefits owed to union employees. *Trs. for Mich. Laborers' Health Care Fund v. Seaboard Sur. Co.*, 137 F.3d 427, 430 (6th Cir. 1998) [Westlaw]. Further, the Michigan Supreme Court has interpreted previous versions of the Public Works Bond Act and noted that it does not extend beyond its express terms, nor does it "cover a

material-man who furnishes materials in pursuance of a contract with another material-man." *People ex rel. Belson Manuf. Co.*, 257 N.W. 877 (Mich. 1934) [Westlaw].

The State Highway Public Works Bond Act is conditioned on the payment owed by a contractor to any subcontractor or party performing labor or furnishing materials or supplies, or any subcontractor to any person, firm, or corporation on account of any labor performed or materials or supplies furnished. Mich. Comp. Laws § 570.103.

C. Notice Required

A claimant directly contracting with the bond's principal is not required to furnish notice under the Public Works Bond Act. Mich. Comp. Laws § 129.207.

A claimant without a direct contract with the bond's principal must give two written notices. *Id*. The first notice must be given in writing and sent via certified mail to the bond's principal within 30 days after first performing labor or first furnishing materials for which it may claim payment. *Id*. This notice must state the nature of the materials furnished (or to be furnished), labor being performed (or to be performed), identify for whom the materials are being furnished and the labor is being performed, and identify the site of performance. *Id*.

The second notice must be given in writing and sent via certified mail to the bond's principal and the obligee within 90 days from the date that the claimant last performed labor or last furnished material. *Id*. The claimant must state with substantial accuracy the amount claimed, the name of the party to whom the material was furnished or supplied and for whom the labor was done or performed. *Id*.

Michigan courts have held that strict compliance with the notice requirements is necessary. *See Tempco Heating & Cooling, Inc. v. A Rea Constr., Inc.*, 443 N.W.2d 486 (Mich. Ct. App. 1989) [Westlaw], *John A. Hall Constr. Co. v. Boone & Darr, Inc.*, 302 N.W.2d 850 (Mich. Ct. App. 1981) [Westlaw]. *But see Trs. for Mich. Laborers' Health Care Fund v. Warranty Builders, Inc.*, 921 F. Supp. 471 (E.D. Mich. 1996) [Westlaw], *aff'd*, 137 F.3d 427 (6th Cir. 1998) [Westlaw]; *Hub Electric Co. v. Gust Constr. Co.*, 585 F.2d 183 (6th Cir. 1978) [Westlaw] (where a claimant does not comply with the statutory notice provisions but does comply with the more generous notice provisions in the bond or contract, the more generous provisions controls).

While the statute requires both notices under the Public Works Bond Act to be sent via certified mail, the Michigan Supreme Court has held that regular mail is sufficient if there is evidence of actual receipt of the notice. *See Pi-Con, Inc. v. A.J. Anderson Constr. Co.*, 458 N.W.2d 639, 644 (Mich. 1990) [Westlaw], *Thomas Indus., Inc. v. C&L Elec., Inc.*, 550 N.W.2d 558, 561 (Mich. Ct. App. 1996) [Westlaw], *app. den.*, 558 N.W.2d 734 (Mich. 1997), *W.T. Andrew Co., Inc. v. Mid-State Sur. Corp. ("W.T. Andrew II")*, 562 N.W.2d 206, 207 (Mich. Ct. App. 1997) [Westlaw], *aff'd*, 611 N.W.2d 305 (Mich. 2000) [Westlaw]. Proof of actual receipt of the notices is not required if the claimant complies with the notice procedures and sends the notices via certified mail. *Wyandotte Elec. Supply Co. v. Elec. Tech. Sys., Inc.*, 881 N.W.2d 95, 103 (Mich. 2016) [Westlaw].

Under the State Highway Public Works Bond Act, a subcontractor shall serve written notice in duplicate upon the board of officers or agents contracting on behalf of the state within 60 days after furnishing the last material or supplies or performing the last work covered by the subcontract. Mich. Comp. Laws § 570.102. All others, except those furnishing labor, shall serve written notice in duplicate upon the board of officers or agents contracting on behalf of the state within 60 days after furnishing the last materials or supplies. *Id*.

Payment bonds issued pursuant to the State Highway Public Works Bond Act for MDOT projects often contain provisions allowing for a greater period of time to give notice than what is required under MCL § 570.102. Often, the MDOT Specifications will require that an "Endorsement" increasing the notice period be added to the bond. The following is an example of one such "Endorsement":

> The provisions of the foregoing lien bond shall also apply to indebtedness described therein in the case of a subcontractor in which notice of reliance on the security of the bond is not furnished within the 60-day period provided in 1905 PA 187, § 2, MCLA 570.102; MSA 26.322 provided such notice is furnished within 60 days after notice of payment of the final estimate or the post final estimate having been made by the State of Michigan, Michigan Department of Transportation, or in the case of a supplier to the contractor or a subcontractor, within 120 days after the materials are last furnished. Nothing in this endorsement shall be considered so as to limit or narrow the coverage provided for in said lien bond, but is in addition thereto, and not in lieu thereof.

It is necessary to review any State Highway Public Works Bond Act bond to determine whether the notice period has been expanded.

D. Coverage

In Michigan, as elsewhere, the Public Works Bond Act is modeled after the Miller Act. *Pi-Con, Inc.*, *supra*, 458 N.W.2d at 641 [Westlaw]. Further, the Public Works Bond Act is remedial in nature and, therefore, it should be liberally construed, as its purpose is to protect contractors and materialmen in the public sector to ensure that they do not suffer injury when other contractors default on their obligations. *W.T. Andrew Co. v. Mid-State Sur. Corp. ("W.T. Andrew I")*, 545 N.W.2d 351, 353 (Mich. 1996) [Westlaw]. While federal precedent applying the Miller Act is not controlling upon Michigan courts, it is instructive. *Pi-Con, Inc.*, *supra*, 458 N.W.2d at 641 [Westlaw].

1. Labor

a. Professional Services

The Public Works Bond Act covers claimants "having furnished labor, materials, or both, used or reasonably required for use in the performance of the contract." Mich. Comp. Laws § 129.206. For purposes of the Public Works Bond Act, professional services have not been classified as labor or materials. While Michigan's Construction Lien Act allows professionals to record construction liens on private projects, no such allowance is made for professionals under the Public Works Bond Act.

The State Highway Public Works Bond Act does not address professional services.

b. Union Benefits

Union benefits are considered "labor or material" and are covered under both the Public Works Bond Act and the State Highway Public Works Bond Act. *See* *U.S. ex rel. Sherman v. Carter*, 353 U.S. 210 (1957) [Westlaw] (holding that fringe fund trustees stand in the shoes of employees and thus are entitled to recover sums withheld from their wages as union benefits), *Trs. for Michigan Laborers' Health Care Fund*, *supra*, 137 F.3d at 430 [Westlaw] (finding that a union is a proper claimant under the Public Works Bond Act).

2. Material

Under the Public Works Bond Act, material includes "that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the contract." Mich. Comp. Laws § 129.206. Absent a specific statutory definition, "the term 'material' has consistently been defined by the Michigan Supreme Court as those items consumed by the construction or which form a part of the finished structure." *KMH Equip. Co. v. Charles J. Rogers*, 305 N.W.2d 266, 267 (Mich. Ct. App. 1981) [Westlaw], *app den.* 411 Mich. 1079 (1981). *See e.g.*, *Stoddard Dick Co. v. Mich. Sur. Co.*, 251 N.W. 373 (Mich. 1933) [Westlaw] (shores were not materials because they, like tools, survive construction and remain the property of the contractor); *People ex rel. Fox v. Fid. & Deposit Co.*, 213 N.W. 68 (Mich. 1927) [Westlaw] (form lumber is material because it is consumed in construction and unusable for other purposes).

Under the State Highway Public Works Bond Act, materials and supplies include "coal, wood, form lumber, gasoline, kerosene and lubricating and fuel oils necessarily used in connection with or consumed in constructing, repairing and ornamenting public buildings and public works." Mich. Comp. Laws § 570.105.

3. Equipment

a. Repair

There is no statute or case law in Michigan pertaining to whether repairs are covered under the Public Works Bond Act or the State Highway Public Works Bond Act.

b. Rentals

The Public Works Bond Act covers the rental of equipment that is directly applicable to the contract. Mich. Comp. Laws § 129.206. The State Highway Public Works Bond Act is silent as to rental equipment.

4. Other

a. Attorneys' Fees

Because the Public Works Bond Act does not make "any provision for the award of attorney fees," attorney fees cannot be recovered. *Hub Elec. Co.*, *supra*, 585 F.2d at 188 [Westlaw]. As such, the American Rule governs the award of attorney fees. *H.A. Smith Lumber & Hardware*

Co. v. Decina, 695 N.W.2d 347 (Mich. Ct. App. 2005) [Westlaw], *rev'd on other grounds*, 742 N.W.2d 120 (Mich. 2007), *remanded* 745 N.W.2d 774 (Mich. 2008) [Westlaw]. To the extent, however, that attorney fees are provided for in the underlying contract, they may be recoverable under the Public Works Bond Act. *Wyandotte Electric Supply*, *supra*, 881 N.W.2d at 107 [Westlaw].

b. Interest

While there is no express statutory authority or case law in Michigan related to whether "interest" is covered under a payment bond, the Michigan Court of Appeals has held that a surety is liable for service or finance charges, also known as time-price differentials, where such charges are an integral part of the underlying contract, which is discussed in the next sub-section. *Price Bros. Co. v. Charles J. Rogers Constr. Co.*, 304 N.W.2d 584 (Mich. Ct. App. 1981) [Westlaw].

c. Financing Charges

Payment bond sureties can be liable for "service charges" included in a supplier's contract with a contractor or subcontractor. In *Price Brothers*, *supra*, 304 N.W.2d 584 [Westlaw], the court found that the surety was liable to the supplier for finance charges based on a provision in the supplier's contract stating that the supplier was entitled to a 1½ percent per month service charge per month on unpaid balances.

d. Insurance Premiums

Michigan courts have not addressed whether insurance premiums would be covered under statutory payment bonds.

e. Loans

Loans from the payment bond claimant to the principal would not be covered by the payment bond in Michigan. The Michigan Court of Appeals in *Price Brothers*, *supra*, 304 N.W.2d at 587 [Westlaw] noted that "it is undisputed that, under the payment bond, [the surety] would not be liable for the payment of any separate loans from plaintiff to [the principal]."

f. Delay Damages

Michigan courts have stated that "no damage for delay" clauses in construction contracts are "generally recognized as valid and enforceable." *John E. Green Plumbing & Heating Co., Inc. v. Turner Constr. Co.*, 742 F.2d 965, 966 (6th Cir. 1984) [Westlaw]. However, because of their "harsh effects, these clauses are strictly construed." *Id*. at 966.

Michigan courts recognize several exceptions to "no damage for delay provisions," as follows:

> These exceptions include situations in which the delay (1) was of a kind not contemplated by the parties; (2) amounted to an abandonment of the contract; (3) was caused by the bad faith on the

> part of the contracting authority; or (4) was caused by the active interference of the other contracting party.

Phoenix Contractors, Inc. v. Gen. Motors Corp., 355 N.W.2d 673, 676 (Mich. Ct. App. 1984) [Westlaw].

To the extent the principal contractor is liable to a subcontractor for delay damages, the payment bond surety may also be liable for such amounts. *See, e.g.*, *Macomb Mech., Inc. v. LaSalle Grp., Inc.*, No. 319357, 2015 Mich. App. LEXIS 877, 2015 WL 1880189 (Mich. Ct. App. Apr. 23, 2015) [Westlaw], *lv app den*, 872 N.W.2d 456 (Mich. 2015) (holding that subcontractor "presented sufficient evidence to create a triable issue on its claim for delay damages," and therefore reversing the trial court's grant of summary disposition on that issue in favor or the principal and surety). Note, however, that the court in *Macomb* did not expressly address whether delay damages are within the scope of the surety's obligations under a payment bond.

g. Profits

Michigan courts have not addressed whether lost profits would be covered under statutory payment bonds.

h. Extracontractual

Under Michigan law, punitive and exemplary damages are generally not recoverable under a breach of contract claim. *Valentine v. Gen. Am. Credit, Inc.*, 332 N.W.2d 591 (Mich. Ct. App. 1983) [Westlaw].

A surety bond is considered an "insurance policy" or "insurance contract" under Michigan's Insurance Code. Mich. Comp. Laws § 500.116(d). However, there is no separate cause of action for bad faith against an insurer in Michigan. *Casey v. Auto-Owners Ins. Co.*, 729 N.W.2d 277 (Mich. Ct. App. 2006) [Westlaw]. Note, however, that Michigan's Uniform Trade Practices Act provides that an insurer that fails to pay a claim within 60 days after a "satisfactory proof of loss" is received by the insurer with respect to an "insurance contract" is obligated to pay the claimant 12 percent interest per annum on such claim. Mich. Comp. Laws § 500.2006. While there are no cases expressly applying such statute to sureties, a court could find that a claim on a payment bond qualifies under such statute based on the inclusion of a surety bond as an "insurance contract," as noted above.

E. Contracts Excluded

The Public Works Bond Act expressly applies only to contracts exceeding $50,000. Mich. Comp. Laws § 129.201. Also, if the principal contractor is a common carrier or the designated operator of a state subsidized railroad, the contractor may provide an irrevocable letter of credit rather than a bond. *Id*. The Act does not apply to contracts awarded under Michigan's Drain Code of 1956. Mich. Comp. Laws § 129.212.

Additionally, following the adoption of the Public Works Bond Act, the prior public works bond statute, Mich. Comp. Laws § 570.101 *et seq.*, no longer applies to any contracts for public buildings or public works, with the exception of construction and maintenance contracts of the state highway commissioner, generally referred to MDOT projects. Mich. Comp. Laws § 129.211.

Until 1996, Michigan courts had held that constitutionally created state universities were not subject to the Public Works Bond Act. *See, e.g.*, *The William C. Reichenbach Co. v. Michigan*, 288 N.W.2d 622 (Mich. Ct. App. 1979) [Westlaw] (holding that the Act's requirement that the owner obtain a performance bond does not apply to Michigan State University, whose governing board was created by the state constitution). However, in *W.T. Andrew I*, *supra*, 545 N.W.2d 351 [Westlaw], the Michigan Supreme Court overturned prior case law, holding that "[a]lthough the University of Michigan is a constitutionally created corporation, the Legislature can impose regulations on it that are designed to provide for the general welfare of society. In this case, [the Public Works Bond Act] provides for the welfare of society by guaranteeing that governmental units and people who have furnished services are not injured when contractors default on their obligations." *Id*. at 356–57. Accordingly, the court held that the claimant was a "claimant" under the Public Works Bond Act. *Id*. at 357.

F. Time for Suit

Suit on the Public Works Bond Act must be brought within one year from the date on which "final payment was made to the principal contractor," pursuant to Mich. Comp. Laws § 129.209. A claimant cannot file suit against a payment bond before 90 days after it last supplied labor or furnished materials to the project. Mich. Comp. Laws § 129.207.

The Michigan Court of Appeals has held that the statute begins to run on the date of the last payment to either the principal contractor or "a person substituted for the first contractor." *Adamo Equip. Rental Co. v. Mack Dev. Co.*, 333 N.W.2d 40, 42 (Mich. Ct. App. 1982) [Westlaw]. Accordingly, the one-year limitation period accrues from the last payment to the contractor performing work under the original contract, whether that this the principal or a replacement contractor.

There is also a one-year statute of limitations to bring suit on MDOT projects under the State Highway Public Works Bond Act. However, that statute runs from "the completion and acceptance of the project." Mich. Comp. Laws § 570.104.

G. Remarks

It is interesting to note that, while courts liberally construe the Public Works Bond Act because it is "remedial in nature," *W.T. Andrew I*, *supra*, 545 N.W.2d 351 [Westlaw], they require strict adherence with the notice requirements of the statute. *See, e.g.*, *Tempco*, *supra*, 443 N.W.2d at 490 [Westlaw].

H. Case Annotations

Limitations Period

Adamo Equipment held that the one-year statute of limitations begins to run on the date of the last payment to either the principal contractor or "a person substituted for the first contractor." *Supra*, 333 N.W.2d 40 [Westlaw]. Accordingly, the one-year limitation period accrues from the last payment to the contractor performing work under the original contract, whether that this the principal or a replacement contractor.

Defenses of Principal

In *Ackron Contracting Co. v. Oakland County*, the Michigan Court of Appeals held that a surety may plead any defense available to its principal. 310 N.W.2d 874, 876 (Mich. Ct. App. 1981) [Westlaw].

Liability for Time-Price Differential/Finance Charges

In *Price Brothers*, the surety was liable to the supplier for finance charges based on a provision in the supplier's contract stating that the supplier was entitled to a 1½ percent per month service charge per month on unpaid balances. *Supra*, 304 N.W.2d 584 [Westlaw]. The court stated: "The crucial issue is whether the one-and-one-half percent monthly service charge constitutes a separate loan, or an extension of credit to [the surety's principal], rather than a flexible price factor employed to reflect plaintiff's increased costs when its bills are not paid promptly." *Id*. at 587. The Court of Appeals held that the time-price differential was an integral part of the contract between the supplier and the principal, and therefore it was part of the "sum justly due" under the payment bond statute. *Id*. at 588.

Government Liability for Failure of Contractor to Obtain Valid Bond

In *Kammer Asphalt Paving Co. v. East China Township Schools*, a subcontractor brought a negligence claim against the project owner for failure to obtain valid bonds from the general contractor. 504 N.W.2d 635 (Mich. 1993) [Westlaw]. The contractor had provided bonds to the owner, but they were from a non-existent surety. The subcontractor had requested a copy of the payment bond under Mich. Comp. Laws § 129.208, and the school district had provided certified copies of the bond as required under that statute. The Michigan Supreme Court held that plaintiff was "entitled to proceed on the negligence count because defendant's provision of the certified copies was prima facie evidence that the bonds were valid, and defendant is liable for the resulting damages stemming from its failure to verify the bonds' validity." *Id*. at 640.

Surety's Liability before Payment Bond Is Issued

In *Leonard C. Carnaghi, Inc. v. Amwest Surety Insurance Co.*, the court reasoned that "a surety may be liable under a payment bond for work or materials furnished before the bond is issued and that the trigger or default giving rise to the claim against the surety is the failure to pay for the construction material or services when payment is due, as opposed to when the materials are acquired or labor is performed." 617 N.W.2d 49, 52 (Mich. Ct. App. 2000) [Westlaw]. While the contractor completed its work on the project before the bond was executed, there was no retrospective application of the bond because the default/non-payment occurred after the bond had been executed. *Id*. at 53.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Unlike public projects, there is no requirement that contractors performing private construction projects obtain payment bonds, as suppliers and subcontractors are protected by construction lien rights. Mich. Comp. Laws § 570.1101, *et seq.* Nevertheless, payment bonds are sometimes required by contract on non-public projects. Additionally, there can be "private" payment bonds on public projects—when a subcontractor on a public project is required to obtain its own payment bond, which is not governed by Public Works Bond Act.

Under Michigan law, a surety bond is a "contract" between the obligee, the principal, and the surety. *Kondzer v. Wayne Cnty. Sheriff*, 558 N.W.2d 215, 217 (Mich. Ct. App. 1996) [Westlaw]. As such, private payment bonds would be construed as any other contracts, the provisions of which are enforced as written unless they violate law or public policy. *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 43 (Mich. 2005) [Westlaw].

B. Time for Suit

There is no specific statute of limitations in Michigan applicable to private surety bonds. Absent a contractual limitations period in the bond itself, the general six-year limitations period for actions on a contract would apply. Mich. Comp. Laws § 600.5807(9).

Michigan courts will generally enforce a contractual limitations period in a private payment bond. The Michigan Supreme Court enforced a one-year limitation period (from the date the principal ceased work) contained in a private payment bond. *Camelot Excavating Co. v. St. Paul Fire Marine Ins. Co.*, 301 N.W.2d 275 (Mich. 1981) [Westlaw]. While the court in *Camelot* based its decision on a "reasonableness" standard (noting that the bond "does not unreasonably limit the time in which plaintiff subcontractor . . . may commence legal action"), the Michigan Supreme Court subsequently overruled the "reasonableness" requirement from *Camelot*, holding instead (in a case involving the contractual limitations period in an insurance policy) that such a contractual provision should be enforced as written unless it "violates law or public policy." *Rory*, *supra*, 793 N.W.2d at 43 [Westlaw].

C. Case Annotations

Limitations Period

In *Camelot Excavating*, the court enforced a one-year limitations period in a private payment bond, holding that the one-year period was reasonable. *Supra*, 301 N.W.2d 275 [Westlaw]. Note that the Michigan Supreme Court later abrogated the "reasonableness" requirement of *Camelot*, holding that a contractual provision should be enforced as written unless it violates the law or Michigan's public policy. *Rory*, *supra*, 703 N.W.2d at 43 [Westlaw].

MINNESOTA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Minnesota's Little Miller Act (officially titled the "Public Contractors' Performance and Payment Bond Act") sets forth bonding requirements for public construction contracts and is codified at Minn. Stat. §§ 574.26 to 574.32 [Lexis]. Under the Minnesota Little Miller Act, "a contract with a public body for the doing of any public work" exceeding $175,000 is not valid unless the contractor first gives performance and payment bonds. Minn. Stat. § 754.26(2) [Lexis]. The payment bond runs "for the use and benefit of all persons furnishing labor and materials engaged under, or to perform the contract, conditioned for the payment, as they become due, of all just claims for the labor and materials." *Id.*

The payment bond penalty "must not be less than the contract price, and if after the giving of the bond the contract price is increased, for any reason, the public body may require additional bonds, the penalties of which shall not be less than the amount of the increase[.]" Minn. Stat. § 574.26(3) [Lexis].

Before beginning work on the public work, the contractor responsible for procuring performance and payment bonds must file both bonds with the treasurer, board, or other officer having financial management of the public body named in the bonds. Minn. Stat. § 574.28 [Lexis]. The bonds must list the addresses of contractor and surety, be approved by the public body, and be made available for inspection and copying on request. *See id.; and see Edward Kraemer & Sons, Inc. v. Ashback Constr. Co.*, 608 N.W.2d 559 (Minn. Ct. App. 2000) [Lexis] (payment bond including surety's address but failing to give contractor's address meets intent of statute). Failure of the public body to approve a valid payment bond or other acceptable financial security prior to commencement of the work renders the public body liable to all persons furnishing labor and materials under the contract for any resulting loss; however, the public body is not liable if the bond does not list the proper addresses of the surety and/or contractor. Minn. Stat. § 574.29 [Lexis].

B. Tiers Covered

The Minnesota Little Miller Act broadly defines a claimant as one "furnishing labor and materials" and does not restrict the payment bond's coverage to subcontractors or suppliers of a particular tier. *See* Minn. Stat. §§ 574.26(2) [Lexis], 574.31(2) [Lexis].

C. Notice Required

Section 574.31, subdivision 2 [Lexis] sets forth the notice requirements necessary to maintain an action on the payment bond:

> In the event of a claim on a payment bond by a person furnishing labor and materials, no action shall be maintained on the payment bond unless, within *120*

> *days after completion, delivery, or provision by the person of its last item of labor and materials, for the public work*, the person serves written notice of claim under the payment bond personally or by certified mail upon the surety that issued the bond and the contractor on whose behalf the bond was issued at their addresses as stated in the bond specifying the nature and amount of the claim and the date the claimant furnished its last item of labor and materials for the public work. The addresses of the contractor and the surety listed on the bond must be addresses at which the companies are authorized to accept service of the notice of the claim. If an agent or attorney-in-fact is authorized to accept service of notice of the claim for the contractor or surety, that fact must be expressly stated in the bond along with the address of the agent or attorney-in-fact at which service of the notice of the claim can be made. For the purpose of this section, notice is sufficient if served personally or via certified mail to the addresses of the contractor and surety listed on the bond.

(emphasis added). The statute goes on to specifically provide a notarized form of notice that shall be "sufficient" if substantially followed. *Id.*

In Minnesota, the 120-day notice deadline "is strictly enforced." *Safety Signs, LLC v. Niles-Wiese Constr. Co.*, 820 N.W.2d 854, 857 (Minn. Ct. App. 2012) [Lexis] (internal citation omitted). Compliance with the statutory notice requirements operates as a condition precedent to maintaining a payment bond claim. *See, e.g.*, *Mineral Res., Inc. v. Mahnomen Constr. Co.*, 184 N.W.2d 780, 786 (Minn. 1971) [Lexis] (and holding that a deficient notice is a defect that cannot be waived). However, a contractor's failure to file the payment bond in accordance with Section 574.28 [Lexis] will serve to relieve the claimant of providing written notice of its claim. Minn. Stat. § 574.31(2b) [Lexis]. Moreover, notice is deemed effective upon mailing, as with a mechanics' lien notice, rather than upon the surety's/contractor's receipt. *Safety Signs*, 820 N.W.2d at 858 [Lexis].

D. Coverage

The purpose of the Minnesota Little Miller Act "is to protect laborers and materialmen who perform labor or furnish material for the execution of a public work to which the mechanics' lien statute does not apply." *Nelson Roofing & Contracting, Inc. v. C.W. Moore Co.*, 245 N.W.2d 866, 868 (Minn. 1976) [Lexis] (internal quotation omitted). Like the Minnesota mechanics' lien statute, the Little Miller Act is to be liberally construed. *Safety Signs*, 820 N.W.2d at 857 [Lexis] (citing *Wheeler Lumber Bridge & Supply Co. v. Seaboard Sur. Co.*, 16 N.W.2d 519, 522 (Minn. 1944) [Lexis]).

Minn. Stat. § 754.26(2) [Lexis] states the payment bond is for the use and benefit of "all persons furnishing labor and materials engaged under, or to perform the contract, conditioned for the payment, as they become due, of all just claims for the labor and materials."

1. Labor

a. Professional Services

The Eighth Circuit case of *U.S. ex rel. W.H. Cates Construction Co.*, 972 F.2d 987 (8th Cir. 1992) [Lexis], took up the question of whether a salaried estimator/project manager provided

labor within the meaning of the federal Miller Act. In that case, the claimant had brought not only Miller Act claims, but also a state statutory claim under the Minnesota Little Miller Act. (The claimant had performed work on a state university project in addition to two federal projects.) While the sole issue on appeal was the meaning of the word "labor" under the federal Miller Act, and only the federal Act, the Eighth Circuit noted in dicta that Minnesota appears to allow a supervisor or other similar professional to obtain a lien for his or her services. *Id.* at 990 n. 3; *and see Korunsky Frank Erickson Architects, Inc. v. Walsh*, 370 N.W.2d 29, 31 (Minn. 1985) [Lexis] (architectural services are lienable); *Lamoreaux v. Andersch*, 128 Minn. 261, 150 N.W. 908, 909 (1915) [Lexis] (same); *Lindquist v. Young*, 119 Minn. 219, 138 N.W. 28, 29 (1912) [Lexis] (supervision is lienable).

Thus, in the absence of published Minnesota authority construing public payment bond claims for professional services, it is perhaps likely that a court would find the state mechanics' lien case law and/or federal Miller Act case law persuasive.

b. Union Benefits

There is no reported Minnesota opinion interpreting whether union benefits are considered "labor and material" under the state's Little Miller Act and thus covered under public payment bonds. *But see Twin City Pipe Trades Serv. Ass'n, Inc. v. Peak Mech., Inc.*, 689 N.W.2d 549 (Minn. 2004) [Lexis] (permitting employee-benefit trust fund to assert mechanics' lien on behalf of employees).

2. Material

Provided the claim is for materials "engaged under, or to perform the contract" (Minn. Stat. § 754.26(2) [Lexis]), such claim falls within the scope of the protections of the Minnesota Little Miller Act.

3. Equipment

a. Repair

In *Mack International Motor Truck Corp. v. Western Surety Co.*, the Minnesota Supreme Court reasoned:

> Our construction of the statute is, in effect, that the bond does not cover a contractor's equipment, or replacement of parts therof, unless it may be said that the equipment or replacement of parts are consumed in the performance of the contract for which the same were furnished; that it properly covers the repair and replacement of parts which are practically used up or consumed in the performance of the contract; that minor incidental repairs of a machine like a truck is covered, but not the replacement of major parts designed to outlast the job in hand.

194 Minn. 484, 484–86, 260 N.W. 869, 870 (1935) [Lexis]. *Mack* has not been cited in more recent Minnesota published decisions, but ostensibly remains good law.

b. Rentals

There is no indication a claimant that leases or rents out equipment for the benefit of a public construction project would be unable to maintain a payment bond claim for the same, where Minn. Stat. § 754.26(2) [Lexis] broadly states the payment bond is for the use and benefit of "all persons furnishing labor and materials engaged under, or to perform the contract, conditioned for the payment, as they become due, of all just claims for the labor and materials." *But see* *Local Oil Co., Inc. v. City of Anoka*, 225 N.W.2d 849 (Minn. 1975) [Lexis] (claimant sought recovery of claimed rental value of excavating machinery alleged to have been leased to contractor in landfill operations, but evidence did not warrant finding that such machinery was actually used in the landfill operations).

4. Other

a. Attorneys' Fees

Under the terms of the Minnesota Little Miller Act: "Reasonable attorneys' fees, costs, and disbursements may be awarded in an action to enforce claims under the act if the action is successfully maintained or successfully appealed." Minn. Stat. § 574.26(2) [Lexis]. The question of whether awards of fees, costs, disbursements, and interest may exceed the bond's penal sum has not been addressed by Minnesota published case law.

b. Interest

Prejudgment interest may be awarded as a matter of statute, Minn. Stat. § 549.09 [Lexis], or pursuant to contract. *See also* *Monarch Turf Supply v. Reliance Ins. Co.*, 1996 WL 363404, 1996 Minn. App. LEXIS 774 (Minn. Ct. App. July 2, 1996) [Lexis] (unpublished); *see also* Minn. Stat. § 574.26(2) [Lexis].

c. Financing Charges

See *American Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569 (Minn. Ct. App. 1984) [Lexis] (allowing award of finance charges to claimant according to its monthly invoices, but revising to prevent compound interest).

d. Insurance Premiums

Under a prior codification of the Minnesota Little Miller Act, workers' compensation insurance premiums were included within the coverage of the payment bond. *See* *Kunz Ins. Agency v. Phillips*, 255 N.W. 90 (Minn. 1934) [Lexis]. Under the current incarnation of the Act, whether insurance premiums give rise to a valid payment bond claim will turn on whether the reviewing court considers premiums "just claims for the labor and materials." Minn. Stat. § 754.26(2) [Lexis].

e. Loans

There is no reported opinion interpreting whether those who loan or advance money to a contractor or subcontractor provide "labor and material" under the Minnesota Little Miller Act.

f. Delay Damages

Under the Minnesota Little Miller Act, a court could allow a claim against the public payment bond which includes the increased cost of the labor or materials because of a delay if compensable by contract; however, there is no authority expressly on point.

g. Profits

There is no reported decision decided under Minnesota law allowing lost profits as part of a public payment bond claim. However, if the profits claimed are part of the contract price of work performed by the claimant, it seems likely that the claimant would be able to recover that amount against the public payment bond.

h. Extracontractual

No published case decided under Minnesota law recognizes a cause of action for "bad faith" against a payment bond surety. *And see* *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46 (Minn. 1983) [Lexis] ("in the absence of a specific statutory provision, extra-contract damages are not available for breach of contract, except in exceptional cases where the breach is accompanied by an independent tort"; further noting that Minn. Stat. § 549.20 [Lexis] provides for punitive damages "only upon clear and convincing evidence [of] a willful indifference to the rights or safety of others.").

E. Contracts Excluded

Exceptions to the public project bonding requirements of the Minnesota Little Miller Act exist for natural resource development projects (*see* Minn. Stat. §§ 574.263 [Lexis] and 574.264 [Lexis]), projects of the Minnesota Department of Administration and Minnesota Department of Transportation (which Departments have the discretion to fix bond limits at not less than 75 percent of the contract price pursuant to Minn. Stat. § 574.26(3) [Lexis]; *and see* Minn. Stat. § 574.26(1a) [Lexis]), as well as other public works contracts not exceeding the statutory threshold of $175,000 pursuant to Minn. Stat. § 471.345(3) [Lexis].

F. Time for Suit

The Minnesota Little Miller Act provides that suit must be filed within one year from the date of completion, delivery, or provision by the claimant of its last item of labor and materials sated in its notice of claim. If the claimant is not required to furnish notice, the time for suit runs for one year from the actual date of completion, delivery, or provision by the claimant of its last item of labor and materials. *See* Minn. Stat. § 574.31(2c) [Lexis].

G. Remarks

Tolling

The claimant can extend the one-year time for suit by (1) written stipulation between the claimant and surety; or (2) written notice from the claimant extending the deadline by one year, provided it is sent by certified mail to the surety at least 90 days before the expiration of the original one-year deadline for suit filing, and so long as the notice is not objected to by the surety via return certified mail within 30 days after receipt of the claimant's notice. *See* Minn. Stat. § 574.31(2d) [Lexis].

Contract Changes Do Not Discharge Surety

Pursuant to Minn. Stat. § 574.28 [Lexis]: "An assignment, modification, or change of the contract, or change in the work covered by the contract, or an extension of time to complete the contract, does not release the sureties on the bond."

Application of Payments

Under Minn. Stat. § 574.32 [Lexis], if a claimant has actual knowledge or should have known that a payment it received was for labor and materials supplied in connection with the public work for which a payment bond was provided, the claimant must prove it applied the payment to its account for that project; otherwise, its claim is reduced accordingly.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Bonds provided for private construction projects in Minnesota are entirely governed by the ordinary rules of contract.

B. Time for Suit

Parties are free to contract for limitations periods shorter than the applicable six-year statute of limitations for contract actions (Minn. Stat. § 541.05(1) [Lexis]). However, Minnesota courts may recognize the doctrine of equitable tolling in the absence of bond or contract language to the contrary. *See Minn. Laborers Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509 (Minn. 2014) [Lexis].

C. Case Annotations

Principal's Obligation Primary

As the Minnesota Supreme Court summarized in *Minnesota Laborers Health and Welfare Fund v. Granite Re, Inc.*:

> A surety bond is a contract between the surety and the principal. *See Standard Salt & Cement Co. v. Nat'l Sur. Co.*, 134 Minn. 121, 124, 158 N.W. 802, 803 (1916)

[Lexis] (clarifying that since a bond is a contract, "[t]he surety and his principal need no [statutory] authority to bind themselves by it"). The surety agrees to stand in the shoes of the principal if the principal defaults on an obligation to the obligee. *See Raymond Farmers Elevator Co. v. Am. Sur. Co.*, 207 Minn. 117, 119, 290 N.W. 231, 233 (1940) [Lexis] ("If liability of the principal is established ... [and if] the acts for which the principal is liable are within the provisions of the bond[,] ... the surety stands as to the merits in the same shoes as the principal."). However, final responsibility to the obligee rests with the principal, "who is liable to the surety" if the surety has to pay the obligee or complete work on behalf of the principal. *Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co.*, 396 N.W.2d 229, 234 n. 7 (Minn.1986) [Lexis]; *see also Wendlandt v. Sohre*, 37 Minn. 162, 163, 33 N.W. 700, 701 (1887) [Lexis]. Ultimately, the surety's obligations are accessory or collateral to those of the principal. *See Schmidt v. McKenzie*, 215 Minn. 1, 6, 9 N.W.2d 1, 3–4 (1943) [Lexis].

844 N.W.2d 509, 513–514 (Minn. 2014) [Lexis].

MISSISSIPPI

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Miss. Code Ann. § 31-5-51 through 57 [Westlaw], which makes up Mississippi's Little Miller Act, requires that any person (or entity) entering into a formal contract with the State of Mississippi or "any county, city or political subdivision thereof, or other public authority for the construction, alteration, or repair of any public building or public work" must furnish both a payment bond and performance bond provided for by any surety company which is authorized to do business in the State of Mississippi and listed on the United States Treasury Department's list of acceptable sureties. Miss. Code Ann. 31-5-51(1) [Westlaw]. The payment bond must be payable to such public body but "conditioned for the prompt payment of all persons supplying labor or material used in the prosecution of the work under said contract, for the use of each such person, in an amount not less than the amount of the contract." Miss. Code Ann. 31-5-51(1)(b) [Westlaw]. This statutory requirement for a payment and performance bond survives even if the project has a design-build method of project delivery or a construction manager at risk method of project delivery. Miss. Code Ann. 31-5-52 [Westlaw].

B. Tiers Covered

Mississippi's Little Miller Act payment bond covers three classes of claimants: (1) Subcontractors and material suppliers of the contractor; (2) Sub-subcontractors and material suppliers of those subcontractors; and (3) Laborers who have performed work on the project site. Miss. Code Ann. 31-5-51(4) [Westlaw].

C. Notice Required

On public projects, claimants who have a direct contractual relationship with a subcontractor, but no direct contractual relationship with the prime contractor, must serve the prime contractor with written notice within ninety (90) 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 for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Miss. Code Ann. 31-5-51(3) [Westlaw].

This notice must be given in writing by the claimant to either the contractor or surety and can be given at any place where the contractor or surety maintains an office or conducts business. The notice can either be personally delivered to the contractor or surety or mailed by certified mail, return receipt requested, postage prepaid, to the contractor or surety. No action may be maintained by a person not having a direct contractual relationship with the contractor/principal unless this

statutory notice is given. Miss. Code Ann. 31-5-51(3) [Westlaw]; *see* *Younge Mech., Inc. v. Max Foote Constr. Co.*, 869 So. 2d 1079, 1081 (Miss. Ct. App. 2004) [Lexis].

D. Coverage

Every person who furnished labor or material used in the prosecution of work on the bonded project who has not been paid in full before the expiration of a ninety (90) days after the date on which the claimant provided labor or material was furnished by him on the project, and provided that the amount claimed has been approved, if required, by the public entity or its architect or engineers, or if such approval is being without as a result of unreasonable acts of the contractor, shall have the right to sue on the payment bond for the amount that is due and payable but unpaid at the time of the suit. Miss. Code Ann. 31-5-51(2) [Westlaw]. However, if the action is subject to contractual provision or conditions between the parties in the action, the action shall be abated pending the performance of such provisions any the fulfillment of any conditions. *Id.*

1. Labor

a. Professional Services

Mississippi public payment bonds cover "[l]aborers who have performed work on the project site." Miss. Code Ann. 31-5-51(4) [Westlaw]. Professional services have not been classified as labor or materials under the Mississippi Little Miller Act to date.

b. Union Benefits

There are no Mississippi cases determining whether or not union benefits are considered "labor or material" and are covered by a public works payment bond.

2. Material

Miss. Code Ann. 31-5-51(2) [Westlaw] states that every person who furnished labor or material used in the prosecution of work on the bonded project, if they meet the timing requirements discussed above, is a proper claimant under the bond. However, the statute does not define the terms labor and materials. It is generally accepted that "used in the prosecution of the work" means that the materials must actually be incorporated into the bonded project in order to be the subject of a valid payment bond claim *See* *Mathes Elec. Supply Co. v. Can't Be Beat Fence Co., LLC*, 267 So. 3d 788, 792 (Miss. Ct. App. 2018) [Lexis]. However, diversion of material by subcontractor that was, in good faith, supplied for use on the bonded project, does not exonerate the prime contractor or the surety for liability for the debt. *Key Constructors, Inc. v. H & M Gas Co.*, 537 So. 2d 1318, 1323 (Miss. 1989) [Lexis]. Although there is no appellate case law on point, state courts have opined that specialized material ordered for a project in good faith belief that it would be incorporated into the project, which material was ultimately not incorporated into the project, constitutes material under the Mississippi Little Miller Act.

Suppliers of fuel consumed by construction machinery on a bonded project fall within the scope of material and are, as such, proper claims under the statutory payment bond. *Key Constructors, Inc.*, 537 So. 2d at 1321–22 [Lexis].

3. Equipment

a. Repair

There is no recent law on the subject of equipment being a proper claim under the payment bond. However, there are several old cases that state that under the predecessor statute, absent bond language to the contrary, a surety is not liable for "equipment necessary for the contractor to have to perform the work, but only covers material and labor consumable in the work." *McElrath & Rogers v. W. G. Kimmons & Sons*, 146 Miss. 775, 112 So. 164, 166 (1927) [Lexis]. Thus, under this theory, the payment bond is not liable for repairs on equipment used on the bonded project.

b. Rentals

Mississippi law is not clear on rental equipment. There is one case wherein the Court examined the terms of the bond and found that unless the payment bond specifically states that rental equipment is covered under the terms of the payment bond, a claim for rental equipment is not covered under Mississippi's Little Miller Act. *Carter Equip. Co. v. Travelers Indem. Co.*, 409 F. Supp. 1008, 1010 (S.D. Miss. 1975) [Lexis], *aff'd*, 520 F.2d 941 (5th Cir. 1975). However, in a 1979 case, the Mississippi Supreme Court analyzed the essential nature of the equipment rented and stated that "the equipment was essential to improving the construction site as provided in the partnership contract, just as laborers would have been had the equipment not been used. In our opinion, it was essential and within the obligation of the performance bond."[1] *Houston Gen. Ins. Co. v. Maples*, 375 So. 2d 1012, 1016 (Miss. 1979) [Lexis].

4. Other

a. Attorneys' Fees

First and foremost, nothing in Mississippi's Little Miller Act affects the rights of any person to recover attorneys' fees where they are provided in the contract or the bond.

Under Mississippi's Little Miller Act, whenever a laborer or materialman that is a proper claimant under the payment bond brings an action on the payment bond and the trial judge finds that the defense raised to such action by the *contractor or surety* was not reasonable, or not in good faith, or was made merely for the purpose of delaying payment, then the trial judge may, in his or her discretion, award the claimant a reasonable amount of attorneys' fees in bringing such successful action. Miss. Code Ann. § 31-5-57 [Westlaw].

Similarly, if the trial judge finds that the action brought by the claimant was without just cause or in bad faith, the trial judge may, in his or her discretion, award the contractor or surety a

[1] The author recognizes this court referenced the performance bond. In 1979, the statute relied upon by the Court had the requirement that the contractor "shall promptly make payments to all persons supplying labor and material" to the bonded project.

reasonable amount of attorneys' fees in bringing such successful action. Miss. Code Ann. § 31-5-57 [Westlaw].

b. Interest

A claimant is entitled to interest from the surety on the amount due for labor and materials from the time the debt became due and payable, even if the bond does not expressly provide for interest on the debt. *See Dixie Contractors, Inc. v. Ballard*, 249 So. 2d 653, 656 (Miss. 1971) [Lexis]; *see also Faulkner Concrete Pipe Co. v. U. S. Fid. & Guar. Co.*, 218 So. 2d 1, 3 (Miss. 1968) [Lexis].

c. Financing Charges

Unless deemed "labor or material used in the prosecution of work," finance charges would not be allowed under a statutory payment bond. Miss. Code Ann. 31-5-51(2) [Westlaw].

d. Insurance Premiums

Unless deemed "labor or material used in the prosecution of work," insurance premiums would not be allowed under a statutory payment bond. Miss. Code Ann. 31-5-51(2) [Westlaw].

e. Loans

There is no reported Mississippi opinion allowing a lender to be a proper claimant on a bond issued pursuant to Mississippi's Little Miller Act.

f. Delay Damages

There is no reported Mississippi opinion allowing delay damages as part of a payment bond claim. Under the statutes, if the cost of labor or materials provided by the claimant increased as a result of delay, the claim allowed under the payment bond may include delay-related cost increases.

g. Profits

There is no reported Mississippi opinion allowing lost profits to be recovered against the payment bond surety.

h. Extracontractual

Under Mississippi law, there has been no distinction made between suretyship and insurance for the purposes of a bad faith claim, which subjects the surety to extracontractual damages. *See C & I Ent., LLC v. Fid & Deposit Co. of Md.*, No. 1:08CV00016-DMB-DAS, 2014 WL 3640790, at *13, 2014 U.S. Dist. LEXIS 99505 (N.D. Miss. July 22, 2014) [Lexis]; *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 972 (Miss. 1999) [Lexis]; *McQueen Contracting, Inc. v. Fid. & Deposit Co. of Md.*, 871 F.2d 32, 34 (5th Cir. 1989) [Lexis].

Under Mississippi law, a surety owes a claimant a duty of good faith and fair dealing and, once the claim is determined to be valid, the issue of punitive damages should be submitted to the jury if "the trial court determines that there are jury issues with regard to whether: (1) the insurer lacked an arguable basis for denying the claims, *and* (2) the insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured's rights." *C & I*, 2014 WL 3640790, at *13 [Lexis].

> In determining what constitutes an arguable basis, Mississippi law states:
> If an insurance [or surety] company fails to pay a claim based upon an arguable or legitimate reason ... punitive damages will not lie. In determining whether an insurer possessed an arguable or legitimate reason, the initial burden is placed on the insurer: it need only show that it had reasonable justifications, either in fact or in law, for its actions. Once an insurance company articulates an arguable or legitimate reason ... the insured bears the burden of demonstrating that the insurer had no arguable reason.

JSI Commc'ns v. Travelers Cas. & Sur. Co. of Am., 717 F. App'x 382, 386 (5th Cir. 2017) [Lexis]. Additionally, sureties have a duty to investigate claims made on a bond and where a surety fails to perform "even a minimal investigation" into the obligee's claim, it can be liable for punitive damages. *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 972 (Miss. 1999) [Lexis] (internal citations omitted).

E. Contracts Excluded

If a contract is less than twenty-five thousand dollars ($25,000.00), the owners have the option to make a lump sum payment at the completion of the job. However, this lump sum payment cannot not be made until completion and acceptance by the governing agency. In such a case a performance bond or payment bond will not be required. Miss. Code Ann. 31-5-51(5) [Westlaw].

F. Time for Suit

Miss. Code Ann. 31-5-53 states, "[w]hen suit is instituted on a payment bond given in accordance with this chapter, it shall be commenced within one (1) year after the day on which the last of the labor was performed or material was supplied by the person bringing the action and not later."

G. Venue

Miss. Code Ann. 31-5-53 states "[a]ny suit brought on a performance or payment bond given in accordance with this chapter shall be brought in the county in which the contract or some part thereof was performed or in the county in which service of process may be obtained upon either the principal or the surety on such bond." [Westlaw].

H. Case Annotations

Equitable Subrogation

The current state of the law in Mississippi regarding equitable subrogation differs from the prevailing trend that "[t]he performance bond surety who agrees to complete the bonded contract becomes entitled to all earned but unpaid progress payments."[2] Mississippi courts differentiate between a surety's right to the retainage funds versus any earned but unpaid progress payments at the time of default. In *Kimberly-Clark Corp. v. Alpha Building Co.*, the United States District Court for the Northern District of Mississippi found that while the right of subrogation begins as of the date of the execution of the bond for the retainage fund, it affirmed decades old rulings that "the surety did not have superior equity to progress payments due under a public contract over an assignment held by a bank who had advanced funds used by the contractor in paying for materials and labor in performance of the contract." 591 F. Supp. 198, 207 (N.D. Miss. 1984) [Lexis] (internal citations omitted).

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Where a contractor gives a payment bond providing payment protection to subcontractors and material suppliers in accordance with the Mississippi Little Miller Act or the private project bond statute, Miss. Code Ann. § 85-7-431 [Westlaw] states that "the payment bond shall be in substitution for the liens provided for a subcontractor or materialman in this article. The contractor's right to a lien is not affected by the provision of a bond."

Miss. Code Ann. § 85-7-432 [Westlaw] is sometimes referred to as Mississippi's Private Works Act and states that a person entering into a formal contract for the construction of a private work, *may* provide a payment bond and, if so provided, the payment bond *shall* conform to the requirements of chapter 7 of title 85 of the Mississippi Code.

Similar to Mississippi's Little Miller Act, a payment bond issued pursuant to Mississippi's Private Works Act "shall be payable to the owner but conditioned for the prompt payment of all persons supplying labor or material used in the execution of the work under the contract, for the use of each such person, in an amount not less than the amount of the contract." Miss. Code Ann. § 85-7-432(1)(b) [Westlaw]. In fact, the notice provisions in the Private Works Act are identical to those in Mississippi's Little Miller Act except that under Miss. Code Ann. § 85-7-432(3) [Westlaw], notice by the second-tier subcontractor or claimant may be made via email so long as it contains a receipt of the read receipt.

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[2] *See, e.g.*, *Lacey v. Md. Cas. Co.*, 32 F.2d 48 (4th Cir. 1929) [Lexis]; *In re Glover Constr. Co.*, 30 B.R. 873 (Bankr. W.D. Ky. 1983) [Lexis]; *Balboa Ins. Co. v. W.C.B., Assocs., Inc.*, 390 So. 2d 172 (Fla. Dist. Ct. App. 1980) [Lexis]; *see also Great Am. Ins. Co. v. United States*, 481 F.2d 1298 (Ct. Cl. 1973) [Lexis]; *Travelers Indem. Co. v. W. Ga. State Bank*, 387 F. Supp. 1090 (N.D. Ga. 1974) [Lexis]; *Fid. & Dep. Co. v. Merchs. & Farmers' Bank*, 179 S.W. 1019 (Ark. 1915) [Lexis]; *Comm'l Bank v. Bd. of Pub. Instruction*, 55 So. 2d 552 (Fla. 1951) [Lexis]; *Union Indem. Co. v. City of New Smyrna*, 130 So. 453 (Fla. 1930) [Lexis]; *Phifer State Bank v. Detroit Fid. & Sur. Co.*, 121 So. 571 (Fla. 1929) [Lexis].

B. Time for Suit

Miss. Code Ann. § 85-7-432(5) [Westlaw] states that "[w]hen suit is instituted on a payment bond given in accordance with this chapter, it shall be commenced within one (1) year after the day on which the last of the labor was performed or material was supplied by the person bringing the action and not later."

C. Venue

The venue provision for Mississippi's Private Works Act is almost identical to Mississippi's Little Miller Act, only having one notable distinction. Pursuant to Miss. Code Ann. § 85-7-432(5)(c) [Westlaw] "[a]ny suit brought on a performance or payment bond given in accordance with this chapter shall be brought in the county in which the contract or some part thereof was performed or in the county in which service of process may be obtained upon either the principal or the surety on such bond." The distinction made in the Private Works Act that differs from Mississippi's Little Miller Act is Miss. Code Ann. § 85-7-432(5)(c) [Westlaw] specifically states that that "[s]ervice of process on the surety through the Commissioner of Insurance does not satisfy the venue requirement of this section."

D. Notice Required

On projects bonded pursuant to the Private Works Act, claimants who have a direct contractual relationship with a subcontractor, but no direct contractual relationship with the prime contractor, must serve the prime contractor with written notice within ninety (90) 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 for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Miss. Code Ann. § 85-7-432(3) [Westlaw].

This notice must be given in writing by the claimant to either the contractor or surety and can be given at any place where the contractor or surety maintains an office or conducts business. The notice can either be personally delivered to the contractor or surety or mailed by certified mail, return receipt requested, postage prepaid, to the contractor or surety. Mississippi's Private Works Act also allows this notice to be sent by email, with confirmation of a read receipt. No action may be maintained by a person not having a direct contractual relationship with the contractor/principal unless this statutory notice is given. *Id.*

E. Attorneys' Fees

Similar to Mississippi's Little Miller Act, whenever a laborer or materialman that is a proper claimant under the payment bond brings an action on the payment bond and the trial judge finds that the defense raised to such action by the *contractor or surety* was not reasonable, or not in good faith, or was made merely for the purpose of delaying payment, then the trial judge may, in his or her discretion, award the claimant a reasonable amount of attorneys' fees in bringing such successful action. Miss. Code Ann. § 85-7-432(7) [Westlaw].

Moreover, if the trial judge finds that the action brought by the claimant was without just cause or in bad faith, the trial judge may, in his or her discretion, award the contractor or surety a reasonable amount of attorneys' fees in bringing such successful action. *Id.*

Additionally, any person supplying labor or materials to the project shall have the right to obtain a copy of the contract and bonds within thirty (30) days of a written request for such to the obligee or the principal. Failure to provide the contract and/or bonds timely shall result in the recipient of the request being liable for reasonable attorneys' fees and costs in any subsequent action under the private works act. Miss. Code Ann. § 85-7-432(6) [Westlaw].

§ 3.0 MISSISSIPPI DEPARTMENT OF TRANSPORTATION BONDS

In addition to the payment bond required by Mississippi's Little Miller Act, all contracts by or on behalf of the Mississippi Transportation Commission (the three-member elected body responsible for the oversight of the Mississippi Department of Transportation) require a payment bond with specific statutory requirements. Miss. Code Ann. § 65-1-85 requires a bond "in an amount equal to the contract price." Miss. Code Ann. § 65-1-85(f) [Westlaw]. All bonds must be payable to the State of Mississippi and be conditioned on "the prompt payment of all persons furnishing labor, material, equipment and supplies" used in the performance of the contract. Such bonds shall be subject to the additional obligation that "the principal and surety or sureties executing the same shall be liable to the state in a civil action instituted by the state at the instance of the commission or any officer of the state authorized in such cases, for double any amount in money or property the state may lose or be overcharged or otherwise defrauded of by reason of any wrongful or criminal act, if any, of the contractor, his agent or employees." *Id.*

The statute governing Mississippi Department of Transportation bonds expressly defines "equipment" and "labor", stating:

> With respect to equipment used in the construction, reconstruction or other public work authorized to be done under the provisions of this chapter: the word "equipment," in addition to all equipment incorporated into or fully consumed in connection with such project, shall include the reasonable value of the use of all equipment of every kind and character and all accessories and attachments thereto which are reasonably necessary to be used and which are used in carrying out the performance of the contract, and the reasonable value of the use thereof, during the period of time the same are used in carrying out the performance of the contract, shall be the amount as agreed upon by the persons furnishing the equipment and those using the same to be paid therefor, which amount, however, shall not be in excess of the maximum current rates and charges allowable for leasing or renting as specified in Section 65-7-95 [Westlaw]; the word "labor" shall include all work performed in repairing equipment used in carrying out the performance of the contract, which repair labor is reasonably necessary to the efficient operation of said equipment; and the words "materials" and "supplies" shall include all repair parts installed in or on equipment used in carrying out the performance of the contract, which repair parts are reasonably necessary to the efficient operation of said equipment.

Miss. Code Ann. § 65-1-85(2) [Westlaw].

MISSOURI

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Public works projects in Missouri are governed by Mo. Rev. Stat. § 107.170, which requires public works projects exceeding fifty thousand dollars to have payment bonds. Mo. Rev. Stat. § 107.170.2 requires that the bond "be conditioned for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work; all insurance premiums, both for compensation, and for all other kinds of insurance, on said work; and for all labor performed in such work whether by a subcontractor, a supplier at any tier, or otherwise." Pursuant to Mo. Rev. Stat. § 107.170.3, a payment bond furnished for a public works project will be construed to contain all the statutory requirements, regardless of the provisions of the bond.

The right of action to sue on the bond required under Mo. Rev. Stat. § 107.170 is given by Mo. Rev. Stat. § 522.300, which provides that every person furnishing material or performing labor, either as an individual or as a subcontractor, shall have a right to sue on such bond.

With respect to road construction, Mo. Rev. Stat. § 229.060 requires the contractor to enter into a bond in an amount fixed by the public body with the condition "that the contractor will faithfully discharge his duties under the contract within the time and in the manner therein provided, and that he will furnish and promptly pay for all labor and materials used and equipment rented in the performance of said contract."

Missouri law specifically prohibits a governmental entity from requiring a bond be issued by a particular surety company. Mo. Rev. Stat. § 34.059(1).

B. Tiers Covered

In Missouri, all tiers of subcontractors and suppliers are covered by a payment bond issued for a public works project. *See* Mo. Rev. Stat. § 107.170.2. However, "remote suppliers" must provide written notice of their claim to the contractor that has the contract with the public entity, "within ninety days of the time the supplier last supplied materials on the public works project." *Id.*

The provisions in Mo. Rev. Stat. § 107.170.2 regarding "remote suppliers" are relatively new. In 2019, the statute was amended to specifically include the "supplier at any tier" language and the notice provisions relating to "remote suppliers." At the time of this publication, this amendment has not been addressed in a published appellate decision. However, this amendment appears to overturn earlier cases, which hold that suppliers were not covered by statutory payment bonds.

C. Notice Required

There is no notice requirement in Mo. Rev. Stat. § 107.170, except for "remote suppliers." "[A] '**remote supplier**' is any material supplier to a public works project having a contract with a second, or lower, tier subcontractor, or with another material supplier of any tier." *Id.* For a "remote supplier" to be covered under the payment bond, the "remote supplier" must "give[] written notice to the contractor that it has not been paid within ninety days of the time the supplier last supplied materials on the public works project." Mo. Rev. Stat. § 107.170 (emphasis original).

Although there is no statutory notice requirement in Mo. Rev. Stat. § 107.170, other than for "remote suppliers," Missouri courts have enforced notice provisions contained in payment bonds, as long as the notice provision is a reasonable condition precedent and does not negate the intent of the statute. *See, e.g.*, *Reorganized Sch. Dist. R-3 v. L. D. Compton Constr. Co.*, 483 S.W.2d 674, 676 (Mo. App. 1972) [Westlaw] (upholding a notice provision that required written notice "within ninety days after the claimant furnished the last of the materials for which claim is made.").

By statute, Missouri prohibits any contract or agreement that either directly or indirectly limits the time in which any suit or action may be instituted. Mo. Rev. Stat. § 431.030. A provision in a bond for a 90-day required notice to the surety, however, has been recognized and held valid and enforceable as a condition precedent, because the notice requirement does not contravene the statute of limitations which determines the time within which suit may be filed. *Frank Powell Lumber v. Fed. Ins. Co.*, 817 S.W.2d 648 (Mo. Ct. App. 1991) [Westlaw].

In *L.D.*, the court enforced the 90-day notice requirement in a payment bond given on a Missouri school project in the face of the argument that Mo. Rev. Stat. 431.030 prohibited the limiting of the time in which suit could be filed. 483 S.W.2d 674 [Westlaw]. The court concluded that the notice provision was not a suit limitations period. The court relied on an earlier decision, *City of St. Louis ex rel. Atlas Plumbing Supply Co. v. Aetna Cas. & Sur. Co.*, 444 S.W.2d 513 (Mo. Ct. App. 1969) [Westlaw], in which it upheld a city ordinance requirement incorporated into the bond at issue providing that suit by an unpaid material supplier had to be filed within 90 days of the completion of the contract. The plaintiff, an unpaid supplier, failed to file suit within 90 days of the completion of the project. The trial court dismissed the case, which ruling was upheld on appeal. Before the court of appeals, the supplier argued that the ordinance was inconsistent with Mo. Rev. Stat. § 107.170 because the public works statute did not contain a time limitation within which to file suit. The *Atlas* court found no such conflict and further found it to be significant that the express language of § 107.170 acknowledged the possibility that a public works bond might include other conditions. The *Atlas* court rejected the argument that additional conditions be "read out" of a public works bond. *See also* *State ex rel. E.A. Martin Mach. Co. v. Line One, Inc.*, 111 S.W.3d 924 (Mo. Ct. App. 2003) [Westlaw] (enforcing a provision in a public works payment bond that required a claimant to give written notice to any two of the owner, the general contractor and the surety within 90 days after the claimant performed the last work or furnished the last materials); *St. Louis Hous. Auth. ex rel. Jamison Elec., LLC v. Hankins Const. Co.*, No. 4:12 CV 1746 CDP, 2014 U.S. Dist. LEXIS 178652, 2014 WL 7408944, at *15 (E.D. Mo. Dec. 31, 2014) [Westlaw], *amended in part*, No. 4:12 CV 1746 CDP, 2015 U.S. Dist. LEXIS 48045, 2015 WL 1636610 (E.D. Mo. Apr. 13, 2015) (holding that a suit on a payment bond that allowed suit only once 90 days had elapsed since the last of the claimant's work or labor was done or performed was not ripe where the 90-day period had not run when the claimant filed suit).

Where a bond contains a notice provision, the time for giving notice will not be extended by the furnishing of small additional items, when the reason for furnishing those items was to circumvent the notice provision. *Sch. Dist. Univ. City ex rel. H & M Mech. Corp. v. Reliance Ins. Co.*, 904 S.W.2d 253, 256 (Mo. Ct. App. 1995) [Westlaw]. However, furnishing labor or material necessary for the proper performance of a contract, done in good faith at the request of the general contractor or owner, does extend the time. *Id.*

Municipalities have also passed ordinances that require a bond claimant to give written notice. The Missouri Court of Appeals upheld a municipal ordinance that required a bond claimant to provide written notice of its claim within 90 days of completion of a contract. *City of St. Louis ex rel. Atlas Plumbing Supply Co. v. Aetna Cas. & Sur. Co.*, 444 S.W.2d 513 (Mo. Ct. App. 1969) [Westlaw].

However, a municipal ordinance that required suit to be filed within three months from the completion of the contract and acceptance by the city, did not merely impose a notice requirement and was held to be void and in violation of a Missouri constitutional provision, in effect at the time the ordinance was adopted. *City of Kansas City v. St. Paul Fire & Marine Ins. Co.*, 639 S.W.2d 903 (Mo. Ct. App. 1982) [Westlaw]. However, the Missouri constitution has been amended and ordinances adopted after November 4, 1971, would not be impacted by the constitutional limitation.

In *Thomas v. A.G. Electrical, Inc.*, the Missouri Court of Appeals applied a prejudice test to a bond provision requiring that the claimant give notice to the surety within 90 days from the date on which the claimant performed the last labor or supplied the last materials for which the claim was made. 304 S.W.3d 179 (Mo. Ct. App. 2009) [Westlaw]. The court relied on Missouri case law in the insurance context and found the "modern trend" was for courts not to require strict compliance with notice provisions. *Id.* at 187. The court concluded that the function of the notice to the surety requirement in the bond was "simply to protect the insurer from being prejudiced." *Id.* Because the surety did not plead any prejudice by the late notice, the court declined to enforce the notice provision.

The court did not address whether the provision was a condition precedent to the surety's liability and instead held that the purpose of the payment bond's notice provision was to give the surety an opportunity to investigate the claim:

> The function of the notice requirement in the bond is the same as that in insurance policies. Indeed, the bonding company concedes that its notice of claim provision exists to afford them an opportunity to investigate the claim. It follows, then, that the notice-of-claim provision should not be strictly construed, nor should liability under the bond be avoided, absent a showing of prejudice.

Id. at 188.

The court expressly declined to address other arguments including the fact that other Missouri case law has recognized the validity and enforcement of 90-day notice bond provisions. Nor did the court mention that the 90-day notice provision is the equivalent to the 90-day notice provision in the Miller Act or the notice requirement (six months) for filing a mechanic's lien in Missouri, neither of which have been held to be subject to a prejudice test.

The Eighth Circuit (which includes Missouri) has recognized that the notice requirement set out in the Miller Act is a strict condition precedent. *United States ex rel. Gen. Elec. Co. v. Gunnar I. Johnson & Son, Inc.*, 310 F.2d 899 (8th Cir. 1962) [Westlaw]. Likewise, Missouri strictly enforces the notice provision in its mechanic's lien statute. Mo. Rev. Stat. § 429.080; *George F. Robertson Plastering Co. v. Altman*, 430 S.W.2d 169 (Mo. 1968) [Westlaw].

D. Coverage

A surety's liability is generally coextensive with that of its principal. *City of Independence for Use of Briggs v. Kerr Constr. Paving Co., Inc.*, 957 S.W.2d 315 (Mo. Ct. App. 1997) [citing *Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556, 564 (Mo. Ct. App. 1991) [Westlaw]]. The surety is not liable if the principal is not liable. *J.R. Watkins Co. v. Lankford*, 363 Mo. 1046, 256 S.W.2d 788 (Mo. 1953) [Westlaw].

On public projects, Missouri law provides for "payment of any and all materials, incorporated, consumed or used in connection with the construction of such work; all insurance premiums, both for compensation, and for all other kinds of insurance, on said work; and for all labor performed in such work whether by a subcontractor, a supplier at any tier, or otherwise." Mo. Rev. Stat. § 107.170.

The public works bond statute demonstrates a "strong legislative purpose to protect those who furnish labor and materials for public construction and to assure that they will be paid." *Thomas v. A.G. Elec., Inc.*, 304 S.W.3d 179, 184–85 (Mo. Ct. App. 2009) [Westlaw] [quoting *Sch. Dist. of Springfield R–12 ex rel. Midland Paving Co. v. Transamerica Ins. Co.*, 633 S.W.2d 238, 248 (Mo. Ct. App. 1982) [Westlaw]]. "The long-established purpose of the public-works bond statute has been "to afford those furnishing labor or material on public works the same measure of protection as is afforded by the mechanic's lien law where the building or improvement is not of a public character." *Thomas*, 304 S.W.3d at 185 [quoting *Collins & Hermann, Inc. v. TM2 Constr. Co.*, 263 S.W.3d 793, 798 (Mo. Ct. App. 2008) [Westlaw]]. "The public-works statute is read broadly to carry out its purpose to protect those who improve and enhance the public properties." *Thomas*, 304 S.W.3d at 185 [citing *Energy Masters Corp. v. Fulson*, 839 S.W.2d 665, 668 (Mo. ct. App. 2009) [Westlaw].

1. Labor

Mo. Rev. Stat. § 107.170 requires a public works payment bond to cover "all labor performed in such work whether by a subcontractor, a supplier at any tier, or otherwise." It also requires the bond to cover "all insurance premiums, both for compensation, and for all other kinds of insurance, on said work." *Id.*

a. Prevailing Wages

For public projects where the engineer's estimate or the bid accepted by the public body exceeds seventy-five thousand dollars, Missouri requires "workers employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance work" to be paid "not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed or the public works contracting minimum wage, whichever is applicable." Mo. Rev. Stat. 290.230.

Prior to 2007, Missouri law required bonds for public works projects covered by the prevailing wage law, to "include such provisions as will guarantee the faithful performance of the prevailing hourly wage clause as provided by contract." Mo. Rev. Stat. § 290.250 (Amended effective August 28, 2007). In 2007, the sentence requiring bonds to guarantee faithful performance of the prevailing wage law was deleted. *Id.*; *see also Thomas*, 304 S.W.3d at 185 [Westlaw] (recognizing the deletion of the bond requirement).

Missouri courts have held a surety was liable based upon the language of Mo. Rev. Stat. §290.250, for prevailing wages owed to a subcontractor's employees. *Id*. Where the bond language contains a provision that contains a prevailing wage provision, sureties have been held to be liable for the doubling penalties, interest, and attorneys' fees provided in the prevailing wage law. *City of Kansas City v. Integon Indem.*, 857 S.W.2d 233 (Mo. Ct. App. 1993) [Westlaw]; *Bd. v. Eurostyle, Inc.*, 998 S.W.2d 810 (Mo. Ct. App. 1999) [Westlaw].

b. Professional Services

If professional services are considered "labor," they will be covered by a statutory payment bond. The public works payment bond statute "is read broadly to protect those who improve and enhance the public properties." *Energy Masters Corp. v. Fulson*, 839 S.W.2d 665, 668 (Mo. Ct. App. 2009) [Westlaw]. In *Energy Masters*, the Missouri Court of Appeals held that engineers who provided mechanical and electrical engineering services pursuant to a subcontract with a general contractor on a public works project were entitled to coverage under Mo. Rev. Stat. § 107.170. *Id.* The court reasoned that on a private project the architects would have been entitled to file a mechanic's lien. *Id.* The *Energy Masters* case involved a situation where the public entity failed to require a payment bond, and thus, there was liability on the directors of the school district. *Id*. Additionally, the Missouri Court of Appeals in *Layne, Inc. v. Moody* recognized that "[p]rofessional services are also covered under [Mo. Rev. Stat. § 107.170]." 886 S.W.2d 115, 117 (Mo. Ct. App. 1994) [Westlaw].

c. Union Benefits

Missouri requires prevailing wages to be paid on public works projects, and prevailing wages include fringe benefits. *See State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 37 (Mo. 2008) [Westlaw]. In *Bonney v. Environmental Engineering, Inc.*, the Missouri Court of Appeals held that a surety was liable for unpaid fringe benefits that were required to be paid under the prevailing wage law. 224 S.W.3d 109, 114 (Mo. Ct. App. 2007) [Westlaw]. Additionally, Mo. Rev. Stat. 107.170 specifically requires insurance premiums "both for compensation, and for all other kinds of insurance" to be covered by the payment bond.

2. Material

Mo. Rev. Stat. § 107.170 requires a public works payment bond to cover "any and all materials, incorporated, consumed or used in connection with the construction of such work." Material must be actually go into the project "so as to become part of the same … consumed or destroyed in, the construction of the work" to be covered by the bond. *Pub. Water Supply Dist. No. 8 of Jefferson Cnty. v. Maryland Cas. Co.*, 478 S.W.2d 293, 299 (Mo. 1972) [Westlaw], *modified*, 513 S.W.2d 311 (Mo. 1974) [quoting *Wiss v. Royal Indem. Co.*, 219 Mo. App. 568, 282 S.W. 164, 165 (1926) [Westlaw]]. Gasoline, oil, and grease consumed in construction, and blasting caps, fuses, and dynamite have been held to be covered material. *See State ex rel. Penn Lubric Oil Co. v. Lyle*, 222 Mo. App. 676, 5 S.W.2d 453, 456 (1928) [Westlaw]; *Kansas City ex rel. Kansas City Hydraulic Press Brick Co. v. Youmans*, 213 Mo. 151, 112 S.W. 225 (1908) [Westlaw].

3. Equipment

a. Repairs

In *Finch Equipment Corp. v. Frieden*, the Eighth Circuit, applying Missouri law, held that repair costs to a crane that was specifically purchased for a public project were covered by a public works payment bond. 901 F.2d 665, 665 (8th Cir. 1990) [Westlaw].

b. Rentals

It has been held that the cost for rental of construction equipment is covered by a public works payment bond. *Pub. Water Supply Dist. No. 3 of Ray Cnty. ex rel. Victor L. Phillips Co. v. Reliance Ins. Co.*, 708 S.W.2d 190, 191–92 (Mo. Ct. App. 1986) [Westlaw]. However, the costs of purchasing equipment are not covered by a public works payment bond. *Id.* at 193.

4. Other

a. Attorneys' Fees

Attorneys' fees are generally not recoverable in Missouri unless they are provided for by statute or contract. A surety will not be liable for attorneys' fees and penalty interest awarded against its principal pursuant to the Missouri Prompt Payment Act, Mo. Rev. Stat. § 8.960. *See e.g. City of Independence ex rel. Briggs v. Kerr Constr. Paving Co.*, 957 S.W.2d 315 (Mo. Ct. App. 1997) [Westlaw] (holding that a surety was not liable for attorneys' fees and penalty interest imposed upon its principal pursuant to the Missouri Prompt Payment Act, Mo. Rev. Stat. § 34.057, renumbered as Mo. Rev. Stat. § 8.960); *see also Midwest Asbestos Abatement Corp. v. Brooks*, 90 S.W.3d 480, 486 (Mo. App. 2002) [Westlaw] (recognizing that "the Prompt Pay Act itself does not specifically authorize the Surety's liability for interest and attorneys' fees").

If the bond contains a provision regarding payment of prevailing wages, attorneys' fees may be awarded if prevailing wages are not paid. *City of Kansas City v. Integon Indem.*, 857 S.W.2d 233 (Mo. Ct. App. 1993) [Westlaw]; *Bd. v. Eurostyle, Inc.*, 998 S.W.2d 810 (Mo. Ct. App. 1999) [Westlaw].

A surety may also be liable for attorneys' fees, interest and penalties, if the surety vexatiously refused to pay a claim. Mo. Rev. Stat. § 375.420; see discussion below regarding Missouri vexatious refusal to pay law.

The bond language may also require the payment of attorneys' fees. In *Brooke Drywall of Columbia, Inc. v. Building Construction Enterprises, Inc.*, the bond contained a provision that made the surety liable for all its principal's obligations under a public works contract. 361 S.W.3d 22 (Mo. Ct. App. 2011) [Westlaw]. The Missouri Court of Appeals held that the bond language was broad enough to include liability for attorneys' fees based upon the language in the bonded contract which obligated the contractor to comply with all provisions of its subcontracts, and the subcontract contained a prevailing party attorneys' fee provision. *Id*.

In *Owners Insurance Co. v. Fidelity & Deposit Co. of Maryland*, the court construed a private payment bond which contained a bond provision that required payment for "sum or sums as may be justly due" to include liability for attorneys' fees and finance charges based upon a

prevailing party attorneys' fees clause and a finance clause in a subcontract. 41 F.4th 956, 959 (8th Cir. 2022) [Westlaw].

b. Interest

Interest may be awarded pursuant to Missouri's prejudgment interest statute, Mo. Rev. Stat. § 408.020, at a rate of nine percent per annum. *See, e.g.*, *Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556, 564 (Mo. Ct. App. 1991) [Westlaw] (holding that claimant was entitled to prejudgment interest from date the amount owed became fixed, which was the date an interlocutory order of default was entered); *see also* *Gary Realty Co. v. Swinney*, 322 Mo. 450, 17 S.W.2d 505, 510 (Mo. 1929) [Westlaw] (holding that when an amount owed on the bond is fixed, prejudgment interest is due from the date the demand for payment is made on the surety).

A surety will be liable for non-penal interest that accrues as a result of the principal failing to pay a subcontractor or supplier. *City of Independence ex rel. Briggs v. Kerr Constr. Paving Co.*, 957 S.W.2d 315, 325 (Mo. Ct. App. 1997) [Westlaw] [citing *Teddy Woods*, 817 S.W.2d at 564 [Westlaw]]. However, a surety is not liable for penalty interest pursuant to the Public Prompt Pay Act. *City of Independence ex rel. Briggs v. Kerr Constr. Paving Co.*, 957 S.W.2d 315 (Mo. Ct. App. 1997) [Westlaw]; *see also* *Midwest Asbestos Abatement Corp. v. Brooks*, 90 S.W.3d 480, 486 (Mo. App. 2002) [Westlaw] (same).

c. Finance Charges

There is no statutory requirement that finance charges be covered by a payment bond. Therefore, the bond language will control. For example, in *Owners Insurance Co. v. Fidelity & Deposit Co. of Maryland*, the court construed a private payment bond which contained a bond provision that required payment for "sum or sums as may be justly due" to include liability for finance charges based upon a finance charge clause in a subcontract. 41 F.4th at 959.

d. Insurance Premiums

Insurance premiums are specifically required to be covered on public projects by Mo. Rev. Stat. § 107.170. The statute specifically provides coverage for "all insurance premiums, both for compensation, and for all other kinds of insurance, on said work." *Id.*

e. Loans

Generally, lenders will not be entitled to recover under a payment bond, even when loan proceeds are used to pay for labor and material for the public works project. *Audrain Cnty. ex rel. First Nat. Bank of Mexico v. Walker*, 236 Mo. App. 627, 155 S.W.2d 251, 257 (1941) [Westlaw].

f. Delay Damages / Lost Profits

No Missouri authority directly discusses these types of potential payment bond claims.

g. Extracontractual, Vexatious Failure to Pay

Missouri does not recognize a common law tort of bad faith claim against a surety. However, Missouri provides a statutory claim for vexatious refusal to pay, when an insurer refuses to pay a claim without reasonable cause or excuse. Mo. Rev. Stat. § 375.420. Missouri courts hold the vexatious refusal to pay statute applies to sureties. *See, e.g.*, *Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556, 562 (Mo. Ct. App. 1991) [Westlaw] ("Although the statutory language providing penalties for vexatious refusal to pay makes reference to policies of insurance, it also encompasses contracts of suretyship."); *Camdenton Consol. Sch. Dist. No. 6 of Camden Cnty. ex rel. W. H. Powell Lumber Co. v. New York Cas. Co.*, 340 Mo. 1070, 104 S.W.2d 319, 330 (1937) [Westlaw].

The vexatious refusal to pay statute permits a court to award reasonable attorneys' fees and statutory penalties, and such penalties may not exceed twenty-five percent of the first fifteen hundred dollars and ten percent of the loss exceeding fifteen hundred dollars. Mo. Rev. Stat. § 375.420. Mo. Rev. Stat. § 375.296 provides the cause of action for vexatious refusal to pay.

To recover attorneys' fees and penalties for vexatious refusal to pay, a plaintiff must demonstrate that the surety's refusal to pay "was willful, and without reasonable cause, as the facts would have appeared to a reasonable person before trial." *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co.*, 171 S.W.3d 81, 97 (Mo. Ct. App. 2005) [Westlaw] (internal quotation omitted). If there is an open question of law or fact, a surety may insist on a judicial determination of the question, "without facing the statutory penalties for vexatious refusal." *Id.* (internal quotation omitted). Statutory penalty cannot be imposed against surety on public construction project, for its alleged vexatious refusal to pay bond claim, unless the evidence demonstrates that surety's refusal to pay was willful and without reasonable cause. *Bd. of Educ. of City of St. Louis ex rel. Bertolino v. Vince Kelly Constr. Co.*, 963 S.W.2d 331 (Mo. Ct. App. 1997) [Westlaw]. The test for a surety's vexatious refusal to pay is not the final determination of the issues, but rather, how the facts appeared at the time the surety refused to pay. *Jerry Bennett*, 171 S.W.3d at 97 [Westlaw].

h. Retainage

As a retainage, a public owner may withhold up to five percent of the value of the contract or subcontract if the contract is estimated to exceed fifty thousand dollars, and ten percent if the estimated value of the contract is estimated to be less than fifty thousand dollars. Mo. Rev. Stat. § 8.960.1(1).

E. Contracts Excluded

Payment bonds are not required for public works contracts with an estimated cost that is not expected to exceed fifty-thousand dollars. Mo. Rev. Stat. § 107.170.1(1)(b).

Additionally, Mo. Rev. Stat. § 107.170.2 excludes certain categories of people or entities from the definition of "contractor" which is required to provide a payment bond. Specifically, engineers, architects, licensed land surveyors, those providing environmental assessment services, artists, and construction managers are excluded from the definition of "contractor." Therefore, such persons or entities are not required to provide payment bonds.

F. Time for Suit

Until recently it was somewhat unclear whether Missouri's five-year statute of limitations for actions brought pursuant to a contract, Mo. Rev. Stat. § 516.120, or Missouri's ten-year statute of limitations for actions upon any writing for the payment of money, Mo. Rev. Stat. § 516.110, applied to payment bonds. The recent case of *Four Star Enterprises Equipment, Inc. v. Employers Mutual Casualty Co.* clarified that the ten-year statute of limitations will likely apply. 648 S.W.3d 903 (Mo. Ct. App. 2022) [Westlaw].

G. Prompt Pay Act

Missouri has a Public Prompt Pay Act that applies to public projects, which is set forth at Mo. Rev. Stat. § 8.960. The Public Prompt Pay Act provides for penalty interest and attorneys' fees against a public entity that withholds payments not in good faith. *Id.* These provisions, however, do not apply to sureties. *Midwest Asbestos Abatement Corp. v. Brooks*, 90 S.W.3d 480, 486 (Mo. App. 2002) [Westlaw] (recognizing that "the Prompt Pay Act itself does not specifically authorize the Surety's liability for interest and attorneys' fees").

H. Surety May Require Obligee to Sue Principal

Missouri provides by statute, Mo. Rev. Stat. § 433.010 *et seq.*, that any person bound as a surety for another in any bond, bill, or note for the payment of money or delivery of property may, at any time after an action has accrued, require in writing that the person having that right of action commence suit against the principal debtor and the other parties liable, and if suit is not commenced within 30 days after service of notice and pursued with due diligence to judgment and execution that the surety shall be exonerated from liability to the person so notified. Mo. Rev. Stat. § 433.010.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Bonds issued for private projects in Missouri will be interpreted according to their terms. The "[l]iability of a surety is limited to the terms and conditions stated in the bond." *Frank Powell Lumber v. Fed. Ins. Co.*, 817 S.W.2d 648, 651 (Mo. Ct. App. 1991) [Westlaw]. "[T]he obligation of the bond may not in the guise of construction be enlarged beyond the plain terms and stipulations." *Id.* [quoting *Bolivar Reorganized Sch. Dist. No. 1 v. Am. Sur. Co. of New York*, 307 S.W.2d 405, 409 (Mo. 1957) [Westlaw]]. The Missouri Court of Appeals has explained that the purpose of private payment bonds is to protect the property owner from mechanic's liens, and subcontractors are incidental beneficiaries. *Id.*

B. Time for Suit

Missouri does not have different statutes of limitations for public and private payment bonds. Therefore, the ten-year statute of limitations for suits for the payment of money based upon a written instrument will likely apply. Mo. Rev. Stat. § 516.110. *Four Star Enters. Equip., Inc. v.*

Emps. Mut. Cas. Co. 648 S.W.3d 903 (Mo. Ct. App. 2022) [Westlaw] (holding that the ten-year statute of limitations in Mo. Rev. Stat. § 516.110 applied to a suit on a payment bond).

C. Private Prompt Pay Act

Missouri has adopted a Private Prompt Pay Act, Mo. Rev. Stat. § 431.180, which applies to design and construction contracts, except for owner occupied residential properties of four units or less. Pursuant to the Private Prompt Pay Act, a person who has not been paid may recover penalty interest and prevailing party attorneys' fees. *Id.* Missouri appellate courts have not addressed whether the Private Prompt Pay Act applies to sureties. However, because the Public Prompt Pay Act does not apply to sureties, it is likely that Missouri courts would hold that the Private Prompt Pay Act does not apply to sureties. *City of Independence ex rel. Briggs v. Kerr Constr. Paving Co.*, 957 S.W.2d 315 (Mo. Ct. App. 1997) [Westlaw] (holding that the penalty interest and attorneys' fees provisions in the Public Prompt Pay Act do not apply to sureties); *see also Fru-Con/Fluor Daniel Joint Venture v. Corrigan Bros., Inc.*, 154 S.W.3d 330, 338 (Mo. Ct. App. 2004) [Westlaw] (describing interest awarded pursuant to the Private Prompt Pay Act as "penalty interest").

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Payment bonds for labor and materials supplied on public construction projects are required in Montana. Mont. Code Ann. § 18-2-201(1) [Lexis]. The amount of the bond must be at least equal to the amounts in the contract for the work to be performed or for the material to be supplied for the public project. Mont. Code Ann. § 18-2-201(2) [Lexis]. A municipal city or town, however, may in its discretion set a lower bond amount, but no less than twenty-five percent of the contract price for the project. Mont. Code Ann. § 18-2-203 [Lexis].

B. Tiers Covered

All laborers, mechanics, subcontractors, and material suppliers for the project are covered under the payment bond, including those who supply the laborers, mechanics, and subcontractors. Mont. Code Ann. § 18-2-201(1)(a)(ii)-(iii) [Lexis].

C. Notice Required

A material supplier must give written notice to the contractor, delivered personally or by certified mail, of its right to payment and right to action under the payment bond, within thirty days of providing the materials. Mont. Code Ann. § 18-2-206 [Lexis].

All laborers, mechanics, subcontractors and material suppliers for the project and/or those who supply the laborers, mechanics, and subcontractors must notify the governmental entity, in writing, that they have a claim for payment that is unsatisfied within ninety days of completion of the contract and acceptance of the work. Mont. Code Ann. § 18-2-204(1) [Lexis]. The notice must contain the specific language provided in the statute. *Id.* The notice must be signed by the person or entity making the claim or giving the notice. Mont. Code Ann. § 18-2-204(2) [Lexis].

D. Coverage

1. Labor

Labor provided in the course of fulfilling a contract for a public project including work performed for the contractor by all laborers, material suppliers, and subcontractors, as well as the labor provided by others to the contractors, is covered by the payment bond. Mont. Code Ann. § 18-2-201 [Lexis].

a. Professional Services

"Professional services" have not been classified as labor under Montana's payment bond laws.

b. Union Benefits

"Union benefits" have not been classified as labor under Montana's payment bond laws.

2. Material

Materials provided in the course of fulfilling a contract for a public project including materials supplied to the contractor by all laborers, material suppliers, and subcontractors, as well as the materials provided by others to the contractors are covered by the payment bond. Mont. Code Ann. § 18-2-201 [Lexis].

3. Equipment/Rentals

Rental equipment used by contractor in a construction job for the state were properly allowable as "provender, materials, or supplies" under the bond and equipment owner could recover from the surety for unpaid rentals. *Bower v. Tebbs*, 314 P.2d 731, 739 (Mont. 1957) [Lexis].

4. Other

a. Attorneys' Fees

In a suit or action brought against the surety, the prevailing party is entitled to recover, in addition to all other costs, attorney fees that the court finds reasonable. Mont. Code Ann. § 18-2-207 [Lexis]; *U.S. ex rel. W. Steel Co. v. Reliance Ins. Co. of Philadelphia, Pa.*, 227 F. Supp. 939, 941 (D. Mont. 1964) [Lexis]. Attorneys' fees, however, may not be allowed in a suit or action brought or instituted before the expiration of 30 days following the date of filing of the notice required in Mont. Code Ann. § 18-2-206. Mont. Code Ann. § 18-2-207 [Lexis].

b. Interest

A payment bond claimant may be entitled to interest with respect to its claim when there is no real dispute over the amount due and the amount can be determined through a simple calculation. *U.S. ex rel. Chemetron Corp. v. George A. Fuller Co.*, 250 F. Supp. 649, 664 (D. Mont. 1965) [Lexis].

c. Financing Charges

Finance charges have not been considered regarding Montana payment bonds.

d. Insurance Premiums

Insurance premiums have not been considered regarding Montana payment bonds.

e. Loans

Loans are generally not recoverable under a Montana payment bond, but loans could be recoverable if such language is included in the bond. *Bower v. Tebbs*, 314 P.2d 731, 736 (Mont. 1957) [Lexis].

f. Delay Damages

Delay damages have not been considered regarding Montana payment bonds.

g. Profits

Lost profits may be recoverable under a payment bond, especially if such compensation was agreed upon in the underlying contract. *U.S. ex rel. U.S.G., Inc. v. Pharaoh Constr., Inc.*, 68 F.3d 482 (9th Cir. 1995) [Lexis].

h. Extracontractual

In Montana, beneficiaries of a payment bond may sue a surety for breach of the covenant of good faith and fair dealing. *K-W Indus., a Div. of Assoc. Techs., Ltd. v. Nat'l Sur. Corp.*, 754 P.2d 502, 506 (Mont. 1988) [Lexis].

E. Contracts Excluded

Montana's statutory payment bond requirements may be waived for government construction projects that cost less than $50,000, and for school district projects that cost less than $7,500. Mont. Code Ann. § 18-2-201(4)–(5) [Lexis].

F. Time for Suit

Claimants may sue on the payment bond no sooner than ninety days after the work is completed or the materials are supplied, and such work or materials are accepted by the government as long as notice of the claim was provided within ninety days. Mont. Code Ann. § 18-2-204(1) [Lexis]; Mont. Code Ann. § 18-2-205 [Lexis]. The statute of limitations applicable to payment bonds is eight years. Mont. Code Ann. § 27-2-202(1) [Lexis]. The eight-year statute of limitations period cannot be reduced by the bond's language and is void by statute. *W. Mun Constr., Inc. v. Zirkelbach Constr., Inc.*, CV 16-30-BLG-SPW, 2016 WL 6583614, at *2 (D. Mont. Nov. 4, 2016) [Lexis]; Mont. Code Ann. § 28-2-708 [Lexis].

G. Remarks

If the government fails to fulfill the requirement of a payment bond for a public contract, it may be liable to the laborers and material suppliers. Mont. Code Ann. § 18-2-203 [Lexis].

In Montana, courts liberally construe the public payment bond statutes to effectuate the overall purpose of compensating those who contribute materials and supplies to the public project. *Luciano v. Nw. Pipe & Casing Co.*, 870 P.2d 99, 101 (Mont. 1994) *Luciano v. Nw. Pipe & Casing Co.*, 870 P.2d 99, 101 (Mont. 1994) [Lexis].

Montana's Unfair Claim Settlement Practices Act is applicable to payment bonds. *K-W Indus., a Div. of Assoc. Techs., Ltd. v. Nat'l Sur. Corp.*, 754 P.2d 502, 503 (Mont. 1988) [Lexis].

H. Case Annotations

See above.

§ 2.0 PRIVATE PAYMENT BONDS

Montana does not require contractors to furnish payment bonds on private projects.

A. Rules of Construction

A common-law payment bond furnished for use on a private project would likely be construed according to its express terms and in light of ordinary rules of contract interpretation. Mont. Code Ann. § 28-3-201 [Lexis] (stating "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties.")

B. Time for Suit

No Montana reported decision addressed the time for a claimant to sue under a common-law payment bond. Presumably, however, a Montana court would enforce the same eight-year statute of limitations and associated law applicable to public payment bonds discussed above.

C. Case Annotations

In *Blackfeet Tribe of Blackfeet Indian Reservation v. Blaze Construction, Inc.*, the Blackfeet Tribe of the Blackfeet Indian Reservation, as property owner, sued construction contractor and its performance bond surety regarding disputes relating to various contracts involving the construction, administration, and management of homes on the Blackfeet Indian Reservation. 108 F. Supp. 2d 1122, 1124 (D. Mont. 2000) [Lexis]. While the opinion ultimately addressed performance bonds, public payment bonds, and claims thereunder, this decision could potentially apply to common-law payment bonds as a result of the general surety law relied upon in this matter. For instance, the Court noted that the general rule that "…sureties have all the defenses that a principal may assert to avoid performance on a bond." *Id.*, at 1133 (citing *Asociacion De Azucareros De Guatemala v. United States Nat'l Bank of Oregon*, 423 F.2d 638, 641 (9th Cir. 1970) [Lexis]). The Court further noted that "[w]hen the obligation of a principal is extinguished or released, the surety's obligation ceases." *Id.* The Court added that "…discharge of

the surety can ... occur in those instances in which the obligee so materially and substantially breaches its obligations on the underlying bonded contract that the principal is discharged." *Id*. at 1134. The Court additionally added that "[u]nder Montana law, a surety is exonerated from its obligations under a bond, *inter alia*, to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security…" *Id*. at 1137 (citing Mont. Code Ann. § 28-11-412).

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Neb. Rev. Stat. § 52-118, contains Nebraska's Little Miller Act, which serves to protect subcontractors, materialmen, and suppliers against a construction company that does not complete a job and does not tender the payment owed to these entities. Nebraska's Little Miller Act sets the statutory requirements for public payment and discusses the bond amount required in Nebraska. (Nebraska's Little Miller Act is codified at Neb. Rev. Stat. §§ 52-118 through 52-118.02) The purpose of Nebraska's Little Miller Act is to provide rights to materialmen and laborers in the construction or repair of public buildings where the provisions of the general mechanic's lien laws do not apply. *Dukane Corp. v. Sides Constr. Co.*, 302 N.W.2d 721 (Neb. 1981) [Lexis].

On these public projects, Nebraska requires that before the state or any city, village, county, or other public board or officer may award a contract for erection or improvement of a publicly owned facility, the general contractor must post a payment bond issued by a corporate surety company in an amount equal to or greater than the full contract price. Neb. Rev. Stat. § 52-118. Still, minimums do apply. A bond is not statutorily required for state projects amounting in a cost less than $15,000, or for any other type of public project with a cost equal or less than $10,000. Neb. Rev. Stat. § 52-118(2). However, the contracting body may require payment bonds on projects costing less than these minimums by including such requirement directly within the bid specifications. *Id*.

B. Tiers Covered

The Nebraska statutes afford rights as claimants against the bond to any person who has furnished labor or materials for the public project. Neb. Rev. Stat. § 52-118.01. This is extended to rental equipment "actually used or rented" for the public project. Neb. Rev. Stat. § 52-118.02.

The right to bring suit on the bond is limited "to those materialmen, laborers, and subcontractors who deal directly with the prime contractor as well as those materialmen, laborers, and subcontractors who, lacking expressed or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give statutory notice of their claims to the prime contractor." *McElhose v. Universal Surety Co.*, 158 N.W.2d 228 (Neb. 1968) [Lexis].

C. Notice Required

The Nebraska statutes provide that any person who has furnished labor or materials or rental equipment "actually used or rented" for the public project may bring suit on the bond if the person has not been paid in full within 90 days after the last day the claimant performed labor, furnished materials, or rented equipment for the project. Neb. Rev. Stat. § 52-118.01. Where the

claimant has no direct contractual relationship with the general contractor, but does have direct contractual relationship with a subcontractor, then the claimant must also give written notice of the claim to the general contractor by certified or registered mail within 'four months' after the last day upon which work was performed for which the claim is made. *Id.*; *Rieschick Drilling Co. v. Am. Cas. Co.*, 303 N.W.2d 264 (Neb. 1981) [Lexis]. Evidence of a contractual relationship with the general contractor creates an exemption from these notice requirements. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 695 N.W.2d 665 (Neb. 2005) [Lexis].

Such notice must be served through either registered or certified mail—postage prepaid—in an envelope directed to the contractor at any place where the contractor maintains an office or conducts its business, or their residence, or in any other manner in which a notice may be served. Neb. Rev. Stat. § 52-118.01. Notice need not be given with respect to each and every separate invoice to be effective. *Rieschick Drilling Co. v. Am. Cas. Co.*, 303 N.W.2d 264 (Neb. 1981) [Lexis]. However, the notice should state with "substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." Neb. Rev. Stat. § 52-118.01. Inadequacy of notice specificity may be overcome by the language of any acknowledgement received in response to such notice or a showing that the failure to adhere to each requirement of the notice statute was not prejudicial. *Chicago Lumber Co. of Omaha v. Sch. Dist. No. 71 of Milligan, Fillmore Cnty.*, 417 N.W.2d 757 (Neb. 1988) [Lexis].

D. Coverage

Under Nebraska statute, coverage is extended to any person who has furnished labor or materials or rental equipment where the person has not been paid in full within 90 days after the last day the person performed labor, furnished materials, or rented equipment for that project. Neb. Rev. Stat. § 52-118.01. It must be shown that the labor, material, supplies furnished, or equipment rented were "actually used" in the completion of that project. *Dukane Corp. v. Sides Const. Co.*, 302 N.W.2d 721 (Neb. 1981) [Lexis].

1. Labor

a. Professional Services

Nebraska public payment bonds cover "every person who has furnished labor or material in the prosecution of the work." Neb. Rev. Stat. § 52-118.01. To date, professional services have not been classified as labor or materials. The test for 'labor' is that which is necessarily employed in performing the contract. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 151 N.W. 942 (Neb. 1915) [Lexis]. Generally, interpretations of the Federal Little Miller Act have served as influential in Nebraska interpretations. *McElhose v. Universal Sur. Co.*, 158 N.W.2d 228 (Neb. 1968) [Lexis]. Federally, professional services do not typically qualify barring a finding that the claimant furnished on-site "labor."

b. Union Benefits

Unless deemed part of the cost of "labor or materials" supplied "in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract.," union benefits would not be allowed under a statutory payment bond. Neb. Rev. Stat. § 52-118.

2. Material

Nebraska's Little Miller Act limits material to that "which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract." Neb. Rev. Stat. § 52-118. This standard based upon actual use has been further supported through Nebraska case law. *See* *Quality Equip. Co. v. Transamerica Ins. Co.*, 502 N.W.2d 488 (Neb. 1993) [Lexis]; *Peter Kiewit Sons' Co. v. Nat'l Cas. Co.*, 8 N.W.2d 192 (Neb. 1943) [Lexis]; *Higgins & Coufal v. Massachusetts Bonding & Ins. Co.*, 112 F. Supp. 390 (D. Neb. 1953) [Lexis]. Fuel, for example, coal, expended for the purpose of contract performance can be considered within the obligation of a surety. *Iddings Co. v. Lincoln Constr. Co.*, 175 N.W. 643 (Neb. 1919) [Lexis]. Materials—if consumed in the course of the contract—would constitute material used; meanwhile tools and machinery which are the property of the contractors and may be used from time to time in other works and other contracts do not fall within the Act. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 151 N.W. 942 (Neb. 1915) [Lexis].

3. Equipment

a. Repairs

Nebraska's Little Miller Act carries no special statutory provision relating to repairs. Neb. Rev. Stat. §§ 52-118 through 52-118.02. Still repairs, fuel used or consumed, and other supplies used or consumed may be subject to the Act. *Peter Kiewit Sons' Co. v. Nat'l Cas. Co.*, 8 N.W.2d 192 (Neb. 1943) [Lexis]. "Permanent repairs constituting a betterment to trucks owned by the drivers, such as a new radiator, are not proper charges against the surety." *West v. Detroit Fid. & Sur. Co.*, 225 N.W. 673 (Neb. 1929) [Lexis].

b. Rentals

Equipment which is rented for a project covered under the Nebraska Little Miller Act and actually used in that project is considered within the scope of labor and materials. Neb. Rev. Stat. § 52-118. This includes rental charges, cost of transportation of equipment to and from the project, and fees for supervisory services. *Peter Kiewit Sons' Co. v. Nat'l Cas. Co.*, 8 N.W.2d 192 (Neb. 1943) [Lexis]. However, to qualify as a 'rental' the equipment may not be a capital asset of the user. *McElhose v. Universal Sur. Co.*, 158 N.W.2d 228 (Neb. 1968) [Lexis].

4. Other

a. Attorneys' Fees

Nebraska statutes provide for the recovery of attorneys' fees. Neb. Rev. Stat. § 44-359. This statutory section has been found applicable to actions on bonds, and the proper amount of such fees rests within the sound discretion of the court. *Rieschick Drilling Co. v. Am. Cas. Co.*, 303 N.W.2d 264, 271 (Neb. 1981) [Lexis]. However, there are instances in which attorneys' fees may not be recoverable. For example, in a case where liability was not presented to the jury, attorneys' fees were deemed not recoverable. *Ritzau v. Wiebe Constr. Co.*, 214 N.W.2d 244 (Neb. 1974) [Lexis].

b. Interest

Nebraska's Little Miller Act carries no special statutory provision relating to interest. Neb. Rev. Stat. §§ 52-118 through 52-118.02. A plaintiff can recover prejudgment interest only where the claim is liquidated, *i.e.*, no reasonable controversy exists to either the claimant's right to recovery or the amount. *Davis v. Davis*, 660 N.W.2d 162 (Neb. 2003) [Lexis]. A two-prong inquiry is used to determine whether a dispute exists to the amount due and whether a dispute exists to the right of recovery. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins. Co.*, 695 N.W.2d 665 (Neb. 2005) [Lexis].

c. Financing Charges

Unless deemed part of the cost of "labor or materials" supplied "in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract.," finance charges would not be allowed under a statutory payment bond. Neb. Rev. Stat. § 52-118.

d. Insurance Premiums

Unless deemed part of the cost of "labor or materials" supplied "in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract.," insurance premium costs would not be allowed under a statutory payment bond. Neb. Rev. Stat. § 52-118.

e. Loans

There is no reported Nebraska opinion allowing recovery of outstanding loans as part of a payment bond claim and it is not addressed within the statutory framework. Generally, interpretations of the Federal Little Miller Act have served as influential in Nebraska interpretations. *McElhose v. Universal Sur. Co.*, 158 N.W.2d 228 (Neb. 1968) [Lexis]. Federally, "[i]t is the generally accepted view that one who loans or advances money to another for the purpose of meeting a payroll and paying for supplies cannot sue a surety who has guaranteed payment to those furnishing labor and material." *U.S. ex rel. First Cont'l Nat. Bank & Tr. Co., Lincoln, Neb. v. W. Contracting Corp.*, 341 F.2d 383, 387 (8th Cir. 1965) [Lexis]. However, this may be subject to the scope described within the specific bond at issue. *St. Paul Fire & Marine Ins. Co. v. Tennefos Constr. Co.*, 396 F.2d 623 (8th Cir. 1968) [Lexis].

f. Delay Damages

There is no reported Nebraska opinion allowing delay damages as part of a payment bond claim and it is not addressed within the statutory framework. Generally, interpretations of the Federal Little Miller Act have served as influential in Nebraska interpretations. *McElhose v. Universal Sur. Co.*, 158 N.W.2d 228 (Neb. 1968) [Lexis]. There are federal cases supporting the recovery of delay damages. *Consol. Elec. & Mechanicals, Inc. v. Biggs Gen. Contracting, Inc.*, 167 F.3d 432 (8th Cir. 1999) [Lexis].

g. Profits

There is no reported Nebraska opinion allowing lost profits as part of a payment bond claim and it is not addressed within the statutory framework. Generally, interpretations of the Federal Little Miller Act have served as influential in Nebraska interpretations. *McElhose v. Universal Sur. Co.*, 158 N.W.2d 228 (Neb. 1968) [Lexis]. There are federal cases clearly stating that lost profits are not within the scope of the Miller Act. *Consol. Elec. & Mechanicals, Inc. v. Biggs Gen. Contracting, Inc.*, 167 F.3d 432 (8th Cir. 1999) [Lexis].

h. Extracontractual

There are no Nebraska authorities holding a statutory payment bond surety liable for punitive damages.

E. Contracts Excluded

Payment bonds are not required for "any project bid or proposed by the State of Nebraska or any department or agency thereof which has a total cost of fifteen thousand dollars or less, or any project bid or proposed by any county board, contracting board of any city, village, or school district, public board, or officer . . . which has a total cost of ten thousand dollars or less unless the state, department, agency, board, or officer includes a bond requirement in the specifications for the project." Neb. Rev. Stat. § 52-118(2).

F. Time for Suit

Lawsuits on the bond must be brought within one year after the final settlement of the principal contract. Neb. Rev. Stat. § 52-118.02. Failure to bring suit under this time limit serves to bar recovery. *Westinghouse Elec. Supply Co. v. Brookley*, 127 N.W.2d 465 (Neb. 1964) [Lexis].

A final settlement has been construed as a determination by the proper authority that the contract has been completed, that the final payment has become due, and that the amount due is determined. *Zimmerman's Elec., Inc. v. Fid. & Deposit Co. of Maryland*, 231 N.W.2d 342 (Neb. 1975) [Lexis]; *Boyd v. Benkelman Pub. Hous. Auth.* 195 N.W.2d 230 (Neb. 1972) [Lexis].

G. Remarks

Nebraska's Little Miller Act is patterned after the federal Miller Act and is subject to interpretation in a manner similar to the federal Miller Act. *Paul Reed Constr. & Supply, Inc. v. Arcon, Inc.*, No. 8:12CV48, 2014 WL 585748, 2014 U.S. Dist. LEXIS 18955 (D. Neb. Feb. 13, 2014) [Lexis]. The Act is remedial and nature, and as such is constructed liberally in order to support its purpose of protecting laborers and materialmen on projects in which general mechanic's lien laws do not apply. *Dukane Corp. v. Sides Constr. Co.*, 302 N.W.2d 721 (Neb. 1981) [Lexis]; *McElhose v. Universal Sur. Co.*, 158 N.W.2d 228 (Neb. 1968) [Lexis]. Still, claimants under the bond carry the burden to bring themselves within the terms of the Little Miller Act and within the coverage terms of the bond itself. *Westinghouse Elec. Supply Co. v. Brookley*, 127 N.W.2d 465 (Neb. 1964) [Lexis].

Liability for third-party beneficiary contracts, such as payment bonds, are governed by the terms and conditions of the statutes, the terms and conditions of the bond, and the terms and conditions of the underlying contract. *Cagle, Inc. v. Sammons*, 254 N.W.2d 398 (Neb. 1977) [Lexis]; *Westinghouse Elec. Supply Co. v. Brookley*, 127 N.W.2d 465 (Neb. 1964) [Lexis]; *Peter Kiewit Sons' Co. v. Nat'l Cas. Co.*, 8 N.W.2d 192 (Neb. 1943) [Lexis].

H. Case Annotations

Necessity of Contractual Relationship

In *Equipment Rental Source, LLC v. Western Surety Co.*, the court held that although each person who has furnished labor or material and has not been paid in full has the right to sue on a bond obtained by a general contractor under Nebraska's Little Miller Act, that the reach of the statute is not unlimited. No. 4:15CV3061, 2016 WL 5936870, 2016 U.S. Dist. LEXIS 141298 (D. Neb. Oct. 12, 2016) [Lexis]. Specifically, the Court found that to recover on a bond, the bond claimant must have a relationship with the prime contractor or subcontractor in limited circumstances. Specifically, the right is restricted to materialmen, laborers, and subcontractors dealing directly with the prime contractor, but also materialmen, laborers, and subcontractors—without an express or implied contractual relationship—that have a direct contractual relationship with a subcontractor and have given statutory notice of their claims to the prime contractor. A subcontractor for these purposes is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract. Other states have adopted broader interpretations of these relationships.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

For private projects in Nebraska, payment bonds are not required. They may still be posted in lieu of construction lien rights, either before or after lien filing. Neb. Rev. Stat. § 52-141 through 52-142. Under this Nebraska Construction Lien Act statutory framework, no liens may attach to real estate where the owner or prime contractor procures and records notice of a payment bond. *Id.*

A claimant may proceed directly against a surety without joining a prime contractor and without compliance with the notice and recording requirements of the Nebraska Construction Lien Act. Neb. Rev. Stat. § 52-141(6). The prevailing party in such a bond suit may be entitled to the recovery of reasonable attorney's fees and costs. *Id*. The Nebraska Construction Lien Act also provides standards for the penal sum of the bond, requires the furnishing of copies upon request, and provides that the surety's liability on the bond is not affected by any change or modification of the prime contract. Neb. Rev. Stat. § 52-141.

Where a lien has already been recorded, a party with interest in the real estate may cause a release of the lien through posting of a 115 percent bond with the clerk of the district court and then recording the clerk's certificate. Neb. Rev. Stat. § 52-142. Once complete, the claimant may enforce its lien rights against the bond through legal action. Neb. Rev. Stat. § 52-142.

B. Time for Suit

The Lien Act provides for posting of a payment bond in lieu of lien rights. Under that Act, claims must be brough within one year after the claimant has completed performance. A longer period may be allowed where it is provided for within the bond. Claimants that do not have a direct contractual relationship with the prime contractor must give notice of non-payment to the prime contractor within 90 days after the completion of performance. Neb. Rev. Stat. § 52-141.

C. Case Annotations

Forgery

In an instance where a bond contains a forged signature by one of two sureties, but the obligee has no knowledge of that forgery at the time that the bond was delivered and accepted, the remaining surety is not released from its obligations under the bond, even where it believed the forged signature to be genuine. *Kansas City Terra-Cotta Lumber Co. v. Murphy*, 68 N.W. 1030 (Neb. 1986) [Lexis].

Unauthorized Payment to Principal

A surety on a contractor's bond is not relieved from liability for the payment of claims of materialmen because the contractor was paid at an earlier date than fixed by the contract. *King v. Murphy*, 68 N.W. 1029 (Neb. 1896) [Lexis].

NEVADA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Nevada's Little Miller Act is found in Nevada Revised Statutes (NRS) § 339.015 through 339.065. The performance and payment bonds required by Nevada's Little Miller Act are described in NRS § 339.025. Payment and performance bonds are required on all public projects for new construction, repair, reconstruction, or improvement on public buildings that exceed $100,000, except for projects subject to NRS § 408, which applies to highway, road, and other transportation projects. NRS § 339.025. The amount of the performance and payment bonds are determined by the contracting body but cannot be less than 50% of the contracted amount. Performance bonds are conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract and are for the sole benefit of the contracting body. Payment bonds must be solely for the protection of claimants supplying labor or materials to the contractor to whom the contract was awarded, or to any of his or her subcontractors, in the prosecution of the work provided for in such contract.

The "contracting body" means "the State, county, city, town, school district, or any public agency of the State or its political subdivisions which has authority to contract for the construction, alteration or repair of any public building or other public work or public improvement." NRS § 339.015(2).

If the contract is with the State Public Works Division, then subcontractors will also be required to provide payment and/or performance bonds if the subcontract exceeds $50,000 or 1% percent of the proposed project value, whichever amount is greater. NRS § 339.025(2). The amount of the required bonds will be determined by the Division.

B. Tiers Covered

For performance bonds, only the contracting body is entitled to make claim. However, Courts have held that public entities may assign their rights to make claim upon performance bonds to private entities where not specifically prohibited by the bond form or contract. *Camino Props., LLC v. Ins. Co. of the W.*, No. 2:13-cv-02262-APG-CWH, 2016 U.S. Dist. LEXIS 39018, 2016 WL 1213224 (D. Nev. Mar. 23, 2016) [Westlaw].

For payment bonds, subcontractors who have performed labor or provided materials for the work established in any contract may make claim if they have not been paid in full before the expiration of 90 days after the date on which the claimant performed the last of such labor or furnished the last of such materials for which the claimant claims payment. (NRS § 339.035).

Sub-subcontractors may make claim subject to additional, dual notice requirements. NRS § 339.035(2). No claimants below sub-subcontractors may make claim.

C. Notice Required

Notice requirements under the Nevada Little Miller Act varies depending upon the claimant's tier. Claimants that have a direct contractual relationship with the general contractor are not required to give any additional notice.

Any claimant who has performed labor or furnished material in the prosecution of the work provided for in any contract for which a payment bond has been given and who has not been paid in full before the expiration of 90 days after the date on which the claimant performed the last of such labor or furnished the last of such materials for which the claimant claims payment, may bring an action on such payment bond in his or her own name to recover any amount due the claimant for such labor or material, and may prosecute such action to final judgment and have execution on the judgment NRS § 339.035.

However, a claimant who has a direct contractual relationship with a subcontractor of the contractor but no contractual relationship with the contractor (a sub-subcontractor) must provide two written notices to the contractor to perfect a Little Miller Act claim. The first written notice must be provided within 30 days of first supplying labor and materials and identify the nature of the materials being furnished or to be furnished, or the labor performed or to be performed, and the person contracting for such labor or materials and the site for the performance of such labor or materials as well as all the requirements for the ninety (90)-day post-work notice.

Nevada case law provides that the claimant will be allowed to recover for any labor or materials provided within the 30 days of the written notice period even if the written notice was not provided within 30 days of labor and materials first being supplied. *Amfac Distrib. Corp. v. Hous. Auth.*, 100 Nev. 573, 576 (Nev. 1984) [Westlaw]. NRS § 339.035(2)(a).

Compliance with the statutory 30-day notice requirement is a precondition to suit on the Little Miller Act bond. Failure to comply is fatal to the bond claim. *Garff v. J.R. Bradley Co.*, 84 Nev. 79 (Nev. 1968) [Westlaw]. This case arises out of the construction of the Carson City law enforcement facility. The subcontractor failed to fully pay the suppliers. Consequently, the suppliers each brought suit upon the payment bond given by the general contractors and their surety pursuant to NRS § 339.025(b). The amount claimed due by each supplier was not disputed. A direct contractual relationship existed between each supplier and the subcontractor, thus placing each case within the provisions of NRS § 339.035(2) providing for suit upon a payment bond only when a claimant has given the notices provided for by subparagraphs (a) and (b). Neither claimant gave the thirty (30)-day notice required by subparagraph (a). The fact that the general contractors had actual knowledge did not stop or waive the notice requirement.

The second written notice must be provided within ninety (90) days of last supplying labor or materials. NRS § 339.035(2)(b). Each written notice shall state with substantial accuracy the amount claimed and the name of the person for whom the work was performed, or the material supplied and shall be served by being sent by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place in which the contractor maintains an office or conducts business, or at the residence of the contractor. NRS § 330.035(2)(b).

Failure to give the notices can be fatal to a claim. *Amfac Distrib. Corp. v. Hous. Auth.*, 100 Nev. 573 (Nev. 1984) [Westlaw]. An awareness that the claimant is on the project or supplying materials does not satisfy the written notice requirement, nor does a brochure which does not set forth the amount of the claim and was not sent by certified mail. *Garff v. J.R. Bradley Co.*, 84 Nev. 79 (Nev. 1968) [Westlaw]; *Capriotti Lemon and Assocs., Inc. v. Johnson Serv.*, 84 Nev. 318, 440

P.2d 386 (1968) [Westlaw]. Legal action must be commenced within one year after last supplying labor or materials for the payment of which such action is brought. NRS § 339.055(2).

Even if the bond does not mention the notice provisions of NRS § 339.035, those provisions are nevertheless operative. "A bond given which is required by statute is deemed to be a statutory bond, and as such, the statutory provisions must be read into the bond and are operative by force of the statute without recitation of them in the bond. *Capriotti Lemon and Assocs., Inc. v. Johnson Serv.*, 84 Nev. 318, 321 (Nev. 1968) [Westlaw]. Further, any notice must comply with the statutory requirements.

Nevada Revised Statute § 408.363 sets forth the procedures for claiming against a bond furnished for an NDOT project. To recover on such bonds, among other things, an action must be commenced within six months after the date of NDOTs' final acceptance of the project. NRS § 408.363(2). Claimants are also required to file with NDOT a claim in triplicate within 30-days from the date of final acceptance of the contract, executed and verified before a notary public and containing a statement that the claimant has not been paid. NRS § 408.363(1). One copy of the claim is to be filed with the Department and the remaining copies are to be forwarded to the contractor and the surety. Failure to comply with these provisions bars a claim. *Zalk-Josephs v. Wells Cargo,* 77 Nev. 441, 444 (Nev. 1961) (contractor failed to file notices and perfect its claim) [Westlaw]; *In re. Capriati Constr. Corp.*, No. 2:16-cv-01560-APG, 2017 U.S. Dist. LEXIS 49419, 2017 WL 1281875 (D. Nev. Mar. 31, 2017) [Westlaw].

D. Coverage

The payment bond covers unpaid labor or material furnished in the prosecution of the work provided for in any contract covered by the payment bond starting 90 days after the labor was last performed or materials last provided. NRS § 339.035(1). Claimants have 1 year from last performing labor or providing materials to file suit. NRS § 339.055(2).

1. Labor

a. Professional Services

The statute does not specifically address whether "labor" includes professional services. There is no case law that addresses this issue. However, the Nevada Supreme Court has said that "federal caselaw interpreting the Miller Act is persuasive in addressing issues surrounding NRS § 339.035." *Hartford Fire Ins. Co. v. Trs. of the Constr. Indus.,* 208 P.3d 884 (Nev. 2009) [Westlaw].

b. Union Benefits

Union trust funds may make claim upon the payment bond but are still required to meet all notice requirements. *Hartford Fire Ins. Co. v. Trs. of the Constr. Indus.,* 208 P.3d 884 (Nev. 2009) [Westlaw]. The court held that trustees of union-affiliated employee-benefit trust funds have standing to assert a bond claim for unpaid benefits but are not exempt from complying with the notice requirements of the Little Miller Act payment bond under NRS § 339.035. Accordingly, the failure of the trustees to provide notice was fatal to their bond claim.

Richardson, the general contractor, entered into bond agreements with the surety, Hartford. Under the bond agreements, Hartford and Richardson were jointly and severally liable for labor, materials, and equipment contributed to bonded projects. Richardson then subcontracted some of its work to Desert Valley Landscape Maintenance, Inc. Although Desert Valley was required to render payments to the trusts for Richardson projects' employees, it never did so.

The trust fund claims against Hartford were based on NRS § 339.035, which allows any claimant who has performed labor or furnished material to bring an action on the contractor's payment bond for any unpaid amount. The trust fund claims against Richardson were based on NRS 608.150, which makes a general contractor liable for a subcontractor's failure to pay for labor and materials.

Under NRS § 339.035's clear terms, a subcontractor's employees are required to provide notice to the general contractor of their claims for the subcontractor's unpaid contributions before recovering on the contractor's payment bond. Likewise, because employee-benefit trust-fund trustees are third-party beneficiaries of the subcontractor's promise to make the contributions, the court concluded that the trust funds represent the employees and, thus, are permitted to make claims on the payment bond. Since the trust funds stand in the employees' shoes, the trust funds also are required to provide the contractor with notice of their claims before recovering against the payment bond under NRS § 339.035. But as NRS § 608.150 plainly does not require that the trust funds provide the contractor with notice of their claims before recovering from the contractor, no such notice is necessary to recover under that statute. The court concluded that trust funds must provide notice as to claims against a surety under NRS § 339.035, but not as to claims against a contractor under NRS § 608.150.

2. Material

The payment bond covers unpaid material furnished in the prosecution of the work provided for in any contract covered by the payment bond starting 90 days after the materials were last provided. NRS § 339.035(1).

3. Equipment

There is no case law that addresses this issue. However, the Nevada Supreme Court has said that "federal caselaw interpreting the Miller Act is persuasive in addressing issues surrounding NRS § 339.035." *Hartford Fire Ins. Co. v. Trs. of the Constr. Indus.*, 208 P.3d 884, 888 (Nev. 2009) [Westlaw].

a. Repairs

There is no case law that addresses this issue.

b. Rentals

There is no case law that addresses this issue.

4. Other

a. Attorneys' Fees

As a general rule, the surety is not liable for attorneys' fees if a bond principal becomes obligated to pay such fees in third-party litigation. "The surety only becomes liable for fees that exceed the bond amount when it engages in direct litigation with the secured entity over the bond." *Glazing Health and Welfare Fund v. Accuracy Glass and Mirror Co.*, 2016 U.S. Dist. LEXIS 43509, 2016 WL 1270991 (D. Nev. 30, 2016) [Westlaw] (internal citation omitted; discussing rule outside public payment bond context). No published case addresses the public payment bond surety's liability for claimant attorneys' fees.

b. Interest

There is no case law that addresses this issue.

c. Financing Charges

There is no case law that addresses this issue.

d. Insurance Premiums

There is no case law that addresses this issue.

e. Loans

There is no case law that addresses this issue.

f. Delay Damages

There is no case law that addresses this issue.

g. Profits

There is no case law that addresses this issue.

h. Extracontractual

Not only has the Nevada Supreme Court held that "as a matter of law, an insurance bad-faith claim does not lie against a surety because there is no special relationship between a surety and its principal" [*Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 458, 134 P.3d 698, 699 (2006) [Westlaw]], but this reasoning very likely extends beyond claims asserted by the principal, *i.e.*, barring *all* claims for tortious breach of the implied covenant of good faith and fair dealing against a surety. *See* *Sonoma Springs Ltd. P'ship v. Fid. and Deposit Co. of Md.*, 409 F. Supp. 3d 946, 955–56 (D. Nev. 2019) [Westlaw].

E. Contracts Excluded

The Nevada Department of Transportation ("NDOT") is statutorily excluded from the Little Miller Act. NRS § 339.025(1). NDOT has its own statutory scheme. The statutory provisions requiring the performance and payment bonds are set forth in NRS § 408.357. "[E]very contract must provide for the filing and furnishing of one or more bonds by the successful bidder, with corporate sureties approved by the Department and authorized to do business in the State, in a sum equal to the full or total amount of the contract awarded."

The bonds provided must be performance bonds or labor and material bonds or both. Specifically, the performance bonds must: "(a) guarantee the faithful performance of the contract in accordance with the plans, specifications, and terms of the contract; and (b) be maintained for one year after the date of completion of the contract." NRS § 408.357(2).

The labor and material bonds must:

a) Secure payment of state and local taxes relating to the contract, premiums under the Nevada Industrial Insurance Act, contributions under the Unemployment Compensation Law, and payment of claims for labor, materials, provisions, implements, machinery, means of transportation or supplies furnished upon or used for the performance of the contract; and

Provided that if the contractor or his or her subcontractors, or assigns, fail to pay for such taxes, premiums, contributions, labor, and materials required of, and used or consumed by, the contractor or his or her subcontractors, the surety shall make the required payment in an amount not exceeding the total sum specified in the bond together with interest at a rate of 8 percent per annum. NRS § 408.357(3).

F. Time for Suit

Suit must be brought within one year "from the date on which the claimant performed the last of the labor or furnished the last of materials for the payment of which such actions is brought" NRS 339.055

Nevada Revised Statute § 408.363 sets forth the procedures for claiming against a bond furnished for an NDOT project. To recover on such bonds, among other things, an action must be commenced within six months after the date of NDOTs' final acceptance of the project. NRS § 408.363(2). Claimants are also required to file with NDOT a claim in triplicate within 30 days from the date of final acceptance of the contract, executed and verified before a notary public and containing a statement that the claimant has not been paid. NRS § 408.363(1). One copy of the claim is to be filed with the Department and the remaining copies are to be forwarded to the contractor and the surety. Failure to comply with these provisions bars a claim. *Zalk-Josephs v. Wells Cargo,* 77 Nev. 441, 444 (Nev. 1961) (contractor failed to file notices and perfect its claim) [Westlaw]; *In re. Capriati Constr. Corp.*, No. 2:16-cv-01560-APG, 2017 U.S. Dist. LEXIS 49419, 2017 WL 1281875 (D. Nev. Mar. 31, 2017) [Westlaw].

G. Remarks

Because Nevada has such little caselaw directly addressing NRS § 339, arguments must be extrapolated by analogy to cases interpreting Nevada's mechanic's lien statute, NRS § 108, the federal Miller Act, or other related areas.

H. Case Annotations

Notice Requirements

In *Hartford Fire Insurance Co. v. Trustees of the Construction Industry,* the Nevada Supreme Court held that trustees of union-affiliated employee-benefit trust funds have standing to assert a bond claim for unpaid benefits but are not exempt from complying with the notice requirements of the Little Miller Act payment bond under NRS § 339.035. 208 P.3d 884 (Nev. 2009) [Westlaw]. Accordingly, the failure of the trustees to provide notice was fatal to their bond claim.

Richardson, the general contractor, entered into bond agreements with the surety, Hartford. Under the bond agreements, Hartford and Richardson were jointly and severally liable for labor, materials, and equipment contributed to bonded projects. Richardson then subcontracted some of its work to Desert Valley Landscape Maintenance, Inc. Although Desert Valley was required to render payments to the trusts for Richardson projects' employees, it never did so.

The trust fund claims against Hartford were based on NRS § 339.035, which allows any claimant who has performed labor or furnished material to bring an action on the contractor's payment bond for any unpaid amount. The trust fund claims against Richardson were based on NRS § 608.150, which makes a general contractor liable for a subcontractor's failure to pay for labor and materials.

Under NRS § 339.035's clear terms, a subcontractor's employees are required to provide notice to the general contractor of their claims for the subcontractor's unpaid contributions before recovering on the contractor's payment bond. Likewise, because employee-benefit trust-fund trustees are third-party beneficiaries of the subcontractor's promise to make the contributions, the court concluded that the trust funds represent the employees and, thus, are permitted to make claims on the payment bond. Since the trust funds stand in the employees' shoes, the trust funds also are required to provide the contractor with notice of their claims before recovering against the payment bond under NRS § 339.035. But as NRS § 608.150 plainly does not require that the trust funds provide the contractor with notice of their claims before recovering from the contractor, no such notice is necessary to recover under that statute. The court concluded that trust funds must provide notice as to claims against a surety under NRS § 339.035, but not as to claims against a contractor under NRS § 608.150.

Statutory Bond

Even if the bond does not mention the notice provisions of NRS § 339.035, those provisions are nevertheless operative. "A bond given which is required by statute is deemed to be a statutory bond, and as such, the statutory provisions must be read into the bond and are operative by force of the statute without recitation of them in the bond." *Capriotti Lemon and Assocs., Inc. v. Johnson Serv.*, 84 Nev. 318, 321 (Nev. 1968) [Westlaw]. Further, any notice must comply with the statutory requirements.

In *Capriotti*, Johnson Service Company entered into a sub-subcontract with subcontractor Dave's Plumbing and Heating, Inc., to furnish and install a temperature control system in accordance with plans and specifications. Johnson Service performed its contract with Dave's Plumbing and Heating but Dave's Plumbing and Heating, filed bankruptcy before paying Johnson

Service. Prior to the bankruptcy, the contractor had paid Dave's Plumbing and Heating all monies due under that subcontract. Johnson Service's only remedy was against the bonding company.

The bonding company contended that Johnson Service failed to comply with the statutory 30-day notice requirement. Johnson Service asserted this requirement was satisfied by a brochure which was given to Dave's Plumbing who forwarded it to the contractor.

The court held that the brochure did not constitute notice under the statute. The brochure did not set forth the amount claimed nor was it sent directly to the contractor by registered mail, both of which are statutory requirements. Under ordinary circumstances anyone receiving the brochure could reasonably understand it to be no more than a brochure and certainly not a notice that work was being commenced or materials furnished on any particular construction project. Nor would a contractor receiving such a brochure conclude that the supplier contemplated pursuing his statutory remedy against the contractor and surety in the event he was not paid in full.

The trial court determined that the bond was a common-law bond instead of a statutory bond, and the statutory notice requirements would not apply. The Nevada Supreme Court reversed the trial court holding that a bond given which is required by statute is deemed to be a statutory bond, and as such, the statutory provisions must be read into the bond and are operative by force of the statute without recitation of them in the bond. The law imputes the provisions into the statutory bond whether written therein or not. If the law has made the instrument necessary, the parties are deemed to have had the law in contemplation when the contract was executed. A common-law bond is a bond given though not required by any statute and the provisions are not prescribed by statute. Accordingly, Johnson Service's claim failed for not having complied with the 30-day notice requirement of the statute.

Thirty-Day Notice Requirement

Compliance with the statutory 30-day notice requirement is a precondition to suit on the Little Miller Act bond. Failure to comply is fatal to the bond claim. *Garff v. J.R. Bradley Co.*, 84 Nev. 79 (Nev. 1968) [Westlaw].

This case arises out of the construction of the Carson City law enforcement facility. The subcontractor failed to fully pay the suppliers. Consequently, the suppliers each brought suit upon the payment bond given by the general contractors and their surety pursuant to NRS § 339.025(b). The amount claimed due by each supplier was not disputed. A direct contractual relationship existed between each supplier and the subcontractor, thus placing each case within the provisions of NRS § 339.035(2) providing for suit upon a payment bond only when a claimant has given the notices provided for by subparagraphs (a) and (b). Neither claimant gave the 30-day notice required by subparagraph (a). The general contractors, however, had actual knowledge of the matters specified in that subparagraph.

The general contractors and surety contended that compliance with the notice provisions is a precondition to a claim for relief on the bond. Since neither claimant gave the 30-day notice his claim for relief must fail. The Nevada Supreme Court ruled that compliance by the suppliers with the 30-day notice requirement is a precondition to suit on the bond. The reasoning was that bond here in question was given pursuant to the statute and conformed with it. The bond did not provide a broader coverage than contemplated by the statute. "The legislative provision for suit on the bond creates a remedy in circumstances where none existed before. It is not unfair to demand compliance with the preconditions for suit [thirty (30)-day preliminary to work and ninety (90)-days after completion]." *Id. at* 83.

The Court was not swayed by the claimants' estoppel argument that the general contractors had actual knowledge of materials being supplied. Such actual knowledge does not create an estoppel. The statute places a duty upon the suppliers to give the notices therein specified. The contractors did not represent to the claimants that they need not comply with the notice requirements. Mere knowledge on the part of the contractors that the claimants were on the job or supplied materials does not constitute a representation by the contractors that the claimants need not follow the statute in perfecting their claims for relief on the bond. Absent such a representation, and a reliance thereon, the doctrine of estoppel cannot apply.

The Court noted that contractors frequently are aware of the identity of the suppliers of materials to subcontractors; frequently know the identity of those performing labor for the subcontractor. However, such awareness or knowledge, standing alone, does not erase the duty which the legislature has placed upon claimants to give the thirty (30)- and ninety (90)-day notices before becoming eligible to file suit on a payment bond given pursuant to NRS § 339.025(b). Fairness does not suggest that the Court force the general contractor to pay twice (the subcontractor had been given funds with which to pay the suppliers) when the suppliers have failed to take essential steps to perfect their claims against the bond.

However, in *Amfac Distribution. Corp. v. Housing Authority*, the court refused to apply strict application of the statutory notice requirements to allow recovery for labor and services supplied thirty days prior to the statutory notice, even if the notice was not supplied within thirty days of first supplying labor and materials as statutorily required. 100 Nev. 573 (Nev. 1984) [Westlaw].

Defendant John E. Yoxen Company was the general contractor on a public works project in Las Vegas. As required by NRS § 339.025(1)(b), Yoxen obtained a payment bond from defendant surety, Safeco Insurance Company of America. Beginning on July 20, 1982, plaintiff-appellant Amfac Distribution Corporation supplied materials to R.I.C. Electric, one of Yoxen's subcontractors on the project. On September 2, 1982, Amfac notified Yoxen that it was supplying materials to R.I.C. On September 27, 1982, R.I.C. became insolvent and stopped working on the project. Amfac's last delivery was on September 30, 1982. Unpaid by R.I.C., Amfac sought payment from Yoxen and Safeco under the payment bond. Yoxen and Safeco contended, and the trial court agreed, that since Amfac had failed to give its initial statutory notice to Yoxen within thirty days of its first delivery to R.I.C., that Amfac was barred from recovery for any of the material, including that supplied within thirty days prior to the notice and thereafter.

The Nevada Supreme Court disagreed, holding: "[W]e read NRS § 339.035 (2)(a) to allow recovery where both initial and final notice are given, even if the initial notice is more than thirty days after the first delivery of materials but limit this recovery to the value of material or labor supplied in the thirty days prior to the initial notice or any time thereafter." *Id.* at 576. The parties did not dispute that Amfac fully complied with the final notice requirement or that the contents of its initial notice were adequate. Only the timeliness of the initial notice was at issue. The Court determined this interpretation to be in line with the legislature's intent rather that a strict interpretation that produces an unnecessarily harsh result not intended by the legislature.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

A common-law payment bond for use on private projects is interpreted, like all surety contracts, in accordance with the purposes for which the surety contract was designed. *Jacobsen v. Am. Fid. Fire Ins. Co.*, 541 P.2d 2 (Nev. 1975) [Westlaw]. Formerly, Nevada strictly construed surety bonds in favor of a compensated surety; that is no longer a correct statement of Nevada law, instead, "the contract of a *compensated* surety is to be interpreted liberally in the interests of the promisee and the beneficiaries rather than strictly in favor of the surety." *Zuni Constr. Co. v. Great Am. Ins. Co.*, 468 P.2d 980 (Nev. 1970) [Westlaw].

B. Time for Suit

There is no case law indicating a payment bond provision limiting the time for suit would be unenforceable as against public policy. Absent such a clause in the payment bond, Nevada's statute of limitations for ordinary actions founded upon written contract is likely to apply. *See* NRS § 11.190(1)(b).

C. Case Annotations

Penal Sum Limitations

In *Acoustics, Inc. v. American Surety Co. of New York*, the Nevada Supreme Court construed a construction bond as a payment bond and reasoned that "[t]he promise of performance of the contract must be accepted at face value" when permitting labor and materialmen to make claim. 320 P.2d 626 (Nev. 1958) [Westlaw] The Court also mentioned that unless otherwise specified, the surety's obligation is payment of the penal sum.

But see also *Glazing Health and Welfare Fund v. Accuracy Glass and Mirror Co.*, 2016 U.S. Dist. LEXIS 43509, 2016 WL 1270991 (D. Nev. 30, 2016) [Westlaw] (internal citation omitted; discussing rule outside public payment bond context) wherein attorney fees and costs were awarded over and above the penal sum where the surety directly litigated its own liability.

Effect of Default Judgment Entered against Principal

See *Gearhart v. Pierce Enterprises, Inc.*, 105 Nev. 517, 779 P.2d 93 (1989) [Westlaw] (default judgment entered against principal for discovery abuses may not be imputed to or binding upon the surety).

NEW HAMPSHIRE

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

"[I]n an amount equal to at least 100 percent of the contract price or of the estimated cost of the work if no aggregate price is agreed upon." N.H. Rev. Stat. § 447:16.

B. Tiers Covered

The statutory language provides protection for "the payment by the *contractors* and *subcontractors* for all labor performed or furnished, . . . [and] for all materials used . . ." N.H. Rev. Stat. § 447:16. Claims under a payment bond are available to all those who "in good faith furnish necessary materials for the construction of public buildings inuring to the public benefit." *Gen. Elec. Co. v. Dole Co.*, 105 N.H. 477, 479 (1964) [Lexis]. However, the New Hampshire Supreme Court has limited this coverage holding that a supplier's supplier is not afforded protection under the New Hampshire public works bond statute, as it only protects those in privity of contract either with a contractor or a subcontractor. *Lyle Signs, Inc. v. Evroks Corp.*, 132 N.H. 156 (1989) [Lexis] (limiting coverage to only those parties who are in privity of contract either with a contractor or a subcontractor).

A supplier's supplier is not afforded protection under the public works bond statute. *Id.* "To construe the statute as protecting a [supplier's supplier] could impose endless liability on a general contractor, thereby making it liable where it would be virtually impossible for the general contractor to protect itself since relations with such entities might be quite remote or unknown." *Id.* at 159. In *Lyle Signs*, the Court set forth a three-part test for determining whether an entity is a protected subcontractor as follows: (1) whether the entity constructs a definite and substantial part of the work or improvement called for in the original contract; (2) whether the work is performed in accordance with plans and specifications of the original contract; and (3) whether the plans and specifications call for a unique product and not a product readily available on the open market. *Id.* [Lexis].

C. Notice Required

N.H. Rev. Stat. § 447:16 requires that a claimant "within ninety (90) days after the completion and acceptance of the project by the contracting party" file with the proper public entity a statement of the claim. A copy of that statement must be sent by mail to the office where it is filed to the principal and surety. New Hampshire courts have held that a failure to comply with the requirement that a statement of claim be filed with the designated party "is usually held fatal." *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 607, 992 A.2d 613, 618 (2010) [Lexis]. "[T]he main purpose of [this] notice requirement is to provide parties with an opportunity to settle the claim without resorting to litigation." *Id.* at 607, 992 A.2d at 618 (quoting *Mountain Env't v.*

Abatement Int'I/Advantex Assoc., 149 N.H. 671, 674, 826 A.2d 556 (2003) [Lexis]). The purpose of filing a statement of a claim is to benefit both the principal and surety. The notice requirement may be waived by either the principal or the surety. *Therrien v. Md. Cas.* Co., 97 N.H. 180 (1951) [Lexis]. The question of waiver is one of fact for the trial court. *Id.* Failure to file statement of the claim within the statutory period is grounds for rejection. *Am. Fid.* Co. *v. Cray*, 105 N.H. 132 (1963) [Lexis]. A premature filing will satisfy the statutory requirements. *New England Metal Culvert* Co. *v. A.E. Williams Constr. Co.*, 105 N.H. 235 (1964) [Lexis].

It is important to note that claimants must provide notices of their claim to different governmental bodies depending on which body is the contracting authority. If the notice is provided to the wrong governmental entity, it is typically fatal to the claim. *Gen. Insulation* Co. *v. Eckman Constr.*, 159 N.H. 601, 607, 992 A.2d 613, 618 (2010) [Lexis]. If the State of New Hampshire is the contracting party, the claimant must file statement of the claim in the office of the Secretary of State. If the Department of Transportation is the contracting party, the claimant must file statement of the claim with the Department of Transportation. If the Department of Administrative Services is the contracting party, the claimant must file statement of the claim with the Department of Administrative Services. If none of these entities are the contracting party, the claimant must file statement of the claim in the office of the clerk of the Superior Court, "for the county within which the contract shall be principally performed." The office where the statement of the claim is filed will mail a copy to both the principal and the surety. N.H. Rev. Stat. § 447:17.

D. Coverage

N.H. Rev. Stat. § 447:16 states that the payment bond must be "conditioned upon the payment by the contractors and subcontractors for all labor performed or furnished, for all equipment hired, including trucks, for all material used and for fuels, lubricants, power, tools, hardware, and supplies purchased by said principal and used in carrying out said contract, and for labor and parts furnished upon the order of said contractor for the repair of equipment used in carrying out said contract."

1. Attorneys' Fees, Interest, and Finance Charges

There is no provision for the award of attorneys' fees against a surety in New Hampshire. The annual rate of interest in all business transactions in which interest is paid or secured, unless otherwise agreed upon in writing, shall equal ten percent (10%). If agreed upon in writing, interest on business transactions may include charging other than simple interest. N. H. Rev.Stat. § 336:1. The annual simple rate of interest on judgments, including prejudgment interest, shall be a rate determined by the state treasurer as the prevailing discount rate of interest on 26-week United States Treasury bills at the last auction thereof preceding the last day of September in each year, plus two (2) percentage points, rounded to the nearest tenth of a percentage point. On or before the first day of December in each year, the state treasurer shall determine the rate and transmit it to the director of the administrative office of the courts.

As established, the rate shall be in *effect* beginning the first day of the following January through the last day of December in each year. N.H. Rev. Stat. § 336:1.

2. Unfair Claims Settlement Practices Act

In New Hampshire, a bond is treated as a contract of insurance. *Concord v. Peerless Ins. Co.*, 272 A.2d. 588, 590 (N.H. 1970) [Lexis] (applying rule governing the interpretation of an insurance contract of construction on a surety bond). N.H. Rev. Stat. Ann. 417:1-417:31. "Failing to acknowledge with reasonable promptness pertinent communications with respect to claims" and "failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims" constitutes unfair claim settlement practices. N.H. Rev. Stat. Ann. § 417:4 (2006).

Within ten (10) days after receipt of an initial claim, the insurer must acknowledge such receipt. N.H. Code Admin. R. § 1001.01 to .02. Within thirty (30) days after receipt of proof of loss, an insurer must accept or deny coverage, unless more time is needed, in which case the insurer must notify the insured of that and continue to do so every thirty (30) days thereafter until a determination of coverage is made. N.H. Code Admin. R. § 1001.01 to .02.

3. Delay Damages

As a general proposition, delay damages are recoverable against a contractor under New Hampshire law. *See Axenics, Inc. v. Turner Constr. Co.*, 164 N.H. 659 (N.H. 2013) [Lexis]. New Hampshire also follows the exception to the enforceability of "no-damage for delay" clauses when an owner intentionally interferes with and delays a project. Jeffrey L. Alitz & Colleen A. Wolcott, *State by State Guide to Design and Construction Contracts and Claims* 31-8 (Michael Dodd, J. Duncan Findlay, eds., Wolters Kluwer Law & Business, 2nd ed. 2012) (citing "Validity and Construction of No Damage Clauses," 74 A.L.R. 3d 187 (1976) [Lexis]).

E. Contracts Excluded

A bond is required if: (a) the contracting party is an officer, public board, agent or other person who contracts on behalf of the State of New Hampshire, or any political subdivision thereof; (b) the contract is for the "construction, repair or rebuilding of public buildings, public highways, bridges or other public works;" and (c) the contract is for more than $25,000.00. N.H. Rev. Stat. § 447:16.

F. Time for Suit

In New Hampshire, unlike many states, there are two different courts in which lawsuits can be filed: one is a court of equity and the other is a court of law. This means that if a payment bond lawsuit is commenced there will often be two lawsuits. One in the court of equity that will contain claims for equitable relief, such as specific performance. The other action will be filed in a court of law, which will contain claims such as breach of contract.

To enforce a claim on a payment bond, the claimant shall, "file a petition in the Superior Court for the county within which the contract shall be principally performed," within one (1) year of filing a statement of the claim. Failure to file petition within the statutory period is fatal to the claim. *Am. Fid. Co. v. Cray*, 105 N.H. 132 (1963) [Lexis]; N.H. Rev. Stat. § 447:18. A copy of the petition must also be provided "to the principal and surety and such further notice as the court may order." N.H. Rev. Stat. § 447:18. Significantly, the New Hampshire Supreme Court has held that, even though a petition may be filed in court against a principal and surety which would necessitate service on the principal and surety, the statute nonetheless requires that a second copy of that

petition be mailed to the principal and surety. The failure to provide that second copy of the petition will be fatal to the claimant's lawsuit. *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 610, 992 A.2d 613, 619 (2010) [Lexis].

A petition must contain specific allegations. The petition must contain allegations, "of the nature and subject matter of the claim or contract or indebtedness relied upon," allegations "of the execution and delivery of the bond," allegations of the facts showing that the claimant complied with the notice requirements by submitting a Statement of the Claim pursuant to N.H. Rev. Stat. § 447:17. N.H. Rev. Stat. § 447:18. Any interested party may file subsequent pleadings to direct the Court accordingly. To intervene in a previously filed petition, the claimant must follow the same procedure for filing an initial petition. After examining the claims, the Court will set a hearing date, notifying all creditors who have filed a petition, the principal and the surety. N.H. Rev. Stat. § 447:18.

G. Remarks

The purpose of N.H. Rev. Stat. § 447:16, *et seq*. is to "furnish an alternative security to lienors, in general more practically adapted to protect them and at the same time to save the state or municipality from annoyance . . . The intent to make the bond security for contractors and subcontractors obtaining liens and thus relieve them from proceeding with their liens, is not open to doubt." *Guard Rail Erectors, Inc. v. Standard Sur. & Cas. Co. of New York*, 86 N.H. 349 (1933) [Lexis]. The statutory requirements for a payment bond apply whether or not the statute is actually referenced on the bond. *See Fastrack Crushing Servs., Inc. v. Abatement Int'l/Advatex Assocs., Inc.*, 149 N.H. 661, 827 A.2d 1019 (2003) [Lexis]; *Mountain Env't, Inc. v. Abatement Int'l/Advatex Assocs., Inc.*, 149 N.H. 671, 826 A.2d 556 (2003) [Lexis]; *Gen. Elec. Co. v. Dole Co.*, 105 N.H. 477, 479, 202 A.2d 486 (1964) [Lexis]; *In re Leon Keyser, Inc.*, 97 N.H. 404, 408, 89 A.2d 917 (1952) [Lexis].

The payment bond statute contains the required conditions for the bond. However, it does not prohibit the incorporation of additional conditions. Any additional conditions will be interpreted in accordance with common law contract principles. It should be noted that despite the language in the bond, creditors otherwise entitled to protection under the statute may make a claim and are required to establish their rights in accordance with statutory procedures. *In re Leon*, 97 N.H. at 408 [Lexis] (holding that where bond seeks to "comply in full" with § 447:16, Section 16 is read into the bond).

Where a bond does contain a different notice requirement than the statute and that provision conflicts with the statute, it must be resolved in favor of the statute and the statutory notice provisions control. *Fastrack Crushing Services, Inc. v. Abatement lnt'l/Advatex Assocs., Inc.*, 149 N.H. 661 (2003) [Lexis]. In *Fastrack*, the bond notice requirement did not require any filing with the Superior Court. Instead, it required a claimant to provide written notice to the owner and contractor within ninety (90) days of completion. *Id.* at 665. The Court held that if this bond did not have a provision that conflicts were resolved in favor of the statute, the surety would have waived its protection under the statutory notice provision and the claimant would not be required to follow the statute so long as it followed the bond notice procedures. However, the Court went on to hold that, in this case, the claimant was required to follow the statutory notice requirement because the bond provided that the statutory provisions governed. Therefore, the claim failed because it was only filed in accordance with the bond requirements and not the statutory requirements. *Id.*

There is no provision for the award of attorneys' fees against a surety in New Hampshire.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

In interpreting a payment bond in conjunction with a construction contract, the two documents are read together as "an integrated obligation." *Maine Bonding & Cas. Co. v. Found. Constructors, Inc.*, 105 N.H. 470, 473, 202 A. 2d 481, 483 (1964) [Lexis] ; *Rivier Coll. v. St. Paul Fire & Marine Ins. Co.*, 104 N.H. 398, 187 A.2d 799 (1963) [Lexis]; *Paisner v. Renaud*, 102 N.H. 27, 149 A.2d 867 (1959) [Lexis]. If the two documents, read as a whole, are not ambiguous, parol evidence is not permitted to alter the terms of the documents. *Id*.

New Hampshire contract law "focuses on the intent of the contracting parties at the time of the agreement." *Found. for Seacoast Health v. HCA Health Servs.*, 157 N.H. 487, 492 (2008) [Lexis] (internal citations omitted). The "words and phrases used by the parties will be assigned their common meaning," and the "intended purpose of the contract [is] based upon the meaning that would be given to it by a reasonable person." *Id*.

B. Time for Suit

The statute of limitations for contract actions in New Hampshire is governed by the three (3) year limitations period for "personal actions." N.H. Rev. Stat. Ann. § 508:4 provides:

> Except as otherwise provided by law, all personal actions, except for slander or libel, may be brought only within three (3) years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within three (3) years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

Surety bonds are considered contracts and limitation periods contained within a private payment bond will be enforced.

C. Case Annotations

In construing a private payment bond, New Hampshire Courts will look to the Federal Miller Act for guidance in the interpretation of private bonds. *Brox Indus., Inc. v. H.J. Stabile & Sons, Inc.*, 21 F.3d 419 (1st Cir. 1994) (unpublished); *New England Metal Culvert Co. v. A.E. Williams Constr. Co.*, 196 A.2d 713, 715 (N.H. 1963) [Lexis].

NEW JERSEY

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

N.J. Stat. § 2A:44-147, which is part of the New Jersey Bond Act (N.J. Stat. §§ 2A:44-143 through 44-147) (the "Bond Act"), establishes the payment bond form required for public projects in New Jersey. Each of the conditions and provisions of the Bond Act are deemed to be incorporated into the bond. *Id.*

The amount of the bond must be equal to 100% of the contract price, N.J. Stat. § 2A:44-144, except in limited circumstances discussed below.

Only a general contractor is required to obtain a payment bond—there is no requirement in the Bond Act that a subcontractor obtain a payment bond. *See generally* N.J. Stat. §§ 2A:44-143 through 44-147; *Hiller & Skoglund, Inc. v. Atl. Creosoting Co.*, 190 A.2d 380, 384 (N.J. 1963) [Lexis].

B. Tiers Covered

The payment bond covers claims asserted by claimants providing labor or materials to the prime contractor or to claimants providing labor or materials to a subcontractor of the prime contractor—*i.e.*, first and second-tier claimants. N.J. Stat. § 2A:44-143(a).

C. Notice Required

1. Pre-Construction Notice from Second-Tier Claimants

Claimants who have a direct contractual relationship with a subcontractor, but no direct contractual relationship with the prime contractor, must serve the prime contractor with a written notice that the claimant is a beneficiary of the payment bond. N.J. Stat. § 2A:44-145. The notice must be provided prior to the commencement of work and must be provided to the prime contractor by certified mail or otherwise, provided that the claimant shall have proof of delivery of same. *Id.* If a claimant fails to provide the required written notice, the claimant shall only have rights under the payment bond from the date the notice is provided. *Id.* This written notice requirement requires strict compliance—constructive notice is not sufficient. *See, e.g.*, *Dial Block Co. v. Mastro Masonry Contractors*, 863 A.2d 373, 379 (N.J. Super. Ct. App. Div. 2004) [Lexis]; *Laborers Loc. Union No. 779 Pension v. Am. Cas Co. of Reading, Pa.*, 771 A.2d 712, 716–17 (N.J. Super. Ct. Law Div. 2000) [Lexis].

2. Post-Completion Notice from All Claimants

At any time prior to the expiration of one year from the last date upon which a claimant shall have performed work or delivered materials to the project, the claimant must provide the surety with a statement of the amount it is owed. N.J. Stat. § 2A:44-145.

D. Coverage

The Bond Act, "being of statutory origin and in derogation of the common law, should be strictly construed with respect to the provisions giving rise to the [claim], but liberally construed as to the provisions for enforcement." *W. Bank Oil, Inc. v. Hartford Acc. & Indem. Co.*, 500 A.2d 32, 64 (N.J. Super. Ct. App. Div. 1985) [Lexis]. "The historical and remedial purpose of the Bond Act is to protect, inter alia, laborers who do work on public projects." *Velez v. Wilkerson Elec. Servs., Inc.*, 796 A.2d 919, 926 (N.J. Super. Ct. App. Div. 2002) [Lexis]. New Jersey courts frequently cite to and follow cases interpreting the federal Miller Act which New Jersey courts describe as the federal analogue of the Bond Act. *See, e.g.*, *Unadilla Silo Co. v. Hess Bros.*, 586 A.2d 226, 233 (N.J. 1991) [Lexis]; *Morris Cnty. Indus. Park v. Thomas Nicol Co.*, 173 A.2d 414, 419 (N.J. 1961) [Lexis]. The Bond Act is *pari materia* with the Construction Lien Law (N.J. Stat. § 2A:44A-1, *et seq.*) and the Trust Fund Act (N.J. Stat. § 2A:44-148) and therefore the three must be construed together. *See Key Agency v. Cont'l Cas. Co.*, 155 A.2d 547, 551 (N.J. 1959) [Lexis]. However, "generally speaking, the benefits of the [B]ond [A]ct are broader and the protection greater than the right of lien." *Hiller & Skoglund, Inc. v. Atl. Creosoting Co.*, 190 A.2d 380, 384 (N.J. 1963) [Lexis].

1. Labor

a. Professional Services

Although there does not appear to be any case law regarding professional services coverage under public payment bonds, the Construction Lien Law permits architects, engineers, land surveyors and landscape architects that perform professional services related to an improvement of property and that are not salaried employees of the contractor to file construction liens. N.J. Stat. §§ 2A:44A-2 and 2A:44A-3. In contrast, an attorney that drafts the construction contract is not entitled to a lien. *Harry Pinsky & Son Co. v. Wike*, 136 A. 920, 922 (N.J. Ch. 1927), *aff'd*, 141 A. 920 (N.J. 1928) [Lexis]. These cases would likely be persuasive to a court if the issue were to ever arise with respect to public payment bonds.

b. Union Benefits

It is an open question in New Jersey as to whether union benefits are covered by a public payment bond. Although the Appellate Division in *Bd. of Trustees of Operating Engineers Loc. 825 Fund Serv. Facilities v. First Indem. of Am. Ins. Co.*, 671 A.2d 596, 601 (N.J. Super. Ct. App. Div. 1996) [Lexis] held that union benefits were covered by a public payment bond, that case was appealed and the New Jersey Supreme Court refused to address the issue and noted that it was an open issue in New Jersey. *Bd. of Trustees of Operating Engineers Loc. 825 Fund Serv. Facilities v. L.B.S. Const. Co.*, 691 A.2d 339, 347–48 (N.J. 1997) [Lexis]. Subsequent to that, at least one

court has held that union benefits are not covered by a public payment bond. *Laborers Loc. Union No. 779 Pension v. Am. Cas. Co. of Reading, Pa.*, 771 A.2d 712, 716–19 (N.J. Super. Ct. Law. Div. 2000) [Lexis]. However, the court limited its holding to the facts of the case and distinguished the facts of *Bd. of Trustees of Operating Engineers*. Specifically, the court noted that the *Bd. of Trustees of Operating Engineers* case involved a union that had a collective bargaining agreement with the general contractors that were named principals on the bonds. *Id.* at 717. In contrast, the *Laborers Loc. Union No. 779* case involved a union that had a collective bargaining agreement with the subcontractor of the bonded general contractor. *Id.* The court therefore stated that there was a more attenuated relationship than was present in the earlier cases. *Id.* The court further noted that the collective bargaining agreement between the subcontractor and the union specifically included a provision requiring the subcontractor to obtain a fringe benefit bond for the protection of the union, which the court said belied any suggestion that the unions expected that they might be beneficiaries of the surety bond posted by the general contractor. *Id.* at 719. The court also found that the definition of beneficiary in the Bond Act could under no circumstance be interpreted to include union pension and benefit funds. *Id.* at 719.

2. Material

Although the issue does not appear to have been addressed by any state courts with respect to public payment bonds, older case law interpreting the Mechanics' Lien Law—which is the predecessor to the current Construction Lien Law—held that so long as materials were delivered to a job site, the material supplier could file a construction lien. It does not matter that the materials may have been diverted for another purpose, so long as the materials were delivered with an intent that they be incorporated into the project. *See, e.g.*, *Bell v. Mecum*, 68 A. 149, 150 (N.J.L. 1907) [Lexis]; *Thirteenth Ward Bldg. & Loan Ass'n v. Kanter*, 147 A. 809, 811 (N.J. Ch. 1929) [Lexis]; *Atl. City Lumber Co. v. Atl. City*, 146 A. 307, 307 (N.J. 1929) [Lexis]; *Morris Cty. Bank v. Rockaway Mfg. Co.*, 14 N.J. Eq. 189, *2 (N.J. Ch. 1862) [Lexis]. These cases would likely be persuasive to a court if the issue were to ever arise with respect to public payment bonds.

Note that there is also a federal decision, *Poly-Flex, Inc. v. Cape May Cty. Mun. Utils. Auth.*, 832 F. Supp. 889, 892–93 (D.N.J. 1993) [Lexis], wherein the court held that materials must be incorporated into the project to be recoverable under a public payment bond and that so long as the claimant proves that the materials were delivered to the site, incorporation of the materials is presumed and it is up to the surety to rebut this presumption.

3. Equipment

a. Repairs

Repairs are covered to the extent they fall within the language of the Bond Act. The Bond Act states, in relevant part, that:

> When public buildings or other public works or improvements are about to be constructed, erected, altered or *repaired* under contract, at the expense of the State or any contracting unit . . . or school district, the board, officer or agent contracting on behalf of the State, contracting unit or school district, shall require delivery of the payment and performance bond issued in accordance with N.J.S.

> 2A:44-147 . . . with an obligation for the performance of the contract and for the payment by the contractor for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or *repair* of such buildings, works or improvements.

N.J. Stat. § 2A:44-143 (emphasis added).

b. Rentals

Rentals are covered under New Jersey public payment bonds, which ensure payment for all "labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of such buildings, works or improvements." N.J. Stat. § 2A:44-143; *see also* *Leonard D. Sylvester, Inc. v. Giovannone Constr. Co.*, 174 A. 582, 583–84 (N.J. Ch. 1934) [Lexis]; *Wilson v. Robert A. Stretch, Inc.*, 129 A.2d 599, 603 (N.J. Super. Ct. Ch. Div. 1957) [Lexis].

4. Other

a. Attorneys' Fees

Attorneys' fees arising from litigation with a surety do not appear to be recoverable in New Jersey on a public payment bond. *See* *Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co.*, 678 A.2d 699, 708 (N.J. 1996) [Lexis]. However, attorneys' fees for which a principal is liable may be recoverable from a surety on a public payment bond due to a surety's coextensive liability. *See* *In re Est. of Lash*, 776 A.2d 765, 770–73 (N.J. 2001) [Lexis]; *see also* N.J. Stat. § 2A:44-143(b).

b. Interest

There do not appear to be any decisions in New Jersey regarding the award of interest on a public payment bond where the principal is liable for interest pursuant to the bonded contract or where the principal is liable for interest pursuant to the New Jersey Prompt Payment Act (N.J. Stat. § 2A:30A-2).

The award of pre-judgment interest is based on equitable principles and is left to the discretion of the trial court. *Cty. of Essex v. First Union Nat'l Bank*, 891 A.2d 600, 608 (N.J. 2006) [Lexis]. An appellate court will not interfere unless there is a "manifest denial of justice." *Id.* at 609.

c. Financing Charges

Financing charges are unlikely to be recoverable on a public payment bond as the Bond Act only covers "the payment by the contractor for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the [construction project] . . .". N.J. Stat. § 2A:44-143.

d. Insurance Premiums

Payment for a principal's premiums on insurance policies such as workmen's compensation, employer's liability or property damage liability are unlikely to be recoverable on a public payment bond in New Jersey as the Bond Act only covers "the payment by the contractor for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the [construction project] . . .". N.J. Stat. § 2A:44-143; *see also* *New Amsterdam Cas. Co. v. Bd. of Ed. of Borough of S. Bound Brook*, 193 F. Supp. 305, 307 (D.N.J. 1961) [Lexis] ("In the absence of an express provision to the contrary in the bond or building contract, it is generally held that a surety is not liable on a payment bond to satisfy claims for public liability or workmen's compensation policy premiums arising in connection with the performance of the contract.") (citing several sources).

e. Loans

Although it does not appear to have been addressed in the context of public payment bonds, it has been held that one who advances money as a loan for the payment of labor and materials in the erection of a building is not entitled to file a construction lien. *James v. Lane*, 33 N.J. Eq. 30, *4 (N.J. Ch. 1880) [Lexis]. This holding would likely apply to a public payment bond as well.

f. Delay Damages

There do not appear to be any decisions in New Jersey regarding whether delay damages are recoverable under a public payment bond.

g. Profits

There do not appear to be any decisions in New Jersey regarding whether lost profits are recoverable under a public payment bond. Lost profits, however, are not recoverable under New Jersey's Construction Lien Law (N.J. Stat. § 2A:44A-1, *et seq.*) because the statutes only permit recovery with respect to work or material already provided. *Gallo v. Sphere Constr. Corp.*, 681 A.2d 1237, 1240–41 (N.J. Super. Ct. Ch. Div. 1996) [Lexis]. This reasoning would likely apply to a public payment bond as well as the Bond Act covers "labor performed or materials . . . provided"—it does not cover future work to be performed or materials to be provided. *See* N.J. Stat. § 2A:44-143.

h. Extracontractual

In New Jersey, sureties are exempt from the Unfair Claims Settlement Practices Act. N.J. Admin. Code § 11:2-17.2. With respect to bad faith liability, there does not appear to be any state court decision addressing the issue. There are, however, several federal court decisions that have addressed the issue. Four of the cases predict that the New Jersey Supreme Court would permit a bad faith claim against a surety. *In re Tech. for Energy, Corp.*, 123 B.R. 979, 988 (Bankr. E.D. Tenn. 1991) [Lexis]; *Deluxe Bldg. Sys., Inc. v. Constructamax, Inc.*, CIV. 06-2996 GEB, 2011 WL 322385, *3 (D.N.J. Jan. 31, 2011) [Lexis]; *U.S. Sewer & Drain, Inc. v. Earle Asphalt Co.*, CIV. 15-1461, 2015 WL 3461087, *3 (D.N.J. June 1, 2015) [Lexis]; *SBW, Inc. v. Ernest Bock & Sons,*

Inc., Civ. No. 07–4199 (MLC) (D.N.J. March 17, 2009) (see oral argument transcript, Dkt. No. 46). And one of the cases predicts that the New Jersey Supreme Court would permit a bad faith claim against a surety. *U.S. ex rel. Don Siegel Constr. Co. v. Atul Constr. Co.*, 85 F. Supp. 2d 414, 418–20 (D.N.J. 2000) [Lexis].

In *Atul*, the only case to predict that the New Jersey Supreme Court would permit a bad faith claim against a surety, the court held that a bad faith claim does not lie against a surety for simple negligence. *Id.* at 419. However, a bad faith claim may be maintained against a surety when "no valid reasons existed to delay processing the claim and the [surety] knew or recklessly disregarded the fact that no valid reasons supported the delay." *Id.* The court stated that this is a "high standard" to meet. *Id.* at 420.

E. Contracts Excluded

If the contract is to be performed at the expense of the State of New Jersey and is entered into by the Director of the Division of Building and Construction or State departments designated by the Director of the Division of Building and Construction, the director or the State departments may: (a) require a performance and payment bond at any percentage, not exceeding 100% of the amount bid, based upon the director's or department's assessment of the risk involved in entering into the contract, and (b) waive the bond requirement if the contract is for a sum not exceeding $200,000. N.J. Stat. § 2A:44-143(a)(2).

If the contract is to be performed at the expense of a contracting unit or school district, the school district, board, officer or agent contracting on behalf of the contracting unit or school district may: (a) require a performance and payment bond at any percentage, not exceeding 100% of the amount bid, based upon the board's, officer's or agent's assessment of the risk presented to the contracting unit or school district's assessment of the risk involved in entering into the contract, and (b) waive the bond requirement if the contract is for a sum not exceeding $100,000. N.J. Stat. § 2A:44-143(a)(3).

F. Time for Suit

"No action shall be brought against any of the sureties on the bond required by this article until the expiration of 90 days after provision to the sureties and the contractor of the statement of the amount due to him, but in no event later than one year from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project." N.J. Stat. § 2A:44-145.

"If the indebtedness due to any person as shown by the statement required to be filed by N.J.S. 2A:44-145 shall not be paid in full at the expiration of 90 days from the date of notice of the amount due to the person, such person shall, within one year from the last date that work was performed or materials were supplied by that person, bring an action in his own name upon the bond required by this article." N.J. Stat. § 2A:44-146.

G. Remarks

The Bond Act provides that "[a] surety's obligation shall not extend to any claim for damages based upon alleged negligence that resulted in personal injury, wrongful death, or damage to real or personal property, and no bond shall in any way be construed as a liability insurance

policy." N.J. Stat. § 2A:44-143(b). The Bond Act further provides that "[n]othing herein shall relieve the surety's obligation to guarantee the contractor's performance of all conditions of the contract, including the maintenance of liability insurance if and as required by the contract." *Id.*

H. Case Annotations

Filing Suit Prior to Expiration of 90-Day Waiting Period

See *Quinn Const., Inc. v. Fid. & Deposit Co. of Maryland*, No. CIV A 06-591 (FLW), 2009 WL 1905174, *7–9 (D.N.J. June 30, 2009) [Lexis] (rejecting a surety's argument that a claimant's filing of a lawsuit 5 days prior to the expiration of the 90-day waiting period should result in judgment in favor of the surety and noting that a party should not prevail on a mere technicality and that there was no prejudice to the surety in the early filing).

Equitable Estoppel

See *D & K Landscaping Co. v. Great Am. Ins. Co.*, 467 A.2d 581, 583 (N.J. Super. Ct. App. Div. 1983) [Lexis] (refusing to equitably estop a surety from asserting the one-year limitations period defense because the surety did not intentionally mislead the claimant to believe that the claim was being evaluated in good faith—rather, the surety had asserted a bona fide defense).

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

"It has long been settled law that a surety is chargeable only according to the strict terms of its undertaking and its obligations cannot and should not be extended either by implication or by construction beyond the confines of its contract." *Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co.*, 678 A.2d 699, 704 (N.J. 1996) [Lexis]. "Although the surety bond is to be interpreted according to its provisions, as against a paid surety company, any ambiguity in a contractor's bond should be liberally construed in favor of laborers and materialmen, for whose benefit it was ostensibly executed." *Id.* at 705 (quoting 13 George J. Couch, *Couch on Insurance* § 47.183 (2d ed. 1982)).

B. Time for Suit

See *Ribeira & Lourenco Concrete Constr., Inc. v. Jackson Health Care Assocs.*, 554 A.2d 1350, 1353 (N.J. Super. Ct. App. Div. 1989), *aff'd*, 571 A.2d 1311 (N.J. 1990) [Lexis] (holding that a one-year limitations period in a private payment bond is enforceable and that it is does not matter whether the claimant has knowledge of the limitations period or the existence of the bond).

C. Case Annotations

General Contractor's Work Includes Subcontractors' Work

See *Eagle Fire Prot. Corp. v. First Indem. of Am. Ins. Co.*, 678 A.2d 699, 705 (N.J. 1996) [Lexis] (holding that a subcontractor's work on a project is imputed to the general contractor for purposes of determining when the general contractor last performed work on a project).

Obligee Is Generally Not a Proper Claimant

See *Ribeira & Lourenco Concrete Constr. v. Jackson Health Care Assocs.*, 603 A.2d 976, 980 (N.J. Super. Ct. App. Div. 1992) [Lexis] (holding that an obligee typically has no right to make a claim on a payment bond, unless through payment, he has become subrogated to the labor or materialmen's claims).

Work Outside of Contract Scope Not Covered

See *Dawson Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 666 A.2d 604, 607 (N.J. Super. App. Div. 1995) [Lexis] (holding that work performed by a subcontractor outside the scope of the prime contract and subcontract which has not been authorized via change order is not covered by a payment bond).

NEW MEXICO

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

The New Mexico Little Miller Act ("NMLMA") is located in Chapter 13, Article 4 of the New Mexico Statutes Annotated (13-4-18 to 13-4-20 NMSA 1978). The NMLMA requires that in any public works construction that is undertaken by a contract awarded in excess of $25,000.00, performance and payment bonds must be obtained by the contractor.

NMSA 1978, Section 13-4-18(A)(2) requires prime contractors on public works projects to provide a payment bond in the full amount of the prime contract "for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract." New Mexico courts have construed this language as allowing claims by third-tier suppliers. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, ¶ 8, 99 N.M. 186 [Westlaw]; *Nichols Corp. v. Bill Stuckman Constr., Inc.*, 1986-NMSC-077, 105 N.M. 37, 728 P.2d 447 [Westlaw].

The New Mexico Supreme Court in *W.M. Carroll & Co.* noted that its conclusion about coverage was supported by analogy to the provisions governing mechanic's and materialmen's liens. *Id.* ¶ 9. One of the purposes of the NMLMA is to protect suppliers, including third-tier suppliers, in public construction projects. *Id.*; *see also* *State ex rel. Elec. Supply Co. v. Kitchens Constr., Inc.*, 1988-NMSC-013, ¶ 8, 106 N.M. 753 [Westlaw]. As stated by one court: "Even though there is no lien provision included in the Little Miller Act, the public policy goals are the same. We see no reason to treat materialmen and suppliers on public versus private projects differently for purposes of determining their priority to retained funds intended to be used to pay project costs." *Hasse Contracting Co., Inc. v. KBK Fin., Inc.*, 1998-NMCA-038, ¶ 29, 125 N.M. 17 [Westlaw].

B. Tiers Covered

Public works payment bonds cover claims asserted by every person, firm or corporation who has furnished labor or material in the prosecution of work provided for in such contract, in respect of which a payment bond is furnished under Section 13-4-18 NMSA 1978, 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 was furnished or supplied by him for which such claim is made. NMSA 1978, Section 13-4-19.

C. Notice Required

On public projects, claimants who have a direct contractual relationship with a subcontractor, but no "express or implied" contractual relationship with the prime contractor, must serve the prime contractor with written notice "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 for which such claim is made, stating with substantial accuracy the amount claimed, and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." NMSA 1978, § 13-4-19(B). The notice must be served by registered mail addressed to the contractor "at any place the contractor maintains an office or conducts business or at the contractor's residence or in any manner in which the service of summons in civil process is authorized by law." *Id.* Additionally, the claimant must "notify the obligee named in the bond of the beginning of [the] action, stating the amount claimed, and no judgment shall be entered in such action within thirty days after giving such notice." NMSA 1978, § 13-4-19(C).

However, the New Mexico Court of Appeals has held that service by certified rather than registered mail is sufficient and that notice of the action to the obligee is timely as long as notice is provided prior to thirty days before judgment is entered. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, ¶¶ 23–30, 273 P.3d 1 [Westlaw].

Service of a written notice "is mandatory as a strict condition precedent to the existence of any right of action upon the payment bond" and such notice must be given within ninety days of the date the last item of material *for which claim is made* was delivered. *State ex rel. State Elec. Supply Co. v. McBride*, 1968-NMSC-146, ¶¶ 17, 23, 79 N.M. 467 [Westlaw] (notice given for certain material described in the notice delivered prior to ninety days was insufficient notice for additional material provided within ninety days); *State ex rel. Komac Paint and Wallpaper Store v. McBride*, 1964-NMSC-108, ¶ 15, 74 N.M. 233 [Westlaw] (notwithstanding convincing proof of contractor's knowledge of non-payment, ninety-day notice must be served or claimant has no cause of action on statutory payment bond).

The notice requirement does not prevent a supplier from giving adequate notice prior to the expiration of the ninety-day time limit, and such a notice is timely sent even if it precedes a final delivery of material. *State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.*, 1984-NMSC-103, ¶ 10, 102 N.M. 22 [Westlaw].

Note, however, that claimants for unpaid workmen's compensation insurance premiums asserting a "lien" under NMSA 1978, Section 48-2-17 against the statutory payment bond do not have to provide the notice. *State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc.*, 1987-NMSC-063, ¶ 15, 106 N.M. 140 [Westlaw].

D. Coverage

Public works payment bonds cover all just claims for labor performed, for materials and supplies furnished, for the work of construction, alteration, improvement or repair of any public buildings, structure or highway or for any public work for which full payment has not been made within ninety (90) days following the last supply of labor, materials or equipment for which the claim is made (NMSA § 13-4-19(B); *see generally*, NMSA § 13-4-1), that is furnished under the original contract or under any subcontract executed pursuant to the original contract (NMSA § 13-4-18.A(2)). New Mexico courts have conclude that because the NMLMA is modeled after that federal Miller Act, that federal decisions interpreting claims as to whether a particular type of labor or materials or other damages would be recoverable will be instructive. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186 [Westlaw].

1. Labor

a. Professional Services

An employee leasing entity is a "furnisher of labor" entitled to recover against a NMLMA payment bond. *Eastland Fin. Servs. v. Mendoza*, 2002-NMCA-035, ¶ 22, 132 N.M. 24 [Westlaw]. Particularly in the absence of New Mexico authority concerning payment bond claims asserted by design professionals, case law interpreting the federal Miller Act is likely to be persuasive. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186 [Westlaw].

b. Union Benefits

There are no reported New Mexico decisions discussing the recoverability of union benefits under a payment bond. However, reference to Miller Act cases can be persuasive. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186 [Westlaw].

2. Material

A number of New Mexico decisions have noted the fact that the NMLMA was derived from the federal Miller Act. *See, e.g.*, *Eastland Fin. Servs.*, *supra*; *New Mexico State Highway and Transp. Dep't v. Gulf Ins. Co.*, 2000-NMCA-007, ¶ 16, 128 N.M. 634 [Westlaw]. Previously, these cases could be cited for support that a claimant can recover against a statutory payment bond even if materials are diverted if shipped to the project in good faith. Although there was no evidence of diversion, in *State ex rel. Solsbury Hill*, the supplier could not prove that the materials actually were incorporated but proved it provided materials to a subcontractor for the project and was not paid. The supplier prevailed at the trial court level and the surety appealed. The New Mexico Court of Appeals affirmed the trial court decision and "conclude[d] that the Act does not require that [a supplier] prove anything beyond the fact that it supplied the material to the subcontractor for and in the prosecution of the work provided for in the contract and also supplied the material for the project[.]" 2012-NMCA-032, ¶ 18, 273 P.3d 1 [Westlaw].

3. Equipment

a. Repairs

There are no reported New Mexico decisions discussing the liability of a statutory payment bond for repairs. However, reference to Miller Act cases can be persuasive. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, *supra.*

b. Rentals

There are no reported New Mexico decisions discussing the liability of a statutory payment bond for rentals. However, reference to Miller Act cases can be persuasive. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, *supra.*

4. Other

a. Attorneys' Fees

The NMLMA does not specifically provide for an award of attorneys' fees on a bond claim. The only New Mexico cases which support an award of attorneys' fees against a payment bond only do so when the fee award is derived from a specific contractual provision in a contract between the principal and the claimant. *See* *State ex rel. Nichols v. Safeco Ins. Co.*, 1983-NMCA-112, 100 N.M. 440, 671 P.2d 1151 [Westlaw]; *see also* *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1 [Westlaw]. In the only New Mexico case which considered an award of attorneys' fees as against a payment bond in the absence of a contractual attorneys' fee provision, the New Mexico Supreme Court specifically found that such fees were in fact not recoverable. See *State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.*, 1984-NMSC-103, 102 N.M. 22 [Westlaw].

b. Interest

In New Mexico, absent a provision in a contract, any award of prejudgment interest is governed by statute, NMSA 1978, Section 56-8-3, which states, in pertinent part, that "[t]he rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in ... cases ... on money due by contract." However, "[i]nterest, even if allowed by statute, is still a matter within the discretion of the district court." *Goodmans Office Furnishings*, 1984-NMSC-103, ¶ 5, 102 N.M. 22 [Westlaw]; *see also* *City of Farmington v. Amoco Gas Co.*, 777 F.2d 554 (10th Cir. 1985) [Westlaw] (where contract does not preclude interest, award of prejudgment interest under Section 56-8-3 is within sound discretion of trial court).

Because Section 13-4-19 allows recovery for "such sum or sums as may be justly due claimant," a public works payment bond is liable for prejudgment interest owed by the principal under the bonded contract. *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of Am.*, 1994-NMSC-106, ¶ 12, 118 N.M. 558 [Westlaw] ("[I]nterest normally commences to run against the principal from the date that he violates his obligation and, since the surety is liable for the principal's entire debt, he will be liable also for such interest on the debt.") (internal citations omitted); *accord* *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, ¶ 35, 273 P.3d 1 [Westlaw] (bond under the Act requires surety "to pay claimants such sum or sums as may be justly due claimant" and entitles claimants to sue on the bond for such "sum or sums justly due;" prejudgment interest at the rate stated on invoices is awardable as a sum or sums justly due).

NMSA 1978, Section 56-8-4 applies to post-judgment interest. If the parties have agreed in the bonded contract to an applicable interest rate, the rate agreed upon is applied for both pre- and post-judgment calculations. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, *ante*. If there is no written agreement as to an interest rate, the statutory rate of 8.75 percent applies. NMSA 1978, § 56-8-4. If the judgment is based on tortious conduct, bad faith or intentional or willful acts, interest shall be computed at the rate of fifteen percent. *Id.*

c. Financing Charges

There are no reported New Mexico decisions discussing the recoverability of financing charges under a payment bond. However, reference to Miller Act cases can be persuasive. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186 [Westlaw].

d. Insurance Premiums

Premiums for subcontractors' workmen's compensation insurance have been deemed to constitute "material" furnished to subcontractors within contemplation of the Mechanics' Lien Act; thus, when subcontractors defaulted on their premium payments, an insurer was held to have lien rights against a performance[1] bond given by a contractor in connection with a state construction project. *State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc.*, 1987-NMSC-063, ¶ 10-11, 106 N.M. 140, 740 P.2d 690 [Westlaw]; see NMSA 1978, §§ 13-4-18 to 13-4-20.

Premiums on workmen's compensation and public liability insurance, both of which were required under a public contract for the construction of a school building, were not deemed to be "supplies" within the meaning of the contractor's faithful performance bond providing for payment of just claims for labor performed and materials and supplies furnished upon or for work under contract, so as to render surety on bond liable therefor. *Anderson v. U.S. Fid. & Guar. Co.*, 1940-NMSC-054, ¶ 10-11, 44 N.M. 483, 104 P.2d 906 [Westlaw] (and construing the 1929 Compilation of the NMSA, Section 17-201).

e. Loans

There are no reported New Mexico decisions discussing the recoverability of loan funds advanced under a payment bond. However, reference to Miller Act cases can be persuasive. *State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co.*, 1982-NMSC-150, 99 N.M. 186 [Westlaw].

f. Delay Damages

Although the NMLMA *allows* recovery for "all just claims for labor performed, and materials and supplies furnished. . ." the language does not allow recovery for lost profits or delay damages. *Herzog Contracting Corp. v. A & S Constr. Co.*, 1988-NMSC-022, ¶ 10, 107 N.M. 6 [Westlaw] (statute clearly and unequivocally limits recovery to labor and materials; nothing is said about recovery for loss of profits or delay damages).

g. Profits

Although the NMLMA *allows* recovery for "all just claims for labor performed, and materials and supplies furnished. . ." the language does not allow recovery for lost profits or delay damages. *Herzog Contracting Corp. v. A & S Constr. Co.*, 1988-NMSC-022, ¶ 10, 107 N.M. 6 [Westlaw] (statute clearly and unequivocally limits recovery to labor and materials; nothing is said about recovery for loss of profits or delay damages).

[11] Although the Court uses the words "performance bond," the case seems to be discussing a payment bond claim.

h. Extracontractual

There are no reported New Mexico decisions holding a surety liable for bad faith or punitive damages related to the payment bond claims handling process.

New Mexico law specifically excludes punitive damages awarded against the principal from coverage under a payment bond. *See* *State ex rel. Nichols v. Safeco Ins. Co.*, 1983-NMCA-112, ¶ 21, 100 N.M. 440, 671 P.2d 1151 [Westlaw] ("Although statutes requiring the filing of contractor's bonds and the terms of surety bonds are liberally construed to effect legislative intent and the purpose of the bond, clearly the language of the bond does not extend to liability for punitive damages.").

E. Contracts Excluded

Except as otherwise referenced herein, there are no statutes or reported decisions in New Mexico expressly excluding any contracts from bond coverage.

F. Time for Suit

Section 13-4-19(D) of the NMLMA provides that no lawsuit against the statutory payment bond "shall be commenced after the expiration of one year after the date of final settlement of such contract. The date of final settlement herein shall be that date set by the obligee in the final closing and settlement of payment, if any, due the contractor, for any limitation period for claims against a performance bond." The term "final settlement date" has not yet been interpreted. One court allowed an amended pleading filed beyond the one year limitations period, and ruled that "[i]n the absence of any resulting prejudice, such amended pleadings will be allowed." *State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.*, 1984-NMSC-103, ¶ 12, 102 N.M. 22 [Westlaw].

G. Remarks

The New Mexico Prompt Payment Act, NMSA 1978, Sections 57-28-1 through 57-28-11, which applies to all construction contracts other than those for residential properties containing four or fewer dwelling units (Section 57-28-3), prohibits retainage on such contracts. With a limited exception for contracts funded by grant money, the Prompt Payment Act requires all construction contracts to provide "that payment for amounts due shall be paid within twenty-one days after the owner receives an undisputed request for payment." NMSA 1978, § 57-28-5(A). The Prompt Payment Act further requires all construction contracts to provide "that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts owed for work performed on the construction project within seven days after receipt of payment from the owner, contractor or subcontractor." NMSA 1978, § 57-28-5(C).

The failure to make timely payment under the Prompt Payment Act creates a right to interest in the amount of 18% per annum, or "one and one-half percent of the undisputed amount per month or fraction of a month until the payment is issued" commencing on the day after payment was due (the 22nd or 8th day, respectively). NMSA 1978, §§ 57-28-5(A) and (C).

Prior versions of the Prompt Payment Act specifically defined the 18% provision as an "interest penalty." Accordingly, New Mexico courts interpreted that provision as a penalty and not

as interest. *See J.R. Hale Contracting Co., Inc. v. Union Pac. R.R.*, 2008-NMCA-037, 143 N.M. 574, 179 P.3d 579 [Westlaw]; *see also Chaparral Materials, Inc. v. Ramos (In re Ramos)*, 442 B.R. 37 (Bankr. D.N.M. 2010) [Westlaw]. The current version of the Prompt Payment Act has eliminated the word "penalty", creating the possibility that courts may allow recovery of Prompt Payment Act interest from the payment bond as they do other types of interest.

H. Case Annotations

Other Construction Related Bonds

NMSA 1978, Section 13-1-148.1 requires subcontractors on public works projects to provide performance and payment bonds if the subcontractor's contract for work is one hundred and twenty-five thousand dollars ($125,000) or more.

Insurance Claim Handling

New Mexico's claims handling act is found at NMSA 1978, Section 59A-16-20. Plaintiff insureds can assert a private cause of action under NMSA 1978, Section 59A-16-20. *Dellaira v. Farmers Ins. Exch.*, 2004-NMCA-132, 136 N.M. 552 [Westlaw].

Section 59A-1-8(A) defines an "insurer" as "every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance." "Insurance" is defined as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies, or to act as surety." NMSA 1978, § 59A-1-5. Formerly, "surety insurance" was separately defined to include "insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings and contracts of suretyship." NMSA 1978, § 59A-7-8 (repealed L. 2016, Ch. 89, § 70, eff. July 1, 2017). The elimination of the "surety insurance" definition from the New Mexico Insurance Code did not, however, remove the reference to "surety" in Section 59A-1-8's definition of "insurer." Therefore, although no reported New Mexico decision has so held, a surety, being defined as an "insurer," appears to be required to comply with the requirements of the claims handling act.

Pay-if-Paid Clauses

There is no reported New Mexico decision on the applicability or enforceability of "pay-if-paid" clauses. However, New Mexico courts generally uphold the parties' freedom to contract as they see fit absent public policy concerns. *See, e.g.*, *State ex rel. Udall v. Colonial Penn Ins. Co.*, 1991-NMSC-048, ¶¶ 9, 112 N.M. 123 [Westlaw]; *MidAmerica Constr. Mgmt., Inc. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1267 (10th Cir. 2006) [Westlaw] (predicting New Mexico Supreme Court would enforce pay-if-paid clause if a clear condition of the contract drafted by the parties); *In re Makwa Builders, LLC*, 545 B.R. 311 (Bankr. D.N.M. 2016) [Westlaw] (predicting the New Mexico Supreme Court would likely enforce a clear pay-if-paid clause).

The provisions of the Prompt Payment Act discussed above predicate the timing of payment to a subcontractor on the contractor's receipt of payment from the owner (or prime contractor) in a manner that would appear to be consistent with a pay-when-paid clause.

There is no reported New Mexico decision on whether a surety may assert its principal's pay-if-paid defense. Given general surety cases cited previously, it is difficult to predict whether a surety could successfully assert its principal's pay-if-paid defense.

Equitable Subrogation

Like other jurisdictions, New Mexico courts have adopted the rationale that a completing surety steps into the shoes of the owner, the principal, and subcontractors that it has paid. *New Mexico State Highway and Transp. Dep't v. Gulf Ins. Co.*, 2000-NMCA-007, ¶ 17, 128 N.M. 634 [Westlaw] ("[B]y bonding the project, the surety steps into the shoes of not only the contractor, but also of the laborers and materialmen paid by it, and of the government."). *See also Randles v. Hanson*, 2011-NMCA-059, ¶¶ 1, 17, 150 N.M. 362 [Westlaw] (adopting Restatement (Third) of Suretyship & Guaranty approach in case concerning cosurety subrogation, and observing that "the Restatement provides that the cosurety is subrogated to the rights of the obligee against the principal obligor to the same extent as if that cosurety had paid the same funds to the obligee") (internal quotation omitted) (citing Restatement (Third) of Suretyship & Guar. § 58 cmt. d, at 249–50).

Limit of Surety Liability

Where bonds are given pursuant to statute for a public or quasi-public purpose or when by special provision of statute the conditions and obligations prescribed in the statute requiring the bond must be read into the bond, whether contained therein or not, the liability of a surety should be determined by conditions and obligations prescribed in the statute, in the first instance, on principles of public policy, and in the second, by force of statutory provision, as exception to general rule that liability of the surety cannot be extended beyond fair import of undertaking in the bond. *Emp. Sec. Comm'n v. C. R. Davis Contracting Co.*, 1969-NMSC-174, 81 N.M. 23, 462 P.2d 608 [Westlaw].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

In New Mexico, a surety on a non-statutory bond (a "common-law bond") can stand on the terms of its bond. As stated by the New Mexico Supreme Court: "Where the language, terms, and conditions of the undertaking are clear, definite, and unambiguous, there is no room for construction either for or against the surety, and in such cases the conditions expressed will be strictly interpreted according to the common and clear meaning of the language used." *Monte Rico Mill & Mining Co. v. U.S. Fid. & Guar. Co.*, 1930-NMSC-121, ¶ 15, 35 N.M. 616 [Westlaw] (internal citations omitted).

B. Time for Suit

New Mexico law generally allows parties to a contract to agree to limitation period shorter than otherwise provided. *See, e.g.*, *State ex rel. Udall v. Colonial Penn Ins. Co.*, 1991-NMSC-048, ¶¶ 7–10, 112 N.M. 123 [Westlaw] ("time to sue" provision in public employee blanket bond acts

as statute of limitations enforceable against the state) *contra* *City of Santa Fe v. Travelers Cas. & Sur. Co.*, 2010-NMSC-010, ¶ 17, 147 N.M. 699 [Westlaw] (two-year time-to-sue provision in performance bond issued on city project violated public policy of protecting the public and is not binding on city because it did not directly contract for the two-year provision).

C. Case Annotations

Liability Delimited by Bond Terms

The general rule in New Mexico is that the liability of a surety cannot be extended beyond the fair import of the undertaking in the bond. *Morgan v. Salmon*, 1913-NMSC-048, ¶¶ 6–8, 18 N.M. 72, 135 P. 553 [Westlaw]. This general rule has certain exceptions: (1) Where bonds are given pursuant to statute for a public or quasi public purpose; or (2) when by special provision of statute the conditions and obligations prescribed in the statute requiring the bond must be read into the bond, whether contained therein or not. In such cases, the liability of a surety will be determined by the conditions and obligations prescribed in the statute, in the first instance, on principles of public policy, and the second, by force of the statutory provision. *Monte Rico Mill & Mining Co. v. U.S. Fid. & Guar. Co.*, 1930-NMSC-121, ¶ 15, 35 N.M. 616 [Westlaw].

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

N.Y. State Fin. Law § 137 (McKinney), modeled after the federal Miller Act, establishes that a payment bond is required for public projects in New York. Section 137 requires general contractors on most public works projects to purchase payment bonds. N.Y. State Fin. Law § 137 (McKinney) (requiring that public improvements undertaken by the state, municipal corporations, public benefit corporations, and commissions appointed by law, must have payment bonds).

Section 137, commonly referred to as New York's Little Miller Act, provides that, "[i]n addition to other bond or bonds, if any, required by law for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York a municipal corporation, a public benefit corporation or a commission appointed pursuant to law, or in the absence of any such requirement, the comptroller may or the other appropriate official, respectively, shall nevertheless require prior to the approval of any such contract a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor or any subcontractors in the prosecution of the work provided for in such contract." N.Y. State Fin. Law § 137 (McKinney). New York's Little Miller Act does not clearly state the amount of the bond required; however, the bond amount is typically equal to the amount of the bonded contract.

Unlike a construction performance bond, which guarantees that construction work will be completed as per the terms of the contract, a construction payment bond under the subject statute is meant to protect an owner against claims made by subcontractors and suppliers and others who furnish certain labor, equipment, services, and/or materials incorporated into to a public project, subject to the terms and conditions of the particular bond and statute. Thus, N.Y. State Fin. Law § 137 (McKinney) requires payment bonds and therefore provides another avenue of recovery for subcontractors and suppliers for nonpayment by a general contractor or developer. Specifically, a payment bond is required for any public construction project that in the aggregate, exceeds $100,000, but only if those projects are not subject to New York's Wicks Law. N.Y. State Fin. Law § 137 (McKinney).

B. Tiers Covered

Under New York's Little Miller Act, a claimant is a party who (1) has furnished labor or material to the contractor or to a subcontractor of the contractor—*i.e.*, first- and second-tier claimants; (2) has not received full payment for the material or labor supplied; (3) has waited 90 days since the day on which the last labor was performed or material was furnished; and (4) is in privity with the bonded contractor, or has otherwise overcome the lack of privity by strict compliance with statutory notice procedures. N.Y. State Fin. Law § 137(3) (McKinney).

C. Notice Required

New York's Little Miller Act provides that an eligible party may bring a claim against the bond once 90 days have elapsed since the last furnishing of labor or materials and no payment has been received. N.Y. State Fin. Law § 137(1) (McKinney). Those subcontractors and suppliers that have a direct contract with a principal of a bond are not required to submit a written notice, but it is recommended. N.Y. State Fin. Law § 137(3) (McKinney). However, second-tier claimants must submit a written notice within 120 days of its last provision of labor or materials or when such second-tier claimant would be "entitled" to payment under its contract. *Id.* Accordingly, any person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship, express or implied, with the principal contractor, must give written notice to the contractor within 120 days from the date on which the last of the labor was performed or the last of the material was furnished for which his claim was made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed. *Id; see Brer-Four Transp. Corp. v. Zurich Am. Ins. Co.*, 78 A.D.3d 875, 876–77, 913 N.Y.S.2d 109, 110 (N.Y. App. Div. 2010) [Lexis] (noting that a condition precedent to bringing this action was for the plaintiff to give contractor written notice of its claim within 120 days from the date on which the last of the labor was performed).

The notice shall be served by delivering the same personally to the contractor or by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where he maintains an office or conducts his business or at his residence, provided, however, that where such notice is actually received by the contractor by other means, such notice shall be deemed sufficient. N.Y. State Fin. Law § 137(3) (McKinney); *Davidson Pipe Supply Co., Inc. v. Wyoming Cnty. Indus. Dev. Agency*, 156 Misc. 2d 989, 595 N.Y.S.2d 898 (N.Y. App. Div. 1993) [Lexis], *reversed on other grounds*, 196 A.D.2d 240, 609 N.Y.S.2d 982 (notice by certified mail satisfied requirement to give notice by registered mail in order to recover on payment bond for contract for public improvement, where receipt cards were acknowledged and returned).

Nothing in N.Y. State Fin. Law § 137(3) (McKinney) requires that the written notice explicitly provide that the subcontractor is asserting a bond claim. *See Am. Bldg. Contractors Assocs., Inc. v. Mica & Wood Creations LLC*, 23 A.D.3d 322, 804 N.Y.S.2d 109, 110 (N.Y. App. Div. 2005) [Lexis] (reversing grant of summary judgment in favor of surety and holding that § 137(3) "does not specifically require that a notice refer to a bond claim"); *MJJ Trucking, LLC v. Fid. & Deposit Co. of Maryland*, 404 Fed. App'x 535, 537 (2d Cir. 2011) [Lexis]. Accordingly, there are two clearly acceptable methods of service: (1) personal service; and (2) registered mail, postage prepaid, to any location where the bonded contractor conducts business.

There is no clear format for the notice. The guiding principle is that it must identify with "substantial accuracy" the amount of the claim and party to whom the labor or materials were furnished. Case law indicates that the terms "substantial accuracy" will be liberally construed. *Riluc Co., Inc. v. Reliance Ins. Co. of New York*, 181 A.D.2d 1048, 582 N.Y.S. 2d 585 (N.Y. App. Div. 1992) [Lexis].

D. Coverage

New York's Little Miller Act's primary purpose was to provide subcontractors remedy by which they might recover sums due them where otherwise they might have failed. *Spanos Painting Contractors, Inc. v. Union Bldg. & Constr. Corp.*, 334 F.2d 457, 459 (2d Cir. 1964) [Lexis]. By enacting statute requiring the giving of a bond to secure laborers and materialmen on state public improvements, the Legislature intended to supplement N.Y. Lien Law §§ 1 *et seq.* (McKinney) and to guarantee payment through a bond to persons and/or entities furnishing labor and material on public improvement projects even though there are insufficient funds against which a lien could be filed. *Harsco Corp. v. Gripon Constr. Corp*, 301 A.D.2d 90, 93 (N.Y. App. Div. 2002) [Lexis]. The purpose of bonds provided for in New York State Finance Law § 137 is not to protect the state against such claims as are therein sought to be protected, but rather is the result of the public policy of the state to protect persons for whose benefit it was enacted, against nonpayment for labor and material furnished in execution of a public project, even though payment to such persons results in a total cost of the project in excess of the contract price. *State Bank of Albany v. Dan-Bar Contracting Co.*, 23 Misc. 2d 487, 491, 199 N.Y.S.2d 309, 313 (N.Y. Sup. Ct. 1960) [Lexis].

New York's Little Miller Act is modeled after the federal Miller Act. New York Courts are guided by, but not bound by, Miller Act precedent in interpreting State Fin. Law. § 137. *Harsco Corp. v. Gripon Constr. Corp.*, 301 A.D.2d 90, 93 (N.Y. App. Div. 2002) [Lexis].

1. Labor

a. Professional Services

New York public payment bonds cover "[e]very person who has furnished labor or material, to the contractor or to a subcontractor of the contractor, in the prosecution of the work provided for in the contract." N.Y. State Fin. Law § 137(3) (McKinney). When considering whether the work performed by a person constitutes "labor" as defined by a payment bond, case law instructs that the Court should consider the "common and ordinary signification of the term." *Walsh v. Int'l Fid. Ins. Co.*, 55 Misc. 2d 565, 566, 285 N.Y.S.2d 327, 329 (N.Y. Civ. Ct. 1967) [Lexis]. With respect to a payment bond, labor usually refers to "one who subsists by physical toil in distinction from one who subsists by professional." *Id.*, 55 Misc. 2d at 567, 285 N.Y.S.2d at 329 (citations omitted).

b. Union Benefits

Union pension and benefits funds and administrator(s) of funds typically have standing to sue upon the payment bond in order to enforce certain obligations undertaken by a contractor to make periodic contributions to funds under terms of the applicable agreements with union. *Cement and Concrete Workers Dist. Council Welfare Fund, Pension Fund, Legal Servs. Fund and Annuity Fund v. Frascone*, 68 F. Supp. 2d 166 (E.D.N.Y. 1999) [Lexis].

2. Material

New York's Little Miller Act provides that: "'[t]he expression 'furnishes material'' or other similar expression wherever used in this section shall be deemed to include the reasonable rental value for the period of actual use of machinery, tools or equipment, and the value of compressed gases furnished for welding or cutting, and the value of fuel and lubricants consumed by machinery operating on the improvement, or by motor vehicles owned, operated or controlled by the contractor or his subcontractors while engaged exclusively in the transportation of materials to or from the improvement for the purposes thereof." N.Y. State Fin. Law § 137(5)(a) (McKinney).

It is important to note that the class of material items covered under most payment bonds generally is the same as those allowed by N.Y. Lien Law § 1 *et seq.* (McKinney). *Hub Oil Co. v. Jodomar, Inc.*, 176 Misc. 320, 27 N.Y.S. 2d 370 (1941) [Lexis]. Payment Bonds are for the cost of labor and materials. Liability on such a bond is not contingent upon the existence of a lienable fund, for the benefits granted to proper claimants are guaranteed by the bond even where there is no sufficient fund due the principal or the principal's down-stream subcontractor on a State public improvement. *See Chittenden Lumber Co. v. Silberblatt & Lasker, Inc.*, 288 N.Y. 396, 404, 43 N.E.2d 459, 462 (N.Y. Sup. Ct. 1942) [Lexis]. Accordingly, Section 137 supplements N.Y. Lien Law § 1 *et seq.* (McKinney) and New York Labor Law, granting to laborers and materialmen this added protection, including claims against the bond by lienors who have filed liens for the use of construction equipment supplied to a subcontractor in carrying out the contract. *A. & J. Buyers, Inc. v. People*, 54 Misc. 2d 995, 1002, 284 N.Y.S.2d 42, 52 (N.Y. Sup. Ct. 1967) [Lexis].

"Material" has been defined as "items which the parties reasonably anticipate will be consumed in the project." *Harsco Corp. v. Gripon Constr. Corp.*, 301 A.D.2d 90, 94–95 (N.Y. App. Div. 2002) [Lexis]. As a general rule, the term "material" as used in a Miller Act bond encompasses items which are reasonably expected to be consumed or substantially consumed in the performance of the work, but the term does not include capital equipment which can be removed from the work site and used on subsequent projects. *Id.* In distinguishing material from capital equipment, the focus is on "the degree of expected consumption of the items on the particular job for which they were furnished." *Id.*

Material is not generally deemed "furnished" until its delivery to the contractor in good faith for the purpose of being used in the improvement. *Giant Portland Cement Co. v. State of New York*, 134 N.E. 322, 324 (N.Y. 1922) [Lexis]. However, in *Graham Architectural Products Corp. v. St. Paul Mercury Insurance Co.*, the court noted two exceptions to this general rule. 303 F. Supp. 2d 274, 281 (E.D.N.Y. 2004) [Lexis]. First, the "diversion exception," which protects material men who supply material to a contractor who in turn diverts the material to a different purpose without the knowledge of the materialman. *Id.* at 282. Second, the "tender exception," which protects materialmen when a contractor refuses to accept delivery of purchased goods that are ready for delivery. *Id.*

In addition, a "contract of surety shall not be construed to have retroactive operation unless express words or necessary implication dictate such effect." *Crisafulli Bros., Inc. v. Clanton*, 128 A.D.2d 963, 964, 512 N.Y.S.2d 927, 928 (N.Y. App. Div. 1987) [Lexis].

3. Equipment

a. Repairs

Unless deemed part of the cost of "labor or materials" supplied "in the prosecution of the work," finance charges may not be allowed under a statutory payment bond. However, if claims for such items arise out of contractual provisions benefitting a surety, such items could be recoverable under the bond. *See* *Conesco Indus. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 210 A.D.2d 596, 599, 619 N.Y.S.2d 865, 867 (1994) [Lexis] (holding that because defendants agreed to pay for repair costs, such items should be recoverable under the bond); *R.J. Russo Trucking & Excavating, Inc. v. Penn. Res. Sys., Inc.*, 169 A.D.2d 239, 245, 573 N.Y.S.2d 95, 99 (N.Y. App. Div. 1991) [Lexis] (promise to pay for damages to rental equipment recoverable under the bond). In situations in which the surety's principal has agreed to assume the expense of ordinary wear and tear in the rental agreement, the repairs may be covered by the bond if the damage is of a consumable nature). *Plattsburg Quarries v. Palcon Ind.*, 111 A.D.2d 1069, 1070, 490 N.Y.S.2d 642 (N.Y. App. Div. 1985) [Lexis] (holding that the phrase 'furnishing materials' under the Lien Law are that part of the goods provided that are expended or used and become a part of the construction project); *P.T. & L. Constr. Co., Inc. v. Winnick*, 59 A.D.2d 368, 370, 399 N.Y.S.2d 712 (N.Y. App. Div. 1977) [Lexis].

b. Rentals

Generally, equipment rented by a contractor is material furnished in performance of public improvement contract, and thus unreturned rental equipment, is covered by a labor and material payment bond issued pursuant to the State Finance Law. *Harsco Corp. v. Gripon Constr. Corp.*, 301 A.D.2d 90, 94–95 (N.Y. App. Div. 2002) [Lexis]; *cf.* *Gerosa Crane Serv., Inc. v. Int'l Prods. Ltd.*, 70 Misc. 2d 176, 332 N.Y.S.2d 536 (N.Y. Civ. Ct. 1972) [Lexis] (lessor of equipment was not entitled to recover for negligent damage by a lessee under a labor and material bond executed in connection with work performed by lessee on a state project).

Absent express language to the contrary, the surety on a labor and material payment bond issued pursuant to State Finance Law provision requiring the giving of a bond to secure laborers and materialmen on state public improvements is obligated to pay only for the unreturned rental equipment which the parties reasonably anticipated would be consumed in the work. *Harsco*, 301 A.D.2d at 94–95 [Lexis]. However, in *EFCO Corp. v. Liberty Mutual Insurance Co.*, the court held where the language in the bond considers recovery for equipment that was not consumed in the work, the bond provided for recovery of unreturned rental equipment whether consumed in the work or not. 897 N.Y.S.2d 669 (N.Y. Sup. Ct. 2009) [Lexis].

Where a claimant has fully performed its obligations under the contracts, and the agreement provides for damages to rental equipment, New York Courts have generally held these damages are recoverable under a payment bond. *R.J. Russo Trucking & Excavating, Inc. v. Pennsylvania Res. Sys., Inc.*, 169 A.D.2d 239, 245, 573 N.Y.S.2d 95, 99 (N.Y. App. Div. 1991) [Lexis]; *Conesco Indus. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 210 A.D.2d 596, 599, 619 N.Y.S.2d 865, 867 (N.Y. App. Div. 1994) [Lexis] (where claims for such items arises out of contract provisions benefitting defendant, as surety, such items should be recoverable under the bond). In *Conesco*, the court held that because of the agreement, defendant was liable for costs

other than strict rental costs, including freight costs, cleaning and repair costs, service charges, and unreturned equipment. 210 A.D.2d at 599, 619 N.Y.S.2d at 867.

4. Other

a. Attorneys' Fees

Courts have discretion to award attorneys' fees where a claim or defense asserted lacks "substantial basis in fact or law." N.Y. State Fin. Law § 137(4)(c) (McKinney). Specifically, "[i]n any action on a payment bond furnished pursuant to this section, any judgment in favor of a subcontractor or material supplier may include provision for the payment of interest upon the amount recovered from the date when demand for payment was made pursuant to the labor and material payment bond and provided further that the court may determine and award reasonable attorney's fee to either party to such action when, upon reviewing the entire record, it appears that either the original claim or the defense interposed to such claim is without substantial basis in fact or law." N.Y. State Fin. Law § 137(4)(c) (McKinney).

A determination of entitlement to attorneys' fees will necessarily depend upon the facts of each case. The case law discussing what a "substantial basis" is within the meaning of this provision is sparse. *Exp. Dev. Canada v. Elec. Apparatus & Power, L.L.C.*, No. 03CIV2063(HBP), 2008 U.S. Dist. LEXIS 93097, 2008 WL 4900557, at *19 (S.D.N.Y. Nov. 14, 2008) [Lexis]. However, New York courts have held that an unsuccessful defense alone does not suffice as a basis for an award of attorneys' fees under New York's Little Miller Act. *See Beninati Roofing & Sheet Metal Co. v. Gelco Builders, Inc.*, 279 A.D.2d 412, 412–13, 720 N.Y.S.2d 37, 38 (N.Y. App. Div. 2001) [Lexis] (upholding trial court finding that defendant surety's arguments were without substantial basis since there was no plausible ground for its claim that the change order in question was not issued pursuant to the covered contract, and given that finding, the award of attorneys' fees pursuant to State Finance Law § 137(4)(c) was held appropriate); *Conviron Controlled Env'ts, Inc. v. Arch Ins. Co.*, No. 14-CV-2030(ADS)(SIL), 2015 U.S. Dist. LEXIS 154392, 2015 WL 12556060, at *8 (E.D.N.Y. Nov. 13, 2015) [Lexis] ("Although ultimately unsuccessful, this Court is not of the view that Arch's position is so clearly meritless as to rise to the level contemplated by the State Finance Law."); *Precision Stone, Inc. v. Arch Ins. Co.*, 472 F. Supp. 2d 577, 582 (S.D.N.Y. 2007) [Lexis], *aff'd in part, rev'd in part sub nom. Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33 (2d Cir. 2009) [Lexis] (unavailing position may, nevertheless, have a substantial basis).

b. Interest

Interest on the amount recovered may be awarded from the date when demand for the payment was made pursuant to the bond, subject to the Court's discretion. N.Y. State Fin. Law § 137(4)(c) (McKinney). While courts generally award interest to a prevailing claimant, the award remains discretionary. Pursuant to NY Gen Oblig. Law § 7-301, the total amount of damages for which the surety is liable shall not exceed the bond's penal sum, except that interest shall be awarded from the time of the surety's default. The surety's time of default has been found to the date upon which the surety received notice of the principal's default. *Town of Clarkson v. North River Ins. Co.*, 803 F. Supp. 827 (S.D.N.Y. 1992) [Lexis]. While an interest award, however, is

discretionary under §137, a bond is generally considered a contract. As a result, a surety's exposure may include prejudgment interest. *See* N.Y. Civ. Prac. Law & R. § 5001(a).

c. Financing Charges

Unless deemed part of the cost of "labor or materials" supplied "in the prosecution of the work," finance charges would not be allowed under a statutory payment bond. N.Y. State Fin. Law § 137(1) (McKinney).

d. Insurance Premiums

The expression "moneys due to persons furnishing labor to the contractor or his subcontractors" includes all sums payable to or on behalf of persons furnishing labor to the contractor or his subcontractors, for wages, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance or other benefits, payment of which is required pursuant to the labor law or by the contract in connection with which the bond is furnished or by a collective bargaining agreement between organized labor and the contractor or subcontractor, and which are computed upon labor performed in the prosecution of the contract. N.Y. State Fin. Law § 137(5)(b) (McKinney).

For example, employers in the position of Contractor are required to make unemployment insurance contributions to insure that workers are protected from "economic insecurity due to unemployment." *Firemen's Ins. Co. of Newark, N. J. v. State*, 65 A.D.2d 241, 242, 412 N.Y.S.2d 206, 207 (N.Y. App. Div. 1979) [Lexis]. Such contributions are guaranteed by the labor and material bond which the Comptroller is authorized to require under New York's Little Miller Act. *Id.*

e. Loans

In enacting Section 137, "the Legislature intended to supplement the Lien Law and to guarantee payment through a bond to persons furnishing labor and material on public improvement projects even though there are insufficient funds against which a lien could be filed." *Harsco Corp. v. Gripon Constr. Corp.*, 301 A.D.2d 90, 94–95 (N.Y. App. Div. 2002) [Lexis]; *see also Graham Architectural Prods. Corp. v. St. Paul Mercury Ins. Co.*, 303 F. Supp. 2d 274, 283 (E.D.N.Y. 2004) [Lexis] ("[P]ayment bonds reflect a strong policy of safeguarding the efforts of suppliers of labor and materials and are to be liberally construed in accordance with their remedial purpose."). "Thus, a bond issued pursuant to Section 137 is intended to guarantee payment for labor or material performed or provided 'in the prosecution of the work provided for in such contract.'" *Morin v. Empiyah & Co., LLC*, 389 F. Supp. 2d 506, 513 (S.D.N.Y. 2005) [Lexis].

Under N.Y. Lien Law § 1 *et seq.* (McKinney), there is no right to file a lien for money loaned to contractors to enable them to execute their contracts. *Uvalde Asphalt Paving Co. v. City of New York*, 191 N.Y. 244, 84 N.E. 83 (N.Y. 1908) [Lexis]; *see also Kerby v. Daly*, 45 N.Y. 84 (N.Y. 1871) [Lexis]. Applying this reasoning, New York's highest court rejected the standing of a professional employer's organization to assert a claim on a payment bond, concluding that merely "advancing money" does not constitute "furnishing materials." *Tri-State Emp. Servs., Inc., v. Mountbatten Sur. Co.*, 99 N.Y.2d 476, 788 N.E.2d 1023, 758 N.Y.S.2d 595 (N.Y. 2003) [Lexis].

f. Delay Damages

Under the statutes, if the cost of labor or materials provided by the claimant increased as a result of delay, the claim allowed under the payment bond may include delay-related cost increases. N.Y. State Fin. Law § 137(1) (McKinney). However, a claimant cannot recover sums against a surety if such sums are prohibited by the applicable contract. *See Universal/MMEC, Ltd. v. Dormitory Auth. of State of New York*, 50 A.D.3d 352, 353, 856 N.Y.S.2d 560, 561–62 (N.Y. App. Div. 2008) [Lexis] (since the surety bond was unambiguous in its incorporation of the terms of the contract, plaintiff was unable recover against the surety for claims prohibited by the contract such as delay damages).

Accordingly, where an underlying contract between the contractor and the subcontractor contains an exculpatory clause prohibiting delay damages, "the surety cannot be held liable for delay damages." *Premier-New York, Inc. v. Travelers Prop. Cas. Corp.*, 20 Misc. 3d 1115(A), 867 N.Y.S.2d 20 (N.Y. Sup. Ct. 2008) [Lexis].

g. Profits

New York courts have held that "lost profits," generally recoverable under a breached contract, "are generally not recoverable under a labor and materials payment bond." *QDR Consultants & Dev. Corp. v. Colonia Ins. Co.*, 675 N.Y.S.2d 117, 119, 251 A.D.2d 641, 643 (N.Y. App. Div. 1998) [Lexis]; *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 41 (2d Cir. 2009) [Lexis].

Further, liability of a surety is generally limited to the amount of the bond and as provided in the contract. *Vill. of Hempstead Cmty. Dev. Agency v. Colonia Ins. Co. of N.Y.*, 2 Misc. 3d 1009(A), 784 N.Y.S.2d 925 (N.Y. Sup. Ct. 2004) [Lexis]. In this regard, a surety's liability may include the cost of completion, as well as damages flowing from its breach. *Id.* (internal citations omitted).

h. Extracontractual

Under New York law, the mere breach of a contract, even if the acts are alleged to be willful and unjustified, does not support imposition of punitive damages. Punitive damages are awardable only upon a showing of morally culpable conduct. *Pinnacle Env't Sys. Inc. v. R.W. Granger & Sons Inc.*, 245 A.D.2d 773, 665 N.Y.S.2d 473 (N.Y. App. Div. 1997) [Lexis]. In *Pinnacle*, the claimant sought punitive damages based on the surety's reliance on a pay-when-paid contract clause alleged to be known as void as against public policy. *Id.* The court reasoned that even if true, the claimant's allegation fell short of the "morally culpable conduct" required to support an award of punitive damages. *Id.* At 775. "New York generally does not permit recovery of punitive damages in a breach of contract action." *Spancrete Ne., Inc. v. Travelers Indem. Co.*, 112 A.D.2d 571, 572, 491 N.Y.S.2d 848, 849 (N.Y. App. Div. 1985) [Lexis] (affirming dismissal of bad faith claim against surety).

Further, as the United States District Court for the Southern District of New York has reasoned:

> Courts in this district have repeatedly denied bad faith claims asserted against payment bonds such as the one at issue in the instant matter. *See The Millgard*

Corporation v. E.E. Cruz/NAB/Frontier–Kemper, 2004 WL 1488534 (S.D.N.Y. July 2, 2004) [Lexis] (denying bad faith claim against payment bond surety because punitive damages available only when egregious conduct causes loss to plaintiff, and conduct directed at general public); *see also* *Cleveland Wrecking Co. v. Nova Casualty Co.*, 2001 WL 1823604 (W.D.N.Y. November 21, 2001) [Lexis] (granting payment bond surety's motion for summary judgment to defeat bad faith claim because plaintiff failed to put forth sufficient proof to raise genuine issue of material fact that surety's acts in contesting payment to claimant were either extraordinarily disingenuous or dishonest failure to carry out contract.).

Nouveau Indus. Inc. v. Liberty Mut. Ins. Co., No. 08 CIV. 10408 CM, 2011 U.S. Dist. LEXIS 101266, 2011 WL 10901796, at *12 (S.D.N.Y. Sept. 7, 2011) [Lexis] (granting surety's summary judgment motion for lack of any evidence of disingenuous or dishonest conduct).

E. Contracts Excluded

Payment bonds on public projects may be dispensed with in the discretion of the head of the state agency, public benefit corporation or commission where the aggregate amount of the contract is under $100,000.00, or in the case of contracts not subject to the multiple contract award requirements of State Fin. Law § 135, where the aggregate amount of the contract is less than $200,000.00. N.Y. State Fin. Law § 137(1) (McKinney). This section with respect to bonds to secure laborers and materialmen, is applicable only to bonds furnished in connection with contract for prosecution of a public improvement for State of New York. *Windalume Corp. v. Rogers & Haggerty, Inc.*, 36 Misc. 2d 1066, 234 N.Y.S.2d 112 (N.Y. Sup. Ct. 1962) [Lexis].

Whether a project is "public" depends on the economic benefits and burdens of ownership," as well as the temporary versus permanent ownership of the property. *Davidson Pipe Supply Co. v. Wyoming Cnty. Indus. Dev. Agency*, 648 N.E. 2d 468 (1995) [Lexis] (holding that State Fin. Law § 137 applies only to ""public improvements" prosecuted by public development corporations, not private projects assisted by industrial development agencies that only temporarily own the property). For a project to be considered a "public improvement," the land upon which the work specified in the contract is to be completed must be owned by a state or public corporation at the time that the contract is executed. *Murnane Assoc. Inc. v. Harrison Garage Parking Corp.*, 239 A.D.2d 882, 883 (N.Y. App. Div. 1997) [Lexis] (relying on the N.Y. Lien Law § 2 (McKinney) definition of "public improvement"). Private improvement projects are not included within the scope of State Fin. Law § 137.

F. Time for Suit

N.Y. State Fin. Law § 137(4)(b) (McKinney) provides the limitation period(s) that a claimant must satisfy to timely bring suit against the bond. Specifically, no action on a payment bond furnished pursuant to this section shall be commenced after the expiration of one year from the date on which the public improvement has been completed and accepted by the public owner.[1] Further, the time periods contained in subdivisions 3 and 4 of Section 137 are to be read

[1] Note that the defined accrual date for the limitation period was changed effective August 3, 2011. Case law before the statutory change will reference the limitation period accruing on the date upon which final payment fell due to the claimant.

in tandem, thereby effectively providing a claimant one year and ninety days within which to commence an action under the bond.

New York law prohibits a surety from imposing payment bond terms and conditions more onerous than Section 137. *Dutchess Quarry v. Firemen's Ins. Co. of Newark, NJ*, 190 A.D.2d 36 (N.Y. App. Div. 1993) [Lexis]; *Bricklayers Ins. & Welfare Fund v. Speranza Brickwork, Inc*., No. 13 CV 5204 CLP, 2015 U.S. Dist. LEXIS 44819, 2015 WL 1529579, at *5 (E.D.N.Y. Mar. 31, 2015) [Lexis]. Accordingly, where the payment bond provides for a shorter notice or limitations period, the statutory provisions shall control. Whether the bond is silent on these issues the statutory provisions also apply. Conversely, when the terms of the bond provide more generous terms, which would have the effect of making a claim timely, courts have allowed those claims to survive. *Swing Staging, Inc. v. Hartford Fire Ins. Co.*, 269 A.D.2d 193, 194, 703 N.Y.S.2d 99 (N.Y. App. Div. 2000) [Lexis]; *Bricklayers*, 2015 WL 1529579, at *5 [Lexis].

G. Remarks

Persuasive Impact of Federal Miller Act Case Law

N.Y. State Fin. Law § 137 (McKinney) is modeled after the federal Miller Act. New York courts are guided by, but not bound by, Miller Act precedent in interpreting Section 137. *Harsco Corp. v. Gripon Constr. Corp.*, 301 A.D.2d 90, 94–95 (N.Y. App. Div. 2002) [Lexis]. For example, in *Morin v. Empiyah & Co., Inc.*, the court faced the issue of whether the surety is liable under the bond only for labor actually performed. 389 F. Supp. 2d 506 (S.D.N.Y. 2005) [Lexis]. The *Morin* court, using guidance from Miller Act precedent, held that under State Fin. Law § 137, laborers providing labor that was "furnished," even if not "performed," are entitled to payment." *Id.* (Support for this holding is found in cases interpreting the Miller Act, 40 U.S.C. § 3131, the federal counterpart to N.Y. State Fin. Law § 137 (McKinney), which "extend[s] protections to those whose labor and materials were made available for use in the project, even if their labor or materials were not actually used in the project."; see also *Graham Architectural Prods. Corp. v. St. Paul Mercury Ins. Co*., 303 F. Supp. 2d 274, 279 (E.D.N.Y. 2004) [Lexis] ("claims under payment bonds issued pursuant to § 137 are not conditioned on whether amounts were due under the prime contract, but rather on whether labor or materials have been 'furnished.'").)

Effect of Conditional Payment Clauses

Additionally, New York courts have held that pay-when-paid provisions that force a subcontractor to assume the risk that the owner will fail to pay the general contractor are void and unenforceable as a matter of public policy. *West–Fair Elec. Contractors v. Aetna Cas. & Sur. Co*., 87 N.Y.2d 148, 158, 638 N.Y.S.2d 394, 661 N.E.2d 967 (N.Y. 1995) [Lexis]; *JC Ryan EBCO/H & G, LLC v. Lipsky Enters., Inc.*, 78 A.D.3d 788, 789–90, 911 N.Y.S.2d 136, 137–38 (2010) [Lexis]. In *West-Fair*, the court contrasted the situation where a pay-when-paid provision does not indefinitely suspend a subcontractor's right of payment upon the failure of an owner to pay the general contractor, but instead merely fixes a time for payment. 87 N.Y.2d at 148.

H. Case Annotations

Surety Not an Insurer of All of the Principal's Risks

In New York, "[a] payment bond issued under N.Y. State Fin. Law § 137 (McKinney) is not intended to insure the supplier of material against every risk accepted by the surety's principal in a contract. *Harsco Corp. v. Gripon Constr. Corp*, 301 A.D.2d 90, 97 (N.Y. App. Div. 2002) [Lexis]. Despite the remedial purpose of § 137, "[a] payment bond issued under State Finance Law § 137 is not intended to insure the supplier of material against every risk accepted by the surety's principal in a contract." *Graham Architectural Prods. Corp. v. St. Paul Mercury Ins. Co.*, 303 F. Supp. 2d 274, 281 (E.D.N.Y. 2004) [Lexis]; *see also Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107, 64 S.Ct. 890, 88 L.Ed. 1163 (1944) [Lexis] ("Congressional intent to protect those whose labor and materials go into public projects ... does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds."). When considering a surety's obligations under a bond, the Court must be mindful that "the responsibility of the surety is not to be extended or enlarged by implication or construction."; *Tri–State Emp. Servs., Inc. v. Mountbatten Sur. Co.*, 99 N.Y.2d 476, 483, 758 N.Y.S.2d 595, 788 N.E.2d 1023 (N.Y. 2003) [Lexis].

Subrogation

In New York, courts have generally agreed that an owner or obligee is not a proper claimant under a payment bond. *Travelers Cas. & Sur. Co. v. Dormitory Auth. State of New York*, 735 F. Supp. 2d 42, 87 (S.D.N.Y. 2010) [Lexis] ("[T]he owner-obligee may generally not recover damages from the surety under the payment bond, as the bond is intended to provide payment to persons supplying labor and material to the contractor, not to provide a financial recovery to the owner-obligee."). However, under New York law, an owner-obligee may have standing to sue under the payment bond employing the theory of subrogation. *Id.* at 88. New York law recognizes a "broad" doctrine of equitable subrogation. *Broadway Houston Mack Dev., LLC v. Kohl*, 71 A.D.3d 937, 897 N.Y.S.2d 505, 506 (N.Y. App. Div. 2010) [Lexis]. The doctrine of subrogation applies "'to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property.'" *Id.* (quoting *Gerseta Corp. v. Equitable Trust Co. of N.Y.*, 241 N.Y. 418, 426, 150 N.E. 501 (N.Y. 1926) [Lexis]). The purpose of subrogation is "to shift a debt or obligation to a party who more properly should be accountable in order to prevent unjust enrichment and an unfair result." *Hytko v. Hennessey*, 62 A.D.3d 1081, 879 N.Y.S.2d 595, 600 (N.Y. App. Div. 2009) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

In general, New York has no statutory requirements for payment bonds on private projects. One limited exception involves public improvement projects undertaken for the benefit of a private entity. N.Y. Lien Law § 5 (McKinney) requires where no public fund for project financing has been established and the estimated cost of such a public improvement exceeds $250,000.00, the private entity for whom the improvement is being made must post a bond or other form of undertaking guaranteeing prompt payment of moneys due the contractor, subcontracts and all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work.

By its terms, the N.Y. Lien Law § 5 (McKinney) imposes obligations only on public owners, as it provides that "the chief financial officer *of the public owner shall require* the private entity for whom the public improvement is being made to post" a bond or other undertaking. N.Y. Lien Law § 5 (McKinney) (emphasis added). *New York Wheel Owner LLC v. Mammoet Holding B.V.*, 481 F. Supp. 3d 216, 241 (S.D.N.Y. 2020) [Lexis].

A. Rules of Construction

With respect to common-law bonds written for private projects, the surety is chargeable only according to the strict terms of its undertaking and its obligations cannot be extended by either implication or construction beyond the terms of its contract. *Davis Acoustical Corp. v. Hanover Ins. Co.*, 22 A.D.2d 843, 254 N.Y.S.2d 14 (N.Y. App. Div. 1964) [Lexis]. New York courts analyze common-law surety bonds as any other contract and they are construed in accordance with their terms. *Walter Concrete Constr. Corp. v. Lederle Lab'ys*, 99 N.Y.2d 603, 605, 788 N.E.2d 609, 610 (N.Y. 2003) [Lexis]; *see also Seneca Ins. Co. v. People*, 40 A.D.3d 1151, 1153, 834 N.Y.S.2d 581, 583 (N.Y. App. Div. 2007) [Lexis] ("Where the terms are unambiguous, interpretation of the surety bonds is a question of law. … Under settled principals, they must be construed strictly in the surety's favor and the surety's obligations cannot be extended beyond the plain language of the bonds[.]) (internal citations omitted). Accordingly, a surety's "obligation upon its undertaking is defined solely by the language of the bond" and "cannot be extended by the court" *Tornatore v. Cohen*, 185 A.D.3d 1394, 1396, 128 N.Y.S.3d 107, 109 (N.Y. App. Div. 2020) [Lexis].

B. Time for Suit

In the absence of a stated limitations period within the bond, New York's six-year limitations period for contracts will govern.

C. Case Annotations

Interpretation of the Term "Work" in Standard-Form Payment Bond

In *Whitacre Construction Specialties, Inc. v. Aetna Casualty & Surety Co.*, the Fourth Department of the New York Supreme Court, Appellate Division construed the meaning of the term "Work" as used in an American Institute of Architects (AIA) payment bond form and standard construction contract. 86 A.D.3d 972, 448 N.Y.S.2d 287 (N.Y. App. Div. 1982) [Lexis].

Although the trial court had interpreted "Work" to include the performance of administrative obligations as well as work on the construction project, the appellate court disagreed, reasoning that "Work" "refers to either the construction project itself or to the labor and materials directly related to the project" and excludes "obligations other than work directly related to construction[.]" *Id.* at 972, 448 N.Y.S.2d at 287. On this basis, the court dismissed the action as untimely because it was commenced more than one year after the contractor ceased performing labor and supplying materials and equipment to the construction project. *Id.*

NORTH CAROLINA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Like most states, North Carolina has a codified Little Miller Act (the "Act"). *See* N.C. Gen. Stat. §§ 44A-25 through 35. The public-works projects covered by the Act are identified in N.C. Gen. Stat. § 44A-26. North Carolina's Little Miller Act, among other requirements, mandates the payment bond form on North Carolina public projects. N.C. Gen. Stat § 44A-33(b). In addition to projects identified in § 44A-26, Department of Transportation projects also require Act-compliant bonds, and the relevant Department of Transportation statutes should be consulted for potential additional bond requirements. *See* N.C. Gen. Stat. § 136-18(46).

When the total amount of prime construction contracts for any *single* project exceeds $300,000, the contracting body must require Act-compliant performance and payment bonds. N.C. Gen. Stat. § 44A-26(a). If there is more than one prime contractor or construction manager at risk whose prime contract exceeds $50,000 on such project, that contractor or manager at risk must supply Act-compliant performance and payment bonds. *Id*. There is an exception, however, for projects for North Carolina State agencies, North Carolina State departments, and the University of North Carolina and its "constituent institutions," which requires Act-compliant bonds only if the single project exceeds $500,000. *Id.* All public projects with amounts less than those above, the contracting body has *discretion* to require bonds, but they are not mandatory. *Id.*

Act-compliant bonds must be 100% of the construction contract amount. N.C. Gen. Stat. § 44A-26(a)(1) & (2). The payment bond "shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager at risk is liable." N.C. Gen. Stat. § 44A-26(a)(2).

B. Tiers Covered

While second-tier and lower payment bond claimants have additional notice duties than first-tier claimants, North Carolina's Little Miller Act does not limit civil actions to recover on a payment bond to any particular tier subcontractor or supplier. The Act provides that "any claimant who has performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond has been given pursuant to the provisions of this Article …, may bring an action on such payment bond in his own name …." N.C. Gen. Stat. § 44A-27(a). In other words, third-tier and lower subcontractor/suppliers appear to have rights under the Act. No North Carolina case, however, has addressed this issue. Note that in this regard North Carolina's Little Miller Act departs from the federal Miller Act, which limits recovery to subcontractor/suppliers who contracted with a prime contractor or a first-tier subcontractor/supplier. *See* 40 U.S.C. §§ 3131 *et seq*.

C. Notice Required

1. Contractor's Project Statement

The bonded prime contractor must provide to each first-tier subcontractor/supplier a "contractor's project statement," which includes the project name, physical address, the public contracting body (the project "owner"), the prime contractor's name, the contact information for the prime contractor's service-of-process agent, and the name, address, and principal place of business of the payment bond surety. N.C. Gen. Stat. § 44A-27(f). Each subcontractor/supplier (regardless of tier) must also provide a copy of the contractor's project statement to each lower-tier subcontractor/supplier that it engages to supply labor or material for the bonded project. *Id.* No contractor or subcontractor/supplier may enforce its agreement with a lower-tier subcontractor/supplier until it provides a copy of the contractor's project statement to the lower-tier party. *Id.*

2. First-Tier Subcontractor/Suppliers

Claimants who have a direct contractual relationship with a bonded prime contractor—that is, first-tier subcontractor/suppliers—may assert a payment bond civil action 90 days after the claimant's last day of furnishing labor or materials to the project. *Id.* There are no other notice conditions. *Id.*

3. Lower-Tier Subcontractor/Suppliers, the Notice of Public Subcontract, and Copies of the Payment Bond

Claimants who lack contractual privity with a bonded prime contractor—that is, second-tier and lower subcontractor/suppliers—have a complex set of rules regarding notice and potential limits on what they may recover. Accordingly, counsel must carefully consult N.C. Gen. Stat. § 44A-27. Like their first-tier counterparts, second-tier and lower claimants may also institute a civil action to enforce their payment bond claim 90 days after the claimant's last day of furnishing labor or materials to the project. *Id.* But these remote claimants must also provide *written notice* of nonpayment to the bonded prime contractor within 120 days of last furnishing labor or materials to the project. N.C. Gen. Stat. § 44A-27(b). This 120-day notice must also state "with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished" and is referred to as a "Notice of Public Subcontract." *Id.* The Act provides a model Notice of Public Subcontract at § 44A-27(d).

Within seven days of receiving this notice, the bonded prime contractor must send a copy of the Act-compliant payment bond to the claimant. N.C. Gen. Stat. § 44A-27(b). It is at this point in the process that a second-tier or lower claimant may fall victim to a "gotcha" provision in the Act. Specifically, if the bonded prime contractor sends the payment bond to the claimant within the seven days, then the claimant may recover for only labor and materials furnished *within the prior 75 days* of the claimant's sending notice to the prime contractor. *Id.* This provision encourages second-tier and lower subcontractor/suppliers to promptly provide notice to the prime contractor and may punish claimants who wait between 75 and 120 days to send their Notice of Public Subcontract. There is also a partial exception to the 75-day recovery limit. Specifically, claims for $20,000 or less are not subject to the 75-day limit. N.C. Gen. Stat. § 44A-27(e). And if

the claim is for over $20,000 and is covered by the 75-day limit, the first $20,000 of such claim is *not* subject to the 75-limit. *Id.*

The Notice of Public Subcontract and the prime contractor's sending the payment bond to the claimant must be accomplished by: (1) certified mail; (2) US mail, postage prepaid, with signature confirmation as required by the U.S. Postal Service; or (3) any manner allowed by North Carolina law for service of a summons. N.C. Gen. Stat. § 44A-27(c). Service must be addressed to "such contractor at any place where his office is regularly maintained for the transaction of business or to such agent identified in the contractor's project statement" as required in section 44A-27(f). *Id.*

In addition to providing the payment bond to potential claimants under § 44A-27 as noted above, the Act requires that the public owner/contracting body provide payment bond copies to anyone who is entitled to bring a claim under the payment bond and who requests a copy. N.C. Gen. Stat. § 44A-31(a).

D. Time for Suit and the One-Year Statute of Repose

The civil actions of all payment bond claimants—regardless of tier—are limited by the Act's one-year statute of repose. Specifically, "no action on a [Little Miller Act] payment bond shall be commenced after the expiration of the longer period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the [bonded prime] contractor." N.C. Gen. Stat. § 44A-28(b). This limitation is one of repose, and not a statute of limitation. *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118–19, 446 S.E.2d 603, 605 (1994) [Lexis]. As such, a claimant must specifically plead compliance with the statute of repose. *Id.*

"Final settlement" under the statute of repose means the time when the contracting body (public owner) has "administratively fixed" the amount it is bound to pay the prime contractor. *Cencomp, Inc. v. Webcon, Inc.*, 157 N.C. App. 501, 505, 579 S.E.2d 482, 485 (2003) [Lexis]. Theoretically, this occurs when the prime contractor and the contracting body make their last change to the contract price via change order or as otherwise required by the prime contract.

Parties to a payment bond are generally "free to contract for any reasonable limitations period they choose." *Town of Pineville v. Atkinson/Dyer/Watson Architects, P.A.*, 114 N.C. App. 497, 499–500, 442 S.E.2d 73, 74 (1994) [Lexis]. But bond language that *shortens* the Little Miller Act one-year statute of repose is *not* enforceable. *Id.* at 499, 442 S.E.2d at 74.

E. Venue

All actions on a North Carolina Little Miller Act payment bond must be in a court of "appropriate jurisdiction" in the North Carolina county "where the construction contract or any part thereof is to be or has been performed." N.C. Gen. Stat. § 44A-28(a). Reference to the "construction contract" means the prime contract, and not the subcontract. Accordingly, the trial court properly transferred a payment bond civil action to the county where the prime contract was performed when the payment bond claimant brought suit in a different county where the claimant had performed part of its subcontract. *McClure Estimating Co. v. H.G. Reynolds Co.*, 136 N.C. App. 176, 179, 523 S.E.2d 144, 146–47 (1999) [Lexis]. North Carolina courts generally prefer to order transfer of a matter as a consequence of an improper venue rather than dismissal. *Id.* at 183, 523 S.E.2d at 149.

Occasionally, a party in a payment bond action might argue that a non-North Carolina forum-selection clause in either the prime contract or a subcontract should control. But provisions in contracts to improve real property *within* North Carolina that call for exclusive venue *outside* of North Carolina are void under N.C. Gen. Stat. § 22B-2. *See Price and Price Mech'l of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008) [Lexis].

F. Coverage

Like its federal big brother, the North Carolina Little Miller Act exists to protect "subcontractors and other persons suppling labor and materials for [a public] project." *Syro Steel Co. v. Hubbell Highway Signs, Inc.*, 108 N.C. App. 529, 534, 424 S.E.2d 208, 211 (1993) [Lexis]. As North Carolina's Little Miller Act is based on the federal Miller Act, North Carolina uses federal case law to interpret its Little Miller Act. *Id*. Further, since there is "little or no distinction" between private payment bonds and Little Miller Act payment bonds, both types of payment bonds are to be "construed liberally" for the benefit and protection of "laborers and materialmen." *Symons Corp. v. Ins. Co. of N. Am.*, 94 N.C. App. 541, 543–44, 380 S.E.2d 550, 552 (1989) [Lexis].

1. Labor

a. Professional Services

Little Miller Act payment bonds exist "solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager at risk is liable." *S. Seating Serv., Inc. v. W.C. English, Inc.*, 217 N.C. App. 300, 307, 719 S.E.2d 211, 217 (2011) [Lexis]. Moreover, the Act itself defines a proper Little Miller Act bond claimant as "any individual, firm, partnership, association or corporation entitled to maintain an action on a bond described in this Article and shall include the 'contracting body' in a suit to enforce the performance bond." N.C. Gen. Stat. § 44A-25(1). The Act defines a "subcontractor" as "any person who is contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a construction contract." N.C. Gen. Stat. § 44A-25(6). And the Act defines "labor or materials" as "all materials furnished or labor performed *in the prosecution of the work* called for by the construction contract regardless of whether or not the labor or materials enter into or become a component part of the public improvement, and further shall include gas, power, light, heat, oil, gasoline, telephone services and rental equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in the construction contract." N.C. Gen. Stat § 44A-25(5) (emphasis added). No cases have interpreted the Act as allowing professionals, such as architects, to make Little Miller Act payment bond claims. Note however, that certain professional activities may permit a claimant to file a mechanics' lien. *See, e.g.*, N.C. Gen. Stat. § 44A-7(3) (permitting certain professional or skilled services such as "architects, engineers, land surveyors, and landscape architects" to file mechanics' liens). But there is no authority suggesting that the same professionals have payment bond rights under the Act.

b. Union Benefits

There are no North Carolina authorities determining whether union benefits are considered "labor or material" under a Little Miller Act payment bond. As noted above, however, North Carolina courts look to federal opinions for guidance if there is no North Carolina case law.

2. Material

North Carolina liberally construes a subcontractor/supplier's right to recover under a Little Miller Act payment bond for supplying materials. So long as a claimant can show that it sold or supplied materials to a higher-tier subcontractor or the prime contractor "in good faith" and under a "reasonable belief that the materials were for ultimate use in the prime contract," the claimant may recover. *Syro Steel Co. v. Hubbell Highway Signs, Inc.*, 108 N.C. App. 529, 535, 424 S.E.2d 208, 212 (1993) [Lexis]. Accordingly, there is no requirement that material be actually delivered to the job site or incorporated into the project improvement.

3. Equipment

a. Repair and Rentals

In a seminal case determining a supplier's right to collect from the surety under a Little Miller Act payment bond, the North Carolina Supreme Court in *Interstate Equipment Co. v. Smith*, held that the Act permitted recovery for not only equipment rental, but also repairs that were necessary over and above normal wear and tear. 292 N.C. 592, 600, 234 S.E.2d 599, 603–04 (1977) [Lexis]. The ability to recover for rentals and repairs, however, depends on the subcontractor/supplier's agreement. In other words, if the agreement allows for the claimant to recover those items then they are recoverable under the Little Miller Act bond. *Id*. (holding that "we are of the opinion that the claims of Interstate [an equipment lessor] for repairs to the machinery, in excess of ordinary wear and tear, and for 'abnormal' tire wear are as much a part of the lease agreement on which Great American is surety as are the rental payments [and accordingly], Great American may be held liable for these charges.").

4. Co-Prime Contractors

Although the issue has not been definitively decided in North Carolina, there is persuasive authority that a co-prime contractor in a multi-prime public project may not recover against another co-prime's payment bond. In *Pennsylvania National Mutual Casualty Insurance Co. v. Wayne J. Griffin Electric, Inc.*, the U.S. District Court for the Eastern District of North Carolina held that a co-prime contractor does not have the right to assert a claim against another co-prime's performance or payment bond. Case No. 5:00-CV-910-BR(3) (E.D.N.C. June 6, 2002) (unpublished Order and Judgment).

5. Other

a. Attorneys' Fees

Under the federal Miller Act, a claimant's recovery of attorneys' fees from the payment bond surety is a gray area. For a time, there seemed to be uncontroverted U.S. Supreme Court authority explaining that the claimant's attorneys' fees do not constitute "sums justly due" under the Miller Act. *F.D. Rich v. U.S. ex rel. Indus. Lumber Co.*, 417 U.S. 116 (1974) [Lexis]. Note that the U.S. Supreme Court decided *F.D. Rich* when the federal Miller Act codification at that time—40 U.S.C. §§ 270a *et seq.*—allowed recovery for "sums justly due." The Miller Act's current codification—40 U.S.C. §§ 3131 *et seq*.—permits payment bond claimants to recover the "amount unpaid" and may bring a claim for the "amount due." 40 U.S.C. § 3133(b)(1). *F.D. Rich* plainly held that a payment bond claimant's attorneys' fees are *not* part of "sums justly due". 417 U.S. at 127–131. The high Court held that state law plays no part in deciding whether a Miller Act claimant may recover attorneys' fees, and since attorneys' fees are not mentioned in the Miller Act, there is no reasons to deviate from the "American Rule" that each party bears its own attorneys' fees. *Id.*

But ever since *F.D. Rich*, lower federal courts have chipped away at its holding. And when the Miller Act was recodified, lower courts have used that as an opportunity to revisit the attorneys' fees issue and find ways to award them to successful payment bond claimants. *See, e.g., U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins.*, 86 F.3d 332, 336 (4th Cir. 1996) [Lexis]; *U.S. ex rel. SCCB, Inc. v. P. Browne & Assocs., Inc.*, 751 F. Supp. 2d 813 (M.D.N.C. 2010) [Lexis].

Recovery of attorneys' fees is not mandatory under North Carolina's Little Miller Act, but they are recoverable in some cases. *See* N.C. Gen. Stat. § 44A-35. Here, trial courts have discretion to award attorneys' fees to the "prevailing party" if "there was an unreasonable refusal by the losing party to fully resolve the matter." *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co.*, 129 N.C. App. 525, 530, 500 S.E.2d 108, 112 (1998) [Lexis] (citing to N.C. Gen. Stat. § 44A-35). Under the Act, a "prevailing party" is a claimant "who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim[.]" N.C. Gen. Stat. § 44A-35. If the party is a defendant, it is considered a prevailing party if the judgment achieved is "less than fifty percent (50%) of the amount sought in the claim defended." *Id*. North Carolina also allows parties to make "offers of judgment" under Rule 68 of the North Carolina Rules of Civil Procedure. If there has been a Rule 68 offer of judgment then a "prevailing party" is an "offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer." *Id.*

b. Interest

In the seminal case *Interstate Equipment Co. v. Smith*, addressed above in Section 1.0(F)(3)(a) ("Rental and Repairs"), the court also found that payment bond claimants may recover interest against the surety. 292 N.C. 592, 601, 234 S.E.2d 599, 605 (1977) [Lexis]. As in all other breach-of-contract cases, interest would begin to run from the date that the surety breached the bond. *Id.* The *Interstate Equipment* case remains good law in North Carolina. But since then, there is an interim quirky decision from the North Carolina Court of Appeals suggesting that if the surety is liable for interest, interest cannot begin to run until *judgment* against the surety and not the surety's breach of the bond. *See Synovus Bank v. County of Henderson*, Case No. C0A111601,

2012 WL 3192688, *8, 2012 N.C. App. LEXIS 967 (N.C. Ct. App. Aug. 7, 2012) [Lexis]. In the *Synovus Bank* decision, the court found that the word "penal sum" in a bond means an amount awarded as a "penalty." *Id.* And by extension, a bond that contains a penal sum is a "penal bond." *Id.* And while interest generally runs from the date a contract is breached, under North Carolina's interest statute, N.C. Gen. Stat. § 24-5(a)(1), interest on *penal bonds* does not run until there has been a judgment against the surety. While at first glance this may seem helpful to sureties because it saves them having to pay interest from the time of breach, alerting a court to the *Synovus Bank* decision has potential drawbacks. By the court's assertion that a bond with a penal sum is equivalent to a penal bond, the court may have inadvertently indicated that payment bonds (which is a bond with a penal sum) are really *forfeiture* bonds. There are many common-law cases in other jurisdictions noting that a penal bond is synonymous with a forfeiture bond. And a forfeiture bond means that once a claimant proves entitlement to a recovery under the bond, the surety must surrender the entire penal sum of the bond to the claimant. That is certainly not the intent of a payment bond, which is a *liability* bond, not a forfeiture bond.

Though the payment bond surety may be liable for interest, generally liability for pre-judgment interest cannot exceed the penal-sum cap. Sureties have long attested that the penal sum is sacred and cannot be exceeded. Indeed the Act attempts to shield the surety from liability above the penal sum. *See* N.C. Gen. Stat. § 44A-29 (providing that "[n]o surety shall be liable under a payment bond for a total greater than the face amount of the payment bond."). But this statutory language may apply only to *pre*-judgment interest. *See Robinson Mfg. Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136, 140–41 (1926) [Lexis]. In *Blaylock*, the court held that a surety's liability generally cannot exceed the bond's penal sum "until judgment has been rendered against the surety." *Id.* After judgment, however, the surety may be liable for statutory post-judgment interest. *Id.* This means that once judgment has been rendered against the surety, *post*-judgment interest begins to accrue at the statutory rate of 8% (N.C. Gen. Stat. § 24-1), and if a surety fails to satisfy its judgment, post-judgment interest accrues and can exceed the penal sum.

c. Financing Charges

There is no specific state authority addressing whether a claimant may recover finance charges to the extent that such charges are different from interest. Under the federal Miller Act, however, the Fourth Circuit Court of Appeals allowed a payment bond claimant to recover service charges imposed by the subcontractor/supplier's credit agreement. *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 334 (4th Cir. 1996) [Lexis]. Again, where there is no controlling state authority, North Carolina courts would look to the federal Miller Act and related decisions for guidance.

d. Insurance Premiums

There is no North Carolina authority addressing whether a payment bond claimant can recover its insurance premiums under the Act. Though the definition of "labor and materials" under the North Carolina Little Miller Act is broad, it likely is not broad enough to include insurance premiums. *See* N.C. Gen. Stat. § 44A-25.

e. Loans

There is no North Carolina authority addressing a claimant's recovery for loaning funds to another contractor to purchase labor or materials.

f. Delay Damages

There is no North Carolina authority addressing whether a Little Miller Act payment bond claimant can recover expressly for "delay damages." These damages are not enumerated in any cases or in the Act itself as falling within the definition of "labor or materials."

g. Profits

There is no North Carolina authority addressing whether a payment bond claimant's lost profits are recoverable under the Act.

h. Extracontractual Damages and Bad Faith

North Carolina law is generally surety-friendly when it comes to recovering bad faith or extracontractual damages against a surety. There are no North Carolina binding precedents finding a surety liable to a payment or performance bond claimant for bad faith, unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes, or violations of North Carolina's Insurance Code, which is Chapter 58 of the North Carolina General Statutes. The underlying reasoning that protects sureties from these types of claims is that suretyship is distinguished from insurance. The North Carolina Court of Appeals undertook a lengthy analysis of this distinction in *Henry Angelo & Sons, Inc. v. Property Development Corp.*, 63 N.C. App. 569, 574–77, 306 S.E.2d 162, 165–67 (1983) [Lexis], noting the lack of support for bad faith claims against sureties. Subsequently, the federal court, interpreting North Carolina law in *Cincinnati Insurance Co. v. Centech Building Corp.*, declined to find an extracontractual or bad-faith claim against a surety. 286 F. Supp. 2d 669, 691 (M.D.N.C. 2003) [Lexis]. The court noted that "the duty of good-faith and fair-dealing required to sustain a common law bad-faith claim [and a claim under Chapter 75 for unfair-trade practices] is a concept of insurance law and attaches because of the special relationship between insureds and insurers …" *Id.* at 688–91.

G. Contracts Excluded

As noted earlier in Section 1.0(A) above, public contracts of $300,000 or less—or public contracts for North Carolina State Departments, State agencies, and the University of North Carolina and its constituent institutions under $500,000—do not require Little Miller Act payment bonds. These excluded contracts, however, may in the discretion of the contracting body, still require a payment bond, but such bonds are not mandatory.

H. Procedural Issues

a. Insurance Code Generally Inapplicable

Litigants often confuse contracts of suretyship with contracts of insurance. As noted earlier, the *Henry Angelo & Sons* case described the differences at length and added that although sureties are similar to insurers in some respects, "this, of course, no more justifies the conclusion that sureties are insurers and performance bonds are contracts of insurance than does the commonly known fact that sheep are somewhat like goats justify the conclusion that sheep are goats." 63 N.C. App. 569, 578, 306 S.E.2d 162, 168 [Lexis]. But because of the confusion, litigants sometimes try to apply statutes from North Carolina's Insurance Code [Chapter 58] in lawsuits against sureties. Although there may be discrete portions of Chapter 58 that mention sureties and their bonds, for the most part the courts consistently hold that Chapter 58 terminology, requirements, and causes of action are not cognizable in cases under performance and payment bonds. *See, e.g.*, the authorities noted in Section 1.0(F)(5)(h) above; *see also Beachcrete, Inc. v. Water Street Ctr. Assocs.*, 172 N.C. App. 156, 160, 615 S.E.2d 719, 722 (2005) [Lexis] (explaining that a "payment bond is a contract of suretyship, not insurance" and that the "statutory provisions that control and regulate insurance in this state are contained in Chapter 58 of the General Statutes entitled: 'Insurance'; those that regulate suretyship in Chapter 26 entitled: 'Suretyship.'").

b. Service of Process

In North Carolina, a non-North Carolina insurance company must agree that in order to receive permission to do business in North Carolina the company must appoint the North Carolina Commissioner of Insurance as a legal agent for service of process. *Biggs v. Mut. Reserve Fund Life Ass'n*, 128 N.C. 5, 27 S.E. 955 (1901) [Lexis]; *see also* N.C. Gen. Stat. § 58-16-5(10) and § 58-16-30. As most sureties under public payment bonds are also insurance companies, sureties can be served through the North Carolina Insurance Commissioner. Service is not exclusive via the Commissioner. All service of process options under Rule 4 of the North Carolina Rules of Civil Procedure are also available. N.C. Gen. Stat. § 58-16-30.

I. Case Annotations

Effect of Conditional Payment Clause and Prompt Payment Act

Many, if not most, subcontracts contain language that the subcontractor will not be paid until the general contractor is paid. These are often referred to as "pay-when-paid" or "pay-if-paid" clauses. Despite their ubiquity, by statute, such clauses are unenforceable in North Carolina. N.C. Gen. Stat. § 22C-2.

Chapter 22C, which outlaws pay-when-paid and pay-if-paid clauses, comprises North Carolina's Prompt Payment Act. The Prompt Payment Act also includes penalties for contractors and higher-tier subcontractors who fail to pay their lower-tier subcontractors promptly. The Act provides that when a contractor or subcontractor receives payment, it must pay its lower-tier subcontractor/supplier "within seven days of receipt by the contractor or subcontractor of each periodic or final payment, the full amount received for such subcontractor's work and materials based on work completed or service provided under the subcontract." N.C. Gen. Stat. § 22C-3.

The Prompt Payment Act makes clear that the payee's entitlement to prompt payment is conditioned on the payee's substantial performance of its subcontract. *See* N.C. Gen. Stat. § 22C-4. If a payor fails to make prompt payment within the seven days, the payment due the payee begins to earn interest "on the eighth day, at the rate of one percent (1%) per month or a fraction thereof on such unpaid balance as may be due." N.C. Gen. Stat. § 22C-5.

Equitable Subrogation

North Carolina law has long held that a performing surety enjoys equitable subrogation rights. *See, e.g.*, *Keeble v. Fid. & Deposit Co. of Baltimore*, 192 N.C. 416, 135 S.E. 141 (1926) [Lexis] (holding that a surety who paid payment bond claims on a state highway project enjoyed rights in the contract balance that were superior to the principal's bankruptcy trustee); *see also Lacy v. Md. Cas. Co.*, 32 F.2d 48, 51 (4th Cir. 1929) [Lexis] (recognizing that it is a "well settled" rule that a "surety on a contractor's bond, who completes the contract on default of the principal, is subrogated to the rights of the obligee, and, to the extent necessary to reimburse himself, has an equity in the funds due the contractor, which is superior to that of a mere assignee."). Quoting U.S. Supreme Court authority from *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404 (1908) [Lexis], the *Lacy* court explained that when a surety pays the claims of laborers and materialmen (who should have been paid by the defaulting principal general contractor), the surety is equitably subrogated to the rights of not only the obligee but also the principal. 32 F.2d at 52. As such, the surety is equitably subrogated to funds that the obligee owed to the principal. *Id.* Many federal cases have descended from *Henningsen*, including the classic equitable subrogation decision of the United States Supreme Court, *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962) [Lexis], where the high Court held that a performing surety is subrogated to the rights of the obligee, the principal, and the subcontractors who are paid under a payment bond.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

A surety is not liable on a bond until there has been a default by its principal. *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 678, 235 S.E.2d 234, 240 (1977) [Lexis].

Sureties may stand on all of the bonded contract terms, and the surety's liability must be found within the terms of the bonded contract. *Ingram v. Bank of Warsaw*, 195 N.C. 357, 142 S.E. 231, 233 (1928) [Lexis]. Stated differently, the extent of a surety's liability is coextensive with that of its principal under the terms of the principal's bonded contract. *Interstate Equip. Co. v. Smith*, 292 N.C. 592, 596, 234 S.E.2d 599, 601 (1977) [Lexis].

Surety bonds are construed under the same rules of construction as ordinary contracts. *First Union Nat'l Bank v. King*, 63 N.C. App. 757, 759, 306 S.E.2d 508, 509 (1983) [Lexis]. And as in non-surety contract cases, contract ambiguities are generally construed against the drafter, which in the case of a payment bond is usually the surety. *See, e.g.*, *Town of Scotland Neck v. W. Sur. Co.*, 301 N.C. 331, 335, 271 S.E.2d 501, 503 (1980) [Lexis].

In North Carolina, as in most all jurisdictions, a surety is entitled to all defenses that its bonded principal has. *Jarratt v. Martin*, 70 N.C. 459 (1874) [Lexis]; *Chozen Confections v. Johnson*, 218 N.C. 500, 11 S.E.2d 472, 473 (1940) [Lexis].

B. Other Statutory Bonds in the Private Construction Context

A real property owner or bond obligee can discharge and remove a subcontractor's mechanics' lien on real property by posting with the Clerk of Superior Court a lien-discharge bond. N.C. Gen. Stat. § 44A-16(6). The bond penal sum for a lien-discharge bond must be 125% of the amount claimed in the mechanics' lien. *Id.* The mechanics' lien claimant who has had its bond discharged under this statute has three years to file an action to recover against the lien discharge bond. *George v. Hartford Accident & Indem. Co.*, 330 N.C. 755, 412 S.E.2d 43 (1992) [Lexis].

C. Time for Suit

North Carolina's statute of limitation for bringing a breach-of-contract action is three years from the date of breach. N.C. Gen. Stat. § 1-52(1). The cause of action accrues and the limitations period begins to run whenever the contract is breached, and it does not matter that the harmful consequences of the breach were not known or discoverable at the time the breach occurred. *Brantley v. Dunstan*, 10 N.C. App. 706, 708, 179 S.E.2d 878, 880 (1971) [Lexis].

Parties to a private payment bond, however, may contract for a shorter limitations period, and a one-year limitations period in a payment bond for a private construction project has been upheld. *Beachcrete, Inc. v. Water Street Ctr. Assocs., LLC*, 172 N.C. App. 156, 159–60, 615 S.E.2d 719, 721–22 (2005) [Lexis]. In *Beachcrete*, the Court of Appeals upheld summary judgment against the payment bond claimant who brought an action more than one year after the owner's final payment, even though the subcontractor–claimant did not learn of the payment bond's existence until after one year and five months from the owner's final payment. *Id.* at 158–60, 615 S.E.2d 721–22.

NORTH DAKOTA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Pursuant to N.D.C.C. § 48-01.2-10(1) payment bonds are required by statute for all public construction projects exceeding $200,000:

> Unless otherwise provided under this chapter, a governing body authorized to enter a contract for the construction of a public improvement in excess of two hundred thousand dollars shall take from the contractor a bond before permitting any work to be done on the contract. The bond must be for an amount equal at least to the price stated in the contract. The bond must be conditioned to be void if the contractor and all subcontractors fully perform all terms, conditions, and provisions of the contract and pay all bills or claims on account of labor performed and any supplies, and materials furnished and used in the performance of the contract, including all demands of subcontractors. The requirement that bills and claims be paid must include the requirement that interest of the amount authorized under section 13-01-14 be paid on bills and claims not paid within ninety days. The bond is security for all bills, claims, and demands until fully paid, with preference to labor and material suppliers as to payment. The bond must run to the governing body, but any person having a lawful claim against the contractor or any subcontractor may sue on the bond.

Additional bonding requirements exist for projects using an agency construction manager delivery method, as well as those using a construction manager-at-risk delivery method. *See* N.D.C.C. § 48-01.2-23.

B. Tiers Covered

A remote supplier or materialman, which furnish materials to a supplier or materialman, rather than to the contractor or its subcontractor, cannot recover on the public contractor's statutory payment bond. *See* N.D.C.C. § 48-01.2-10(1) (limiting rights on bond to one "having a lawful claim against the contractor or any subcontractor"); *see also* N.D.C.C. § 48-01.2-01(10) and (22) (defining terms "contractor" and "subcontractor").

Though interpreting a prior version of the North Dakota public bonding statute, which did not contain express definitions of the terms "contractor" and "subcontractor," *Kinney Electrical Manufacturing Co. v. Modern Electric Co.*, 149 N.W.2d 69, 72 (N.D. 1967) [Lexis] nonetheless remains valid in its observation that: "The statute was not enacted to protect every remote materialman who deals with one who in turn deals with a contractor or subcontractor erecting a public building or making public improvements."

C. Notice Required

Like many other Little Miller Acts, North Dakota's statute contains mandatory notice requirements applicable only to claimants not in direct contractual privity with the contractor:

> A person that has furnished labor or material for any public improvement for which a bond is furnished and has not been paid in full within ninety days after completion of the contribution of labor or materials may sue on the bond for the amount unpaid at the time of institution of suit. *However, a person having a direct contractual relationship with a subcontractor, but no contractual relationship with the contractor furnishing the bond, does not have a claim for relief upon the bond unless that person has given written notice to the contractor, within ninety days from the date on which the person completed the contribution, stating with substantial accuracy the amount claimed and the name of the person for which the contribution was performed*. The notice must be served by registered mail in an envelope addressed to the contractor at any place the contractor maintains an office, conducts business, or has a residence. A governing body shall provide a certified copy of the bond and the contract for which the bond was given to any individual who submits an affidavit that either the individual has supplied labor or materials for the improvement and that payment has not been made or that the individual is being sued on the bond. The individual requesting the copy shall pay the actual cost of the preparation of the certified copy of the bond and the contract. The certified copy of the bond is prima facie evidence of the contents, execution, and delivery of the original.

N.D.C.C. § 48-01.2-11 (emphasis added). *And see* *Kuchenski v. Kramer Sheet Metal, Inc.*, 377 N.W.2d 133 (N.D. 1985) [Lexis] (holding the date claimant "completed the contribution" a question of fact and analogizing to federal Miller Act case law).

D. Coverage

The purpose of North Dakota's statute is to "afford to laborers and materialmen a measure of security for their contribution to the public improvements named similar to the security of a mechanic's lien for improvements of private property." *Thompson Yards v. Kingsley*, 208 N.W. 949, 951 (N.D. 1926) [Lexis]. The coverage of public payment bonds will therefore be ascertained by reference to the express language of the statute and its purpose. *See id.* at 950.

1. Labor

a. Professional Services

There is no published North Dakota authority concerning whether a claimant can maintain an action on a public payment bond for design, engineering, architectural, or supervisory work in connection with a public project. Whether such a claim is valid will turn on whether it asserts a claim for "labor performed … in the performance of the contract" and cognizable against a contractor or its subcontractor. *See* N.D.C.C. § 48-01.2-10(1).

b. Union Benefits

There is no published authority directly on point.

2. Material

In *Farmer's Union Central Exchange, Inc. v. Reliance Ins. Co.*, 675 F. Supp. 1534, 1541 (D.N.D. 1987) [Lexis], the United States District Court for the District of North Dakota considered whether North Dakota's public payment bond statute required the claimant to trace materials supplied to a specific bonded project in order to recover. Analogizing to the federal Miller Act and cases interpreting it, the *Farmer's* court concluded that the claimant need only have a good faith belief that their product(s) or material(s) would be used in particular bonded projects. In that case, there was no evidence supporting claimants' good faith belief that their asphaltic product was to be used in particular bonded projects, and the surety was therefore justified in denying the claims. *Id.* at 1540–41.

More recently, the North Dakota Supreme Court has held that supplying materials to a stockpile for use in future public projects does not constitute "the construction of a public improvement" as defined in N.D.C.C. ch. 48-0.2. *Woodrock, Inc. v. McKenzie Cnty.*, 2020 ND 182, ¶ 12, 948 N.W.2d 20, 24 [Lexis].

3. Equipment

a. Repair

In *Nelson v. Hagen*, 146 N.W.2d 873 (N.D. 1966) [Lexis], the Supreme Court of North Dakota reasoned that interim and minor repairs to heavy-duty construction equipment were within the bond on the job where repairs were done, even though the contractor would have the benefit of the equipment on other work. The *Nelson* court took the view that "if the repair is only minor, inexpensive, and incidental, so that it is substantially exhausted in the performance of the contract, it is within the contractor's bond." *Id.* at 879 (citing 43 Am. Jur. Public Works and Contracts § 186, at 928 (1942)).

b. Rentals

Claims for rented equipment likely fall within the coverage of North Dakota public payment bonds, provided such equipment is "furnished and used in the performance of the contract" pursuant to N.D.C.C. § 48-01.2-10(1).

4. Other

a. Attorneys' Fees, Interest, and Financing Charges

No published opinion construes the recovery of attorneys' fees by public payment bond claimants in North Dakota. However, pursuant to N.D.C.C. § 48-01.2-10(1), interest charges may be assessed in accordance with N.D.C.C. § 13-01-14, whereby late payment charges allowed at a rate not greater than one and three-fourths percent per month.

b. Loans

See *Nelson v. Hagen*, 146 N.W.2d 873, 880 (N.D. 1966) [Lexis] ("It is a well-established general rule that a claim for money loaned or advanced to a building or construction contractor is not within the coverage of the ordinary form of contractor's bond conditioned on the performance of the contract and the payment of all claims for labor and material, even though the borrowed money has been wholly applied to the payment of the cost of labor and material actually going into the construction project.") (citing 17 Am. Jur. 2d Contractor's Bonds §§ 72, 73, at 249–51 (1964)).

c. Extracontractual

See *Szarkowski v. Reliance Ins. Co.*, 404 N.W.2d 502 (N.D. 1987) [Lexis] (recognizing the possibility for a bad-faith claim sounding in tort against a performance/payment bond surety and holding North Dakota Unfair Insurance Practices Act, N.D.C.C. § 26.1-04-03, applies to surety conducting business within state).

E. Contracts Excluded

By statute, the term "public improvement" does not include "a county road construction and maintenance, state highway, or public service commission project governed by title 11, 24, or 38." N.D.C.C. § 48-01.2-01(21). Bonds for public construction contracts in an amount equal to or less than $200,000 are not required. N.D.C.C. § 48-01.2-10(1).

F. Time for Suit

Pursuant to N.D.C.C. 48-01.2-12:

> Any claim for any labor, material, or supply furnished for an improvement, upon which a suit is not commenced within *one year after completion and acceptance of the project*, is barred as a lien or claim against the contractor and the contractor's surety and any right of setoff or counterclaim may be enforced in any court in this state against the governing body, the contractor, or the contractor's surety. This chapter does not bar the right of any person who has furnished any labor, supply, or material to any subcontractor to enforce the claim against the subcontractor.

(emphasis added).

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

By North Dakota statute, "[a] surety cannot be held beyond the express terms of the surety's contract and if such contract prescribes a penalty for its breach, the surety cannot be liable in any case for more than the penalty." N.D.C.C. § 22-03-03. "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." N.D.C.C. § 22-03-04. Payment bonds issued for use in connection with private construction projects are therefore

interpreted according to their plain language and pursuant to the general rules of contract interpretation set forth in N.D.C.C. ch. 9-07.

B. Time for Suit

Pursuant to N.D.C.C. § 22-03-03, if the parties contractually agree to a limitation on the time to bring a claim, the surety cannot be held beyond that limitation, and this remains true notwithstanding N.D.C.C. § 9-08-05, which voids any contractual provision limiting the time within which a party can enforce its rights. In other words, N.D.C.C. § 22-03-03 serves as an exception to § 9-08-05, such that the surety can rely on contracted-for limitations periods. *L & C Expedition, LLC v. Swenson, Hagen & Co., P.C.*, 2023 ND 29, ¶ 13, 985 N.W.2d 692, 694–95 [Lexis].

In the absence of a contractual time-for-suit clause, the six-year statute of limitations applicable to breach of contract actions will govern. N.D.C.C. § 28-01-16.

C. Case Annotations

Coextensive Liability

Generally, the rights and liabilities of a surety are coextensive with those of its principal. *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 276 F. Supp. 2d 999, 1018 (D.N.D. 2003) [Lexis], *aff'd*, 420 F.3d 751 (8th Cir. 2005).

Construction of Payment Bond

In *Larson v. Granite Re, Inc.*, 532 F.3d 724 (8th Cir. 2008) [Lexis], the Eight Circuit Court of Appeals construed a payment bond provided for use on a road construction project at Turtle Mountain Indian Reservation near Belcourt, North Dakota. The surety's payment bond was held not to cover a dirt-moving subcontractor's claims for idle equipment and labor that predated the project subcontract because the bond did not incorporate prior activity or any other preexisting contracts. *Id.* at 731–32. However, claimed "long haul costs" and supervisor costs incurred post-contracting were awarded, given that the bond broadly covered all "labor, material, or both, used or reasonably required for use in the performance of the contract…." *Id.* at 732–33.

OHIO

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Ohio statutes require payment bonds for (1) contracts with the state or any political subdivision, district, institution, or other agency ("Public Payment Bonds") and (2) contracts with the Ohio Department of Transportation ("ODOT Payment Bonds"), but separate statutory schemes govern Public Payment Bonds and ODOT Payment Bonds.

Ohio Rev. Code § 153.54 requires the principal to furnish either a Public Payment Bond for the full amount of its bid or a bid guaranty equaling ten percent of the bid. When a ten percent bid guaranty is submitted, § 153.54 requires the principal to subsequently furnish a Public Payment Bond for the full amount of the contract. The forms for Public Payment Bonds are specified by law at § 153.571 (for bonds incorporated into the bid) and § 153.57 (for bonds subsequent to other bid guaranty). Either form secures the public authority as obligee for the full bid and contract price. Also, both statutory bond forms detail the principal's and surety's performance and payment bond obligations thereunder in a single bond. The payment covenant in both forms states, "[Principal and surety] shall pay all lawful claims of subcontractors, material suppliers, and laborers, for labor performed and materials furnished in the carrying forward, performing, or completing of said contract; we agreeing and assenting that this undertaking shall be for the benefit of any material supplier or laborer having a just claim, as well as for the obligee herein[.]" Ohio Rev. Code §§ 153.571 and 153.57.

The terms "public improvement," "subcontractor," "material supplier," "laborer," and "materials" in Public Payment Bonds are construed in harmony with Ohio's mechanics' lien laws at Ohio Rev. Code. § 1311.25. *See* Ohio Rev. Code § 153.54(J) (for purposes of Public Payment Bonds, key terms "have the same meanings as in § 1311.25"). Ohio Rev. Code § 1311.25(A) broadly defines a "public improvement" as "any construction, reconstruction, improvement, enlargement, alteration, demolition, or repair of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water works, and any other structure or work of any nature by a public authority." Ohio Rev. Code § 1311.25(B) defines a "public" authority as "the state, and a county, township, municipal corporation, school district, or other political subdivision of the state, and any public agency, authority, board, commission, instrumentality, or special district of or in the state or a county, township, municipal corporation, school district, or other political subdivision of the state, and any officer or agent thereof."

Ohio Rev. Code § 5525.16 governs ODOT Payment Bonds relative to contracts involving the Ohio Department of Transportation ("ODOT"). ODOT Payment Bonds must be "in an amount equaling the initial contract amount, conditioned for the payment by the contractor and all subcontractors for labor or work performed or materials furnished in connection with the work, improvement, or project involved." Ohio Rev. Code § 5525.16(A)(2). An ODOT Payment Bond must include the surety's certificate of authorization to transact business in Ohio from the superintendent of insurance. Ohio Rev. Code § 5525.16(B). The terms "improvement,"

subcontractor," "material supplier," and "materials" in ODOT Payment Bonds have the same definitions provided in Ohio Rev. Code. § 1311.01. The term "contractor" in ODOT Payment Bonds has the same meaning as "original contractor" as defined in § 1311.01.

B. Tiers Covered

The tiers covered by Public Payment Bonds and ODOT Payment Bonds are not expressly limited by statute. In fact, when construing prior versions of the statutes governing Public Payment Bonds, Ohio courts held that coverage extended to material suppliers of subcontractors (*i.e.*, second-tier material suppliers) but did not extend to subcontractors of subcontractors (*i.e.*, second-tier subcontractors). *Wagner-Smith Co. v. Dyson Elec. Co.*, 14 Ohio App. 3d 447, 472 N.E.2d 54, 56-57 (Ohio Ct. App. 1984) [Lexis]; *J. T. Weybrecht's Sons Co. v. Hartford Accident & Indem. Co.*, 161 Ohio St. 436, 119 N.E.2d 836 (Ohio 1954) [Lexis].

In any event, pursuant to Ohio Rev. Code § 153.54, coverage under Public Payment Bonds extends to "subcontractors, material suppliers, and laborers" as those terms are defined in Ohio Rev. Code § 1311.25, under which the definition of "subcontractor" includes "any person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of any public improvement under a contract with any person other than the public authority." The statutory forms for Public Payment Bonds further reference "lawful claims of subcontractors, material suppliers, and laborers, for labor performed and materials furnished[.]" Ohio Rev. Code §§ 153.571 and 153.57. Moreover, Ohio Rev. Code § 153.56(D), which governs the "notice of furnishing" requirements for second-tier subcontractors and second-tier material suppliers with claims in excess of thirty thousand dollars, expressly references "a subcontractor or materials supplier . . . who is not in direct privity of contract with the principal contractor or design-build firm for the public improvement."

With respect to ODOT Payment Bonds, Ohio Rev. Code § 5525.16 references "payment by the contractor and all subcontractors" as those terms are defined in Ohio Rev. Code § 1311.01, under which the definition of "subcontractor" includes "any person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of any improvement under a contract with any person other than the owner, part owner, or lessee."

C. Notice Required

The statutory notice requirements for claims against Public Payment Bonds differ from the statutory notice requirements for claims against ODOT Payment Bonds.

With respect to Public Payment Bonds, Ohio Rev. Code § 153.56 dictates that "a subcontractor or materials supplier supplying labor or materials that cost more than thirty thousand dollars, who is not in direct privity of contract with the principal contractor or design-build firm for the public improvement, shall serve a notice of furnishing upon the principal contractor or design-build firm in the form provided in section 1311.261 of the Revised Code." A subcontractor or material supplier who serves such a notice of furnishing, "has the right of recovery only as to amounts owed for labor and work performed and materials furnished during and after the twenty-one days immediately preceding service of the notice of furnishing." The failure to furnish the notice of furnishing is fatal to a second-tier subcontractor or material supplier's claim against a Public Payment Bond. *See Firefighter Sales and Serv. v. Travelers Cas. and Sur. Co. of Am.*, No.

1:14CV2337, 2015 U.S. Dist. LEXIS 132733, 2015 WL 5749627, at *1 (N.D. Ohio Sept. 30, 2015) [Lexis] (applying Ohio Rev. Code § 1311.261).

Ohio Rev. Code § 153.56(A) further requires all subcontractors and material suppliers to furnish the surety on a Public Payment Bond with a statement of the amount due as a condition of pursuing a claim against a Public Payment Bond. The statement of amount due can be furnished "any time after performing the labor or work or furnishing the materials, but not later than ninety days after the completion of the contract by the principal contractor . . . and the acceptance of the public improvement for which the bond was provided by the duly authorized board or officer." Ohio Rev. Code § 153.56(A).

With respect to ODOT Payment Bonds, any person to whom money is due, but not later than ninety days after the acceptance of the work, improvement, or project by the director of transportation, may furnish to the surety a statement of the amount due. Ohio Rev. Code § 5525.16(C). There is no requirement for a notice of furnishing by second-tier subcontractors or second-tier material suppliers under § 5525.16; however, coverage also does not expressly extend to second-tier subcontractors or second-tier material suppliers under that statute.

The lack of a proper notice of furnishing and/or a statement of amount due will be fatal to a claim against a Public Payment Bond or an ODOT Payment Bond. *G.R. Osterland Co. v. Triple A Bridge Constr. Co.*, No. 97-L-317, 1999 Ohio App. LEXIS 2937, 1999 WL 455771, at *1, *3–4 (Ohio Ct. App. June 25, 1999) [Lexis]. The pre-suit notice requirements for providing notices of furnishing and statements of amount due are rigid and applied with "literal approach to the interpretation of its language." *Id.* at *3. The only flexibility under § 153.56(A) and § 5525.16(C) is the format of the statement of the amount due. The statement must be "more than mere notice," but "need not be prepared with the particularity of detail required in a statement of account." *Id.* "It is sufficient if the statement advises the surety of the amount due and that it is for labor performed or materials furnished in the construction of the improvement for which the bond is given." *Id.*

D. Coverage

The coverage afforded under Public Payment Bonds and ODOT Payment Bonds is generally analogous to the coverage afforded by Ohio's mechanics' lien statutes. Under Ohio law, "it is apparent that . . .the legislature intended to make the sureties upon contactor's bonds liable for such labor and materials furnished for public works or improvements as would be the subject of a mechanic's lien if the property were privately owned." *Kline v. Fed. Ins., Co.*, 152 N.E.2d 911, 912 (Ohio Com. Pl. 1958) [Lexis] (citing *Royal Indem. Co. v. Day & Maddock Co.*, 114 Ohio St. 58, 150 N.E. 426, 429 (Ohio 1926) [Lexis]).

1. Labor

The statutory definitions of "laborer" and "subcontractor" are nearly identical under both definition sections that apply to Public Payment Bonds and ODOT Payment Bonds, Ohio Rev. Code §§ 1311.25 and 1311.01, which are cross-referenced in Ohio Rev. Code §§ 153.54 and 5525.16, respectively.

For Public Payment Bonds, a "laborer" is defined as "any mechanic, worker, artisan, or other individual who performs labor or work in furtherance of any public improvement." Ohio Rev. Code. § 1311.25(D). A "subcontractor" is defined as "any person who undertakes to

construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of any public improvement under a contract with any person other than the public authority." Ohio Rev. Code § 1311.25(E).

For ODOT Payment Bonds, a "laborer" is defined as "any mechanic, worker, artisan, or other individual who performs labor or work in furtherance of any improvement." Ohio Rev. Code § 1311.01(C). A "subcontractor" is defined as "any person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of any improvement under a contract with any person other than the owner, part owner, or lessee. Ohio Rev. Code. § 1311.01(D).

a. Professional Services

Generally speaking, Public Payment Bonds and ODOT Payment Bonds cover professional services that are rendered primarily at the project site and have a close connection to the construction. On that note, Ohio law has "no basis for excluding a laborer from the benefits of either the mechanics' lien or contractor's bond statutes merely because he is a skilled worker or renders professional services, such as an architect or engineer." *Kline*, 152 N.E.2d at 913 [Lexis] (citing *Robert V. Clapp Co. v. Fox*, 124 Ohio St. 331, 178 N.E. 586, 588 (Ohio 1931) [Lexis]). In *Kline*, the surveyor performed most of its work at the project site, though it performed a smaller portion of the work at the surveyor's office. The court found that when "a surveyor renders services on the project which are essential to its construction," the value of the professional services is recoverable on the bond. *Id*. at 914. Following the rule that recoverable professional services must have a close connection to the premises and construction, an architect or engineer cannot claim services for "preparing the plans and specifications" but can claim "services rendered in supervising the construction." *Id*. at 913. A surveyor who provided property boundaries, an attorney who examined title work, and a financier who appraised the property are all additional examples of professional services too remote from the work essential to construction to constitute a valid claim on the payment bond. *Id*. at 914.

b. Union Benefits

Coverage under Public Payment Bonds and ODOT Payment Bonds generally extends to union-worker wages, fringe contributions, and union dues. *See State ex rel. Gen. Elec. Supply Co. v. Jordano Elec. Co., Inc.*, 53 Ohio St. 3d 66, 558 N.E.2d 1173, 1174 (Ohio 1990) [Lexis]. Claims for union benefits are eligible for mechanics' liens on escrowed public projects funds, and the claims are recoverable pursuant to the lien procedures in Ohio Rev. Code §§ 1311.25 to 1311.32. *Id*.

2. Material

The statutory definitions of "materials" for both Public Payment Bonds and ODOT Payment Bonds include "all products and substances including, without limitation, any gasoline, lubricating oil, petroleum products, powder, dynamite, blasting supplies and other explosives, tools, equipment, or machinery furnished in furtherance of an improvement." Ohio Rev. Code §§ 1311.01(I) and 1311.25(G).

As noted above, the coverage afforded by Public Payment Bonds and ODOT Payment Bonds is generally analogous to the coverage afforded by Ohio's mechanics' lien statutes. Under Ohio's mechanics' lien statutes, claims for materials arise only if the materials are:

(1) Furnished with the intent, as evidenced by a contract of sale, delivery order, delivery to the site by the claimant or at claimant's direction, or by other evidence, that the materials be used in the course of the improvement;
(2) Incorporated in the improvement or consumed as normal wastage in the improvement operations;
(3) Specifically fabricated for incorporation in the public improvement and not readily resalable in the ordinary course of the fabricator's business even if not actually incorporated in the public improvement;
(4) Used for the improvement or for the operation of machinery or equipment used in the course of the improvement and not remaining in the improvement, subject to diminution by the salvage of those materials;
(5) Tools or machinery used, provided that (a) if rented, the claim is for the reasonable rental value for the period of actual use and any reasonable period of nonuse taken into account in the rental contract, and (b) if purchased, the claim is for the price but only if the tools or machinery were purchased for use in the particular project and have no substantial value to the purchaser after completion of the project.

Ohio Rev. Code § 1311.251.

Moreover, Ohio Rev. Code § 5525.12 clarifies that, for purposes of Public Works Payment Bonds and ODOT Payment Bonds, "[l]umber in highway work shall be deemed material . . . when it actually becomes part of the structure or improvement in which it is used, or when it is used as form material."

3. Equipment

Technically speaking, neither the statute governing Public Payment Bonds nor the statute governing ODOT Payment Bonds uses the term "equipment." Nonetheless, as used in Public Payment Bonds and ODOT Payment Bonds, the definition of "materials" includes "tools, equipment, or machinery" furnished in furtherance of the public improvement at issue. Ohio Rev. Code § 1311.01(I) and Ohio Rev. Code. § 1311.25(G).

The coverage afforded by Public Payment Bonds and ODOT Payment Bonds is generally analogous to the coverage afforded by Ohio's mechanics' lien statutes. With respect to claims for furnishing tools or machinery, Ohio's mechanics' lien statutes extend coverage for the following:

(1) If the tools or machinery are rented, the claim is for the reasonable rental value for the period of actual use and any reasonable period of nonuse taken into account in the rental contract.
(2) If the tools or machinery are purchased, the claim is for the price, but the claim only arises if the tools or machinery were purchased for use in the course of the particular public improvement and have no substantial

> value to the purchaser after the completion of the public improvement on which they were used.

Ohio Rev. Code § 1311.251(C)(2).

a. Repairs

Historically, under antecedent versions of § 153.54 and the Ohio mechanics' lien laws, both the labor and parts required to complete repairs of equipment in furtherance of a public improvement were compensable claims under a Public Payment Bond. *Mountaineer Euclid, Inc. v. Western Cas. & Sur. Co.*, 19 Ohio App. 2d 185, 250 N.E.2d 768, 772 (Ohio Ct. App. 1969) [Lexis]. The analysis in *Mountaineer Euclid* has never been overturned, and it expanded payment bond claims for materials to include both labor and parts for repairs to, "insure confidence in the contractor, and therefore encourage responsible and capable persons to furnish labor and materials, and to contract for certain portions of the work, and at the same time insure a better quality of performance." *Id*. at 772. However, amendments have changed the statutes upon which that reasoning was based, which calls into question the issue of whether repairs to equipment would trigger coverage under a Public Payment Bond or an ODOT Payment Bond. No coverage would appear to exist unless the repairs qualify as "labor" or "materials" under Ohio Rev. Code § 1311.01(I) or Ohio Rev. Code. § 1311.25(G).

b. Rentals

Again, the coverage afforded by Public Payment Bonds and ODOT Payment Bonds is generally analogous to the coverage afforded by Ohio's mechanics' lien statutes. Under Ohio's mechanics' lien statutes, "[i]f the tools or machinery are rented, the claim is for the reasonable rental value for the period of actual use and any reasonable period of nonuse taken into account in the rental contract." Ohio Rev. Code § 1311.251(C)(1).

4. Other

a. Attorneys' Fees

The statutes governing Public Payment Bonds and ODOT Payment Bonds do not obligate sureties to pay attorneys' fees. "In the absence of any statutory obligations, the sureties' duties are governed by contract." *Dean v. Seco Elec., Co.*, 35 Ohio St. 3d 203, 519 N.E.2d 837, 840 (Ohio 1988) [Lexis]. Under Ohio law, the surety may not be held liable for any penal interest or attorneys' fees that may be imposed upon its principal "unless the act of the principal was authorized, participated in, or ratified by the surety." *Id*. at 840. In other words, attorneys' fees are not included in the "lawful claims" that may be pursued against Public Payment Bonds or ODOT Payment Bonds. *Intercargo Ins. Co. v. Mun. Pipe Contractors, Inc.*, 127 Ohio Misc. 2d 48, 805 N.E.2d 606 (Ohio Com. Pl. 2003) [Lexis].

b. Interest

The surety under a Public Payment Bond or an ODOT Payment Bond is generally obligated to pay prejudgment interest. In an unreported case, the court held that the surety's payment bond obligation is joint and several to that of the principal, and as such, interest under the contract becomes due and owing from the surety at the time the payment was due from the principal. *Whitaker Merrell Co. v. Claude A. Janes, Inc.*, 173 N.E.2d 402, 407 (Ohio Com. Pl. 1961) [Lexis] (holding that accrual of prejudgment interest owed by the surety was not stayed by the sixty day notice prerequisite to claimant filing suit provided in § 153.56).

The surety is not responsible for prejudgment interest imposed upon the principal pursuant to any penal statute, particularly the Ohio Prompt Pay Act (Ohio Rev. Code § 4113.61). "[T]he surety has no control over the actions of the contractor in failing to promptly pay the subcontractor, nor does the surety have control over when the subcontractor submits the statement of amounts owed under § 5525.16, which triggers the surety's obligation to pay under the bond." *Intercargo*, 805 N.E.2d at 613 [Lexis]. "Thus, imposition of payment of the interest on the surety would not serve the purpose of the statute." *Id*.

c. Financing Charges

Whether an Ohio public payment bond covers claims for financing charges has not been addressed by statute or case law. Unless deemed part of the cost of labor or materials "furnished in furtherance of an improvement" project, finance charges would not be allowed under a Public Payment Bond or an ODOT Payment Bond. Ohio Rev. Code §§ 1311.01 and 1311.25. Further evidence that financing charges are not recoverable comes from *Kline v. Federal Ins. Co.*, where it was held that labor of a "financier who appraised the premises for a loan" was not recoverable as professional services because this category was too far removed from the construction labor performed at or closely connected to the premises. 152 N.E.2d at 913–14 [Lexis].

d. Insurance Premiums

Whether Public Payment Bond or an ODOT Payment Bond covers claims for insurance premiums has not been addressed by statute or case law. However, unless deemed part of the cost of labor or materials "furnished in furtherance of an improvement" project, insurance premiums would not be allowed. Ohio Rev. Code §§ 1311.01 and 1311.25.

e. Loans

Ohio precedent prior to the enactment of contemporary statutes governing Public Payment Bonds and ODOT Payment Bonds established that a lender cannot bring a claim against a Public Payment Bond "by virtue of having paid for work and labor." *Illinois Surety Co. v. City of Galion*, 211 F. 161 (N.D. Ohio 1931) [Lexis]. In *City of Galion*, a bank loaned funds the principal used to procure labor and materials, with an agreement that the principal would utilize bonded contract proceeds to repay the loan. When the principal defaulted, the bank alleged that it was an equitable assignee of any claims that subcontractors or material supplier would have possessed but for their receipt of payments from the loan. The bank further alleged the equitable assignment entitled it to recovery from the remaining proceeds of the bonded contract, the contractor, and/or the surety.

The court held the surety was subrogated to the rights of the contractor/principal, but the bank was not. *Id*. at 163. "It was the business of this bank to loan money, and not, as a national bank, to supply labor and material, to a contractor." *Id*.

Under the current statutes governing Public Payment Bonds and ODOT Payment Bonds, coverage for loaned funds has not been addressed. However, unless deemed part of the cost of labor or materials "furnished in furtherance of an improvement," such claims would be futile against Public Payment Bonds and ODOT Payment Bonds. Ohio Rev. Code §§ 1311.01 and 1311.25.

f. Delay Damages

Whether a Public Payment Bond or an ODOT Payment Bond covers claims for delay damages has not been addressed by statute or case law. Unless deemed part of the cost of labor or materials "furnished in furtherance of an improvement" project, delay damages would not be allowed under a Public Payment Bond or an ODOT Payment Bond. Ohio Rev. Code §§ 1311.01 and 1311.25.

g. Profits

Whether a Public Payment Bond or an ODOT Payment Bond covers claims for lost profits for work not performed has not been addressed by statute or case law. Unless deemed part of the cost of labor or materials "furnished in furtherance of an improvement" project, lost profits would not be allowed under a Public Payment Bond or an ODOT Payment Bond. Ohio Rev. Code §§ 1311.01 and 1311.25.

h. Extracontractual

Under Ohio law, extracontractual damages, particularly punitive damages, "are not recoverable against a surety unless the act of the principal was authorized, participated in, or ratified by the surety." *Dean v. Seco Elec., Co.*, 35 Ohio St. 3d 203, 519 N.E.2d 837, 840 (Ohio 1988) [Lexis]. Moreover, no Ohio court has ever recognized a common-law claim for bad faith against a surety relative to a Public Payment Bond or an ODOT Payment Bond.

E. Contracts Excluded

Subject to the coverage limitations of the Public Payment Bonds and ODOT Payment Bonds described above, all contracts falling within the definition of "public improvement" must be bonded pursuant to the appropriate statute. Those statutes do not exclude any contracts on the basis of a monetary threshold. However, ODOT Payment Bonds are not required in connection "with any force account work." Ohio Rev. Code § 5525.16(B).

F. Time for Suit

The time requirements for notice and filing suit are functionally the same for Public Payment Bonds (under § 153.54) and ODOT Payment Bonds (under § 5525.16). In addition to the notice of furnishing requirement for second-tier subcontractors and second-tier material suppliers

for Public Work Payment Bonds, any claimant seeking payment for labor or materials under a Public Payment Bond or an ODOT Payment Bond must at any time after performing the labor or furnishing the materials, but not later than ninety days after acceptance of the improvement by the duly authorized board, officer, or director, furnish the surety a statement of the amount due. Ohio Rev. Code §§ 153.56(A) and 5525.16(C). After timely furnishing the required statement of the amount claimed to the surety, the surety or contractor must be provided sixty days to pay the indebtedness in full. *Id*. After the expiration of the sixty days, if the claim was not paid in full, the claimant may file suit to enforce the Public Payment Bond or the ODOT Payment Bond. *Id*. Notwithstanding the mandatory sixty-day pre-suit notice period or any other statute of limitations in the Ohio Revised Code, any claim on the payment bond against the surety must be filed not later than one year after the date of acceptance of the public improvement at issue. Ohio Rev. Code §§ 153.56(B) and 5525.16(C).

The one-year statute of limitations for claims against Public Payment Bonds and ODOT Payment Bonds, which begins to run on the date the public improvement is accepted, is "jurisdictional in character," rigid, and strictly applied by Ohio's courts. *Thomas Steel, Inc. v. Wilson Bennett, Inc.*, 127 Ohio App. 3d 96, 711 N.E.2d 1029, 1034 (Ohio Ct. App. 1998) [Lexis].

G. Remarks

In addition to suit against the surety relative to a Public Payment Bond or an ODOT Payment bond, Ohio has a statutory procedure through which an unpaid subcontractor or material supplier may seek satisfaction out of the bonded contract proceeds being held by the public authority. To initiate that procedure, any subcontractor, laborer, or supplier may, within 120 days from the last performance of labor or furnishing of material, serve the public authority with an affidavit stating the amount due and unpaid. Ohio Rev. Code § 1311.26.

Upon receiving a claimant's affidavit pursuant to § 1311.26, and upon receiving proof that the claimant complied with all § 131.261 notice of furnishing requirements to the principal (if so required), the public authority shall detain contract funds from the principal in the amount of the claim, but not to exceed the remaining balance of the contract. Ohio Rev. Code § 1311.28.

Within five days after receiving claimants § 1311.26 affidavit of claim, the public authority must serve the principal with a copy of the affidavit. The principal, or a subcontractor (on the principal's behalf) for whom claimant performed work, has twenty days after receipt of the affidavit to furnish the public authority with written notice disputing the claim. Ohio Rev. Code § 1311.31. If the principal does not provide notice disputing the claim within twenty days, the claim is deemed valid, and the public authority shall pay the claim(s) from the detained funds in the order of priority (prescribed by statute). *Id*.

If the public authority, the principal, or the subcontractor at issue disputes the claimant's affidavit, the disputing party may serve the claimant with notice to commence suit. Ohio Rev. Code § 1311.311. If the claimant fails to commence suit within sixty days after receiving such notice, the claimant's § 1311.26 affidavit is rendered void and any withheld funds are to be released by the public authority to the principal (or the surety depending upon the circumstances). *Id*.

A claimant seeking to recover payment from a public authority through this procedure is only entitled to recover from contract funds that are actually due and owing from the public authority to the principal, regardless of the validity of the claim. A valid claim simply places the subcontractor or material supplier into the shoes of the principal when funds become due to the principal. *First Response Metering, LLC v. City of Wilmington*, No. 1:20-cv-329, 2022 U.S. Dist.

LEXIS 180361, 2022 WL 4621573, at *1, *4 (S.D. Ohio Sept. 30, 2022) [Lexis] (citations omitted). If the affidavit is filed and the public authority has already paid the full contract price to the principal, or the owner has valid grounds to withhold payment from the principal, the public authority is not required to remit any payment to the claimant.

H. Case Annotations

Determination of Date of Acceptance

Ambiguity can arise as to the exact date upon which the public authority's duly-qualified representative accepted the public improvement at issue. This date is critical because a subcontractor or material supplier must furnish the surety a statement of amount due within ninety days after acceptance occurs and must file suit within one year of acceptance. Ohio Rev. Code § 153.56.

In *Brewer Co. v. Harris Construction Co.*, the board of county commissioners issued a resolution stating that "excepting" certain itemized portions of the work, the "project be accepted and setting of the one-year warranty period to begin[.]" No. CA 686, 1978 Ohio App. LEXIS 10960, 1978 WL 216167, at *1 (Ohio Ct. App. March 15, 1978) [Lexis]. When the surety received a statement of amount due over five months after the resolution was issued, the surety argued the statement of amount due was not timely under § 153.56. *Id*., a *2. However, the court found the resolution, with its itemized description of incomplete items, did not constitute acceptance triggering the time limit for the claimant to provide its statement of amount due. "[T]he statute uses the word acceptance. It does not refer to partial acceptance, or acceptance of a part of the work . . . .There is nothing to indicate that substantial acceptance, or something tantamount to acceptance, would be sufficient . . . . The liability of the contractor, and therefore the liability of the surety upon the bond of the contractor, did not cease until complete performance." *Id*. at *3.

The *Brewer* holding that § 153.56(A) contemplates nothing short of complete and utter project acceptance is slightly contrasted by a subsequent case, *Thomas Steel, Inc. v. Wilson Bennett, Inc*, 127 Ohio App. 3d 96, 711 N.E.2d 1029 (Ohio Ct. App. 1998) [Lexis]. Thomas Steel was a second-tier material supplier on a project involving a multiphase airport upgrade, who supplied materials for two specific phases of the project. Thomas Steel completed its work and sent a final invoice to the subcontractor on April 12, 1993, which went unpaid. The public authority executed a "Statement of Work Accepted" on March 4, 1994, which (1) specifically stated a "Date of Acceptance" as December 14, 1993 and (2) identified the two project phases in which Thomas Steel participated. *Id*. at 1034. On June 30, 1995, the principal, who was the prime contractor, submitted its final pay request to the public authority for completion of all phases of the project. On October 18, 1995, more than two years after its last invoice, Thomas Steel submitted a statement of amount due to the surety under the Public Payment Bond. The surety denied the claim pursuant to the statute of limitations in § 153.56(A) and argued the applicable date of acceptance was December 14, 1993. The court rejected Thomas Steel's argument that the date of acceptance was the public authority's last payment to principal on other phases of the project. "The legislative purpose of requiring relatively prompt notice of nonpayment to the sureties would not be served by allowing postponement of the notice until the ultimate end of a major project, in this case, over two years after the subcontractor had completed its work." *Id*. The payment bond claim was barred for failure to provide timely notice to the surety and bring suit within one year of the date of acceptance.

Bond Claims as Exclusive Remedy Against the Principal

Generally speaking, a subcontractor, laborer, or material supplier who is not in privity with the principal will not have a direct cause of action against the principal; instead, the Public Payment Bond or ODOT Payment Bond at issue would be the exclusive remedy against the principal (and the surety). *Thomas Steel, Inc.*, 711 N.E.2d at 1036 [Lexis] (holding second-tier material supplier's exclusive remedy against general contractor was on the payment bond and "not other common law remedies") (citing *Gen Elec. Supply Corp. v. Wiley Elec. Co.*, 47 Ohio App. 196, 191 N.E. 706 (Ohio 1933) [Lexis] (holding the statutory remedy of materialmen or laborers on bond of public improvement contractor is exclusive under G.C. 2365-3, predecessor to § 153.56)). "If an independent claim for unjust enrichment were also allowed, subcontractors, material suppliers, and laborers on public works contracts could effectively ignore the notice and commencement-of-suit requirements of the bond statute, which would become meaningless." *Id*.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Payment bonds for private projects ("Private Payment Bonds") are not creatures of statute under Ohio law. Accordingly, a Public Payment Bond's terms are interpreted according to Ohio contract law as follows:

> In interpreting a surety contract: Other words cannot be added by construction or implication, but the meaning of the words actually used is to be ascertained in the same manner as the meaning of similar words used in other contracts. They are to be understood in their plain and ordinary sense, when read in the light of the surrounding circumstances and of the object intended to be accomplished. Furthermore, any doubtful language in the contract of surety must be construed strongly against the surety, and in favor of indemnity, which the creditor has reasonable grounds to expect.

Water Works Supplies, Inc. v. Grooms Constr. Co., Inc., No. 01CA18, 2003 Ohio App. LEXIS 1447, 2003 WL 1563809, at *1, *5 (Ohio Ct. App. March 24, 2003) [Lexis] (quotations and citation omitted).

Ohio does not require Private Payment Bonds by statute or rule. However, contractors do have statutory mechanics' lien rights that afford protection under private construction contracts. 1 JW-CLBL § 36.01, *see also* John J. Petro, *Fifty State Construction Lien and Bond Law* § 36 (2022). The mechanics' lien statutes applicable to private projects are codified at Ohio Rev. Code §§ 1311.01 through 1311.22.

B. Time for Suit

Ohio has a six-year statute of limitations for breach of contract claims, which is codified at Ohio Rev. Code § 2305.06. However, the parties to a contract, such as a payment bond, may provide for a shorter period within which to commence an action on the contract than provided by statute. *Hall v. Orr-Ault Constr. Co.*, 10 Ohio Law Abs. 101, 103 (Ohio Ct. App. 1930) [Lexis]. Ohio courts have not determined a specific test for how restrictively a surety bond may dictate the time for suit. However, the contractual limitation period must be reasonable and stated

unambiguously in order to be valid. See *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d 63, 543 N.E.2d 488 (Ohio 1989) [Lexis]. One-year contractual limitations for actions arising from Private Payment Bonds are acceptable and have been upheld by Ohio's courts. *Stake v. Seco Elec. Co.*, 73 Ohio App. 3d 371, 597 N.E.2d 520, 523 (Ohio Ct. App. 1991) [Lexis].

C. Case Annotations

Principal's Defenses Inure to the Benefit of Surety

Generally speaking and depending on the language of the bond at issue, the surety under a Private Payment Bond is jointly and severally liable for claims against the principal. As a result, the surety's liability is ordinarily conditioned upon and shall not exceed the principal's liability. *Hopkins v. INA Underwriters Ins. Co.*, 44 Ohio App. 3d 186, 542 N.E.2d 679, 683 (Ohio Ct. App. 1988) [Lexis] (citations omitted). In addition to the surety's separate defenses, Ohio law adheres to the general rule that a surety is entitled to assert and rely upon any defense that is available to its principal. In fact, the Ohio Supreme Court explained over a century and a half ago:

> 'The contract of surety takes place when one person, to obtain some trust, confidence, or credit for another, engages to be answerable for him.' It is always accessory to the obligation of a principal, and 'it is of its essence that there should be a valid obligation of a principal debtor.' 'Without a principal there can be no accessory, and by the extinction of the liability of the former, the latter becomes extinct.'

Ide v. Churchill, 14 Ohio St. 372, 383 (Ohio 1863) [Lexis]. More recently the Ohio Court of Appeals has confirmed that, "[t]he general rule is that whatever discharges the principal discharges the surety." *Dressler Properties, Inc. v. Ohio Heart Care, Inc.*, No. 2004CA00231, 2005 Ohio App. LEXIS 1085, 2005 WL 578756, *1, at*2 (Ohio Ct. App. Mar 7, 2005) [Lexis]. Stated differently:

> When sued under a surety agreement, a surety is typically entitled to raise the nonpersonal defenses of the principal debtor. "Otherwise, the principal would be indirectly deprived of the benefit of a valid defense against the creditor, by being compelled, in effect, to respond through his sureties; or the sureties could be deprived of their right to reimbursement from the principal, and thus one or the other be compelled to lose the rights which the law had secured to them."

O'Brien v. Ravenswood Apartments, Ltd., 862 N.E.2d 549, 554–55 (Ohio Ct. App. 2006) [Lexis].

The defenses available to the surety include the principal's pay-if-paid defense, which exists when the principal's receipt of payment from the obligee is a condition precedent to the principal's duty to pay the subcontractor or material supplier at issue. With respect to the enforceability of pay-if-paid clauses, the Ohio Supreme Court has explained:

> [W]e hold that when a contract provides that payment by a project owner to a general contractor for work performed by the subcontractor is a condition precedent to payment by the general contractor to the subcontractor, the provision is a pay-if-paid provision. We further hold that the use of the term "condition precedent" in the payment provision of a contract between a general contractor and a subcontractor clearly and unequivocally shows the intent of those parties to transfer

> the risk of the project owner's nonpayment from the general contractor to the subcontractor.

Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp., 16 N.E.3d 645, 652 (Ohio 2014) [Lexis].

Bond's Invariable Penal Sum

The surety has the right to agree to all terms by which it will be bound, and the surety's liability only arises by execution of the bond. As a result, the surety has no liability beyond the plain terms of a Private Payment Bond —including the capping of the surety's liability at the penal sum. Moreover, unless the Private Payment Bond contains an escalation clause or the surety consents to an increase of the penal sum through a rider, the surety's liability under a Private Payment Bond remains capped at the penal sum even if the price of the bonded contract is increased through additive change orders and even if the surety waived notice of changes to the contract. *Freedman v. Transamerica Ins. Co.*, Nos. 2152, 2153, 1975 Ohio App. LEXIS 8340, 1975 WL 180920, at *1, *3 (Ohio Ct. App. April 21, 1975) [Lexis] (citations omitted).

OKLAHOMA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Oklahoma's Little Miller Act is codified as Title 61 of Oklahoma Statutes Annotated §§ 1-19. Okla. Stat. Ann. tit. 61, § 1 [Lexis] establishes that payment bonds are required for public works projects exceeding $100,000.00. The bond must be worth no less than the total sum of the contract. *Id.*

B. Tiers Covered

Okla. Stat. Ann. tit. 61, § 2 [Lexis] dictates who may file a payment bond claim. In Oklahoma, *any* person owed money for labor, material or repair to machinery or equipment furnished, may bring an action on the bond for recovery of the indebtedness. Further, any person having direct contractual relationship with a subcontractor performing work on the contract, regardless of who has the right to take civil action. Okla. Stat. Ann. tit. 61, § 2(B)(1) [Lexis]. It is immaterial whether the subcontractor seeking to make a claim has a contractual relationship express or implied with the contractor furnishing the payment bond, unless the project at issue is an at-risk construction management contract. *Id.*

If the subject contract is an at-risk construction management contract, only persons having a direct contractual relationship with the party furnishing the payment bond (first-tier subcontractors) shall have a right of action upon the payment bond. Okla. Stat. Ann. tit. 61, § 2(B)(2) [Lexis]. An at-risk construction management contract is one in which the construction manager acts as consultant to the owner in the development and design phases, but as the equivalent of a general contractor during the construction phase. PHILIP L. BRUNER AND PATRICK J. O'CONNOR, JR., 2A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 6:13 (2022).

C. Notice Required

Notice of claim is required as a condition precedent to suit when the claimant has a direct contractual relationship with a subcontractor but no contractual relationship (express or implied) with the contractor furnishing the bond. Okla. Stat. Ann. tit. 61, § 2(B)(1) [Lexis]. Claimants must give written notice to the contractor and surety on the payment bond within ninety (90) days from the date on which the persons last performed labor or furnished the last of the supplies for which the claim is made. *Id.*; *G.A. Mosites Co. of Fort Worth, Inc. v. Aetna Cas. & Sur. Co.*, 545 P.2d 746 (Okla. 1976) [Lexis].

This notice must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed. *Id.* The notice must be addressed to the contractor at its place of business and served by registered or certified mail, postage prepaid with a copy sent to the surety or sureties on the payment bond. *Id.* A payment

bond claimant having a direct contractual relationship with the party furnishing the bond on an at-risk construction management contract must comply with the same notice requirements. Okla. Stat. Ann. tit. 61, § 2(B)(2) [Lexis].

D. Coverage

1. Labor

Payment bond coverage is extended to *every party* who supplied labor or materials to a public project. *Richards and Conover Steel Co. v. Neilsons, Inc.*, 755 P.2d 644, 648 (Okla. 1988) [Lexis]. The protections afforded under a payment bond are not limited to contractors with a direct contractual relationship (first-tier subcontractors) with the prime contractor. *Id*.

2. Material

Materials are covered by a payment bond if they are "consumed" or used in the project. *Mid-Continent Cas. Co. v. P & H Supply, Inc.*, 490 P.2d 1358 (Okla. 1971) [Lexis]. In *Mid-Continent*, the Supreme Court of Oklahoma held that a claimant makes a prima facie case that material was "consumed" in a public project and therefore covered under a bond when he or she shows: (1) a material was sold to be used in a project; (2) the material was delivered to the jobsite; (3) the project was constructed; and (4) some evidence the material was used in the construction of the project. A claimant can demonstrate materials were consumed in a project without having to prove delivery of the materials to the jobsite if, under the circumstances of the case, the record supports no other presumption. *Id*.

When material has been delivered to a jobsite, a rebuttable presumption is created that it has been consumed and therefore covered by the project's bond. Materials that were not delivered to the jobsite are not presumed to have been used in the public works project. There is no payment bond liability for materials furnished on public works project that were not used in the construction of the project. *Id.*

3. Equipment

Oklahoma courts extend the bond liability for sureties to "all indebtedness the contractor occurs" encompassing costs incurred related to equipment "consumed" for a project. Okla. Stat. Ann. tit. 61, § 1 [Lexis]; *Equip. World, Inc. v. Int'l Fid. Ins. Co.*, 90 P.3d 590, 592 (Okla. Civ. App. Div. 4, 2004) [Lexis]. Courts extend this liability liberally.

a. Repairs

Bond coverage extends to repairs of equipment rented to carry out the performance of a public project. *Equipment World*, *supra*, 90 P.3d at 592 [Lexis]. If a surety agrees to keep rented equipment in good working conditions, the surety is responsible for damage that occurs to the equipment during its use at the bonded project. *Id*. A surety is responsible for repairs, even if the damages are in excess of normal wear and tear and the equipment is no longer being used for the project. *Id*. Courts extend bond coverage to "all indebtedness the contractor occurs" liberally

unless tailored by the language of the bond. *Id*. Bond language can limit coverage to exclude repairs necessitated by extraordinary damages or tortious acts. *See id*.

b. Rentals

Rental expenses for equipment, parts and appliances necessary for the performance of a public works project can be payable under a payment bond claim. A surety's obligation to pay all indebtedness incurred by a contractor may include interest if called for in an equipment lease contract. *See Equipment World*, *supra*, 90 P.3d at 593 [Lexis].

4. Other

a. Attorneys' Fees

Under Oklahoma law, attorneys' fees may only be awarded when authorized by statute or contract. *Builders Overhead Cranes v. Nashco Bldg. Co.*, 85 P.3d 851, 852 (Okla. Civ. App. Div. 3, 2003) [Lexis] (internal citation omitted). In *Nashco*, a subcontractor on a public works project for the University of Oklahoma was awarded attorneys' fees as against the prime contractor and payment bond surety pursuant to Okla. Stat. Ann. tit. 12, § 936 [Lexis], which provides for reasonable attorneys' fees to the prevailing party "[i]n any civil action to recover for labor or services rendered, or on an open account … or contract relating to the purchase or sale of goods, wares or merchandise[.]"

Depending on the language of the bond, Oklahoma will at times allow for attorneys' fees and beyond the penal limit of the bond. *Truax v. Capitol Life Ins. Co.*, 26 P.2d 755 (Okla. 1933) [Lexis].

b. Interest

A surety's obligation to pay all indebtedness incurred by a contractor may include interest if called for in an equipment lease contract. *Equipment World*, 90 P.3d at 593.

E. Contracts Excluded

Payment bonds are not required for public contracts which do not exceed $100,000.00. Okla. Stat. Ann. tit. 61, § 1 [Lexis]

F. Time for Suit

Any action on a bond must be filed within one year from the date on which the labor or materials at issue were last performed or supplied. Okla. Stat. Ann. tit. 61, § 2(A) [Lexis]. This one-year limitations period and notice requirements only apply to the action on the bond. The timing of the contract action is governed by the general statute of limitations provisions. Failure to timely file suit is an absolute defense; however, the limitations period can be tolled by conduct on the part of the surety amounting to estoppel. *Phillips Petroleum Co. v. U.S. Fid. & Guar. Co.*, 442 P.2d 303 (Okla. 1968) [Lexis]. Abandonment of work on a public project does not

automatically start the tolling of the statute of limitations if there is no bond language creating or alluding to this stipulation. *Coyle v. U.S. Gypsum Co.*, 166 P. 394 (Okla. 1917) [Lexis].

G. Remarks

"A surety cannot be held beyond the express terms of [its] contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty." Okla. Stat. Ann. tit. 15, § 373 [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Under Oklahoma law, rights under private payment bonds are completely governed by the language of the bond. *Barbero v. Equitable Gen. Ins. Co.*, 607 P.2d 670 (Okla. 1980) [Lexis]. The bonds can dictate the time and limitations for suit on bond. *Id*. Parties may even contract to waive their rights to file mechanics' and materialmen's lien(s). *H2K Techs., Inc. v. WSP USA, Inc.*, 503 P.3d 1177 (Okla. 2021) [Lexis].

Whether plaintiffs are beneficiaries under the bond turns on the intention of the parties. *Barbero*, 607 P.2d at 673 [Lexis]. To determine the intention of the parties, courts take into consideration the bond and the contract incorporated in the bond and the circumstances under which bond was purchased. *Aetna Cas. & Sur. Co. v. Tucker*, 50 P.2d 339 (Okla. 1935) [Lexis]; *Gibbs v. Trinity Universal Ins. Co.*, 330 P.2d 1035 (Okla. 1958) [Lexis].

B. Time for Suit

The relevant statute of limitations period for private payment bond claims is set out by Oklahoma statutory law. The relevant portion of that statute states: "Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: 1. Within five (5) years: an action upon any contract, agreement or promise in writing; 2. Within three (3) years: an action upon a contract express or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment." Okla. Stat. Ann. tit. 12 § 95 [Lexis]. Contractual limitations period in surety bonds are prohibited in Oklahoma. The statute states: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void." Okla. Stat. Ann. tit. 15 § 216 [Lexis].

C. Case Annotations

A surety is liable to the same extent as the principal unless the owner of the project or obligee violates some provision of the bond or commits some act to prejudice the surety's rights. *U.S. Fid. & Guar. Co. v. Kern*, 62 P.2d 1173 (Okla. 1936) [Lexis].

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Or. Rev. Stat. ("ORS") 279C.380(1)-(5), which is part of Oregon's Little Miller Act, requires a successful bidder on a public improvement project to promptly execute and deliver to the contracting agency a payment bond "in a form approved by the contracting agency." (Public contracting statutes forming Oregon's Little Miller Act are codified at ORS 279C.005 through ORS 279C.807.) A "public improvement" is a project for the construction, reconstruction, or major renovation on real property by or for a public agency authorized by law to conduct a procurement; it generally does not include projects for which no funds of a contracting agency are directly or indirectly used, emergency work, minor alterations, and ordinary repair or maintenance that is necessary to preserve a public improvement. ORS 279A.010(1)(cc).

The Oregon Legislature intended Oregon's Little Miller Act to "substitute" for the statutory construction lien rights available on private construction contracts. *Great Western Coatings, Inc. v. Carboline Co.*, 746 F. Supp. 11, 13–14 (D. Or. 1990) [Lexis]. On projects regulated under Oregon's Little Miller Act, the payment bond requirement applies to public improvement contracts with a value, estimated by the contracting agency, of more than $100,000 or, regarding contracts for highways, bridges and transportation projects, more than $50,000. ORS 279C.380(5). The payment bond must be in an amount equal to the full contract price. ORS 279C.380(1)(b). Each payment bond must be executed solely by a surety company or companies holding a certificate of authority to transact a surety business in Oregon, and the bond may not constitute the surety obligation of an individual or individuals. ORS 279C.380(3). The payment bond must be payable to the contracting agency or to the public agency or agencies for whose benefit the contract was awarded, as specified in the solicitation documents. ORS 279C.380(3). If a contracting entity fails to require the contractor to furnish a payment bond when such a bond is required, the contracting body and the officers authorizing the contract "shall be" jointly liable for the labor and materials used in the performance of the work under the public improvement contract. ORS 279C.625(1) and (2).

An exception to the payment bond requirement is triggered when the public improvement is expressly exempted by (1) the Director of the Oregon Department of Administrative Services for state projects; (2) by the appropriate local contract review board for such local projects; and (3) by the Director of Transportation for Oregon transportation projects. ORS 279C.390(1). Nonetheless, the contracting agency may require a payment bond "even though the public improvement contract is of a class exempted." ORS 279C.390(2).

Oregon also recognizes an exception to the Little Miller Act payment bond requirement in "cases of emergency" or when "the interest or property" of the public agency "probably would suffer" material injury through delay or other cause. This exception applies if a declaration of the public agency that an emergency exists is made in accordance with rules adopted under ORS 279A.065. *See* ORS 279C.380(4).

Even when construction services are not considered to be a "public improvement" because no funds of a public agency are directly or indirectly used (except for participation that is incidental or related primarily to project design or inspection), the benefiting public body may nonetheless condition acceptance of the services on receipt of such protections as the public body considers to be in the public interest, including requiring a payment bond. ORS 279C.320(3).

Generally, parties who furnish labor, materials, or equipment for public contract work and who are not paid are entitled to assert a claim against the prime contractor's payment bond in accordance with the applicable statutes. ORS 279C.600. Such should be the outcome, regardless of the specific form of bond given by the prime contractor. *Dexter v. Homecomings Fin., L.L.C.*, 3:09-CV-00493-PK, 2012 U.S. Dist. LEXIS 70435, 2012 WL 1831787, at *9 (D. Or. Jan 24, 2012) [Lexis], *report and recommendation adopted*, 3:09-CV-00493-PK, 2012 U.S. Dist. LEXIS 70434, 2012 WL 1831513 (D. Or. May 17, 2012) [Lexis] (the court discussed that a breach of contract claim "would merely serve to enforce a right of action created by statute . . . [and] where the surety bond is required by statute, the contours of liability on . . . the bond are dictated by statute") (citing *Gen. Elec. Credit Corp. v. United Pac. Ins. Co.*, 80 Or. App. 129, 134–35, 722 P.2d 15, 18 (Or. Ct. App. 1986) [Lexis], *rev. den.*, 302 Or. 86 (Or. 1986) [Lexis]).

B. Tiers Covered

Oregon has extended Little Miller Act payment bond claim rights to a broad class of claimants, recognizing that such claimants have rights to assert claims on payment bonds irrespective of privity and without reference to the tiers from which their claims arise. 1 FIFTY ST. CONSTR. LIEN & BOND LAW, § 38.03 Statutory Bonds, 1 JW-CLBL § 38.03 (Oregon) (2023 Ed.) (Thomson Reuters 2023). The Oregon Supreme Court has liberally construed Oregon public contract law to "'insure the payment of every person who should supply labor or material for the prosecution of any public work.'" *Oregon Willamette Lumber Corp. v. Lincoln Cnty.*, 232 Or. 540, 546, 376 P.2d 422, 425 (Or. 1962) [Lexis] (citing and quoting *Fitzgerald v. Neal*, 113 Or. 103, 110, 231 P. 645, 648 (Or. 1924) [Lexis] ("As these statutes were enacted for the benefit of the public, they should be liberally construed to effectuate the purpose for which they were enacted") (citation omitted)).

All public improvement contracts in Oregon must contain written terms and conditions requiring the prime contractor to "promptly" make payments as they become due "to all persons supplying to the contractor labor or material for the performance of the work . . ." ORS 279C.505(1)(a). Parties that furnish labor, materials, or equipment for public contract work, or having a direct contractual relationship with the contractor or with any subcontractor, who have not been paid in full generally can assert a claim against the prime contractor's payment bond in accordance with the statute. ORS 279C.600. Those eligible to assert such payment bond claims also include assignees of the prime contractor and subcontractors, as well as persons claiming moneys due to the State for payment of workers' compensation coverage, unemployment insurance, or other withholding and payroll tax liabilities, as set forth in the statute. ORS 279C.600. Additionally, persons furnishing medical, hospital, or surgical care to employees of a contractor or subcontractor are authorized to assert a claim on the prime contractor's bond. ORS 279C.620.

C. Notice Required

Oregon's Little Miller Act does not mandate any notice of commencement of work, deliveries, or other pre-claim notice. Nonetheless, a notice of claim against the payment bond at the completion of the claimant's performance is necessary.

A notice of claim on a statutory payment bond must be in writing and signed by the person making the claim or that person's attorney. ORS 279C.605(5); *see also* *State ex rel. Town Concrete Pipe, Inc. v. Andersen*, 264 Or. 565, 571, 505 P.2d 1162, 1165 (Or. 1973) [Lexis] (signature of the claimant's attorney on the notice of claim `"is sufficient compliance with the statute") (construing former ORS 279C.528(3)). Notice of claim against a payment bond surety must be provided to the contractor and the contracting agency by registered or certified mail, or hand delivered, within 180 days after the claimant last furnished labor, materials, or equipment, or within 180 days after the worker listed on the notice of claim by the Commissioner of the Bureau of Labor and Industries last provided labor. ORS 279C.600(1)(b); ORS 279C.605(1); *State ex. rel. Robert Warren Trucking, LLC v. Smith & Smith Excavation, Inc.*, 280 Or. App. 766, 777, 386 P.3d 112, 118–119 (Or. Ct. App. 2016) [Lexis] (provider timely provided notice of its claim when it did so within 180 days of day that it last provided labor or furnished materials for performance of work provided for in port project). The notice of claim may be sent or delivered to the prime contractor at any place the prime contractor resides, maintains an office, or conducts business. ORS 279C.605(1). In the event the claim is for a required contribution to a fund of an employee benefit plan, however, the notice must be sent or delivered within 200 days after the employee last provided labor or materials. ORS 279C.605(2). Delivery of replacements or corrective parts can constitute the "last material furnished" and, therefore, trigger or restart the statutory notice of claim period. *See e.g.*, *City of The Dalles, Or. ex rel. Taylor Elec. Supply, Inc. v. D'Lectric Co.*, 105 Or. App. 46, 52, 803 P.2d 771, 774 (Or. Ct. App. 1990) [Lexis], *rev. den.*, 311 Or. 261 (Or. 1991).

The written notice of claim must be in a form substantially similar to the form set forth in the statute. ORS 279C.605(3). Nevertheless, substantial compliance with the statutory notice provision can be sufficient to preserve claims against a payment bond if the owner, contractor, and surety had actual notice of the claim. *Sch. Dist. No. 1, Multnomah Cnty. ex rel. Lynch Co. v. A. G. Rushlight & Co.*, 232 Or. 341, 353, 375 P.2d 411, 416 (Or. 1962) [Lexis]. Failure to satisfy the notice of claim statutory requirements will preclude recovery on a suit against the prime contractor's public works payment bond. *See e.g.*, *Great W. Coatings, Inc. v. Carboline Co.*, 746 F. Supp. 11, 13 (D. Or. 1990) [Lexis] (letter sent by supplier to bond surety for public contractor did not satisfy Oregon's statutory notice requirement for claim against contractor's public works payment bond, thus precluding surety's liability to supplier).

D. Coverage

Oregon's Little Miller Act "being remedial in its nature, should be liberally construed to effectuate its purpose." *State ex rel. Pegan v. Am. Sur. Co. of New York*, 137 Or. 394, 402, 300 P. 511, 514 (Or. 1931) [Lexis] (interpreting former Oregon Code section 67-1101); *see also* 18 Or. Op. Atty. Gen. 533 (1938) [Lexis] (the statute is remedial and should be liberally construed). The role of courts "in interpreting the Little Miller Act is to give effect to its text, liberally construing that text to give effect to the purpose for which the legislature enacted the Little Miller Act: to protect suppliers of materials and labor for a public works project by providing them with an alternative source of payment." *State ex rel. Robert Warren Trucking, LLC v. Smith & Smith*

Excavation, Inc., 280 Or. App. 766, 778, 386 P.3d 112, 119–20 (Or. Ct. App. 2016) [Lexis] (citations and internal quotations omitted). An action to recover under a payment bond can be successfully prosecuted under theories of breach of contract or quantum meruit. *State v. Ross Bros. & Co.*, 268 Or. App. 438, 449, 342 P.3d 1026, 1032 (Or. Ct. App. 2015) [Lexis], *rev. den.*, 357 Or. 551 (2015), and *rev. den.*, 357 Or. 743 (Or. 2015).

Because Oregon's Little Miller Act is modeled after the federal Miller Act, federal court decisions can be a guide to the Oregon Little Miller Act's interpretation. *Sch. Dist. No. 45, Multnomah Cnty. v. Hallock*, 86 Or. 687, 694, 169 P. 130, 133 (Or. 1917) [Lexis]. Courts applying Oregon law recognize, although "it is appropriate to consider case law under the federal Miller Act in interpreting the Little Miller Act, such case law is not binding and, in particular, does not control over the plain terms of Oregon's law." *Smith & Smith Excavation*, 280 Or. App. at 778, 386 P.3d 112 at 119 [Lexis] (examining federal case law in interpreting a notice provision of the Little Miller Act but noting that the question of the proper interpretation of the Little Miller Act ultimately hinges on the wording and purpose of the Oregon statute) (citations and footnotes omitted).

1. Labor

a. Professional Services

Parties that furnish labor for public contract work or having a direct contractual relationship with the contractor or with any subcontractor, who have not been paid in full generally can assert a claim against the prime contractor's payment bond in accordance with the statute. ORS 279C.600. "Labor" is broadly defined and "[a] person providing medical, surgical or hospital care services or other needed care and attention, incident to sickness or injury, to the employees of a contractor or subcontractor on a public contract is deemed to have performed labor on the public contract for the purposes of ORS 279C.600 to 279C.625." ORS 279C.620. It presently is unclear whether architects and engineers working under contract with parties other than the public agency owner have the right to assert a claim on the prime contractor's payment bond. *See, e.g., Jacobs Assocs. v. Argonaut Ins. Co.*, 282 Or. 551, 554, 580 P.2d 529, 530 (Or. 1978) [Lexis] (construing a performance bond on a private project, the Oregon Supreme Court signaled that lower-tier design professionals might have payment bond claim rights, as third-party beneficiaries, for their services performed).

b. Union Benefits

With few exceptions, prevailing wage rates must be paid to all workers performing Oregon public improvement contracts. ORS 279C.840. If the prevailing wage rate is not paid to the principal's workers, a surety may be liable for the amount of the workers' unpaid minimum wages, including all "fringe benefits," and an additional amount equal to the unpaid wages as liquidated damages. ORS 279C.855(1). The workers may bring an action to enforce liability on the contractor's payment bond as provided in ORS 279C.610. *See* ORS 279C.855(2).

"Fringe benefits" means:

(a) Contributions that a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program; and

(b) Costs that a contractor or subcontractor may reasonably be anticipated to incur in providing the following items, except for items that federal, state or local law requires the contractor or subcontractor to provide:

(A) "[b]enefits to workers pursuant to an enforceable written commitment to the workers to carry out a financially responsible plan or program" for: (i) medical or hospital care; (ii) pensions on retirement or death; or (iii);

(i) Medical or hospital care;

(ii) Pensions on retirement or death, or

(B) Insurance to provide the above-described benefits;

(C) Unemployment benefits;

(D) Life insurance;

(E) Disability and sickness insurance or accident insurance;

(F) Vacation and holiday pay;

(G) Costs of apprenticeship or other similar programs; or

(H) Other bona fide fringe benefits.

ORS 279C.800(1)(a) and (b).

When, upon investigation, the Commissioner of the Bureau of Labor and Industries has received information indicating that one or more workers providing labor on a public works bond, including subcontractor's workers, have not been paid in full at the prevailing rate of wage or overtime wages, the Commissioner has a right of action first on the contractor's or subcontractor's public works bond required under ORS 279C.836 and then, for any amount of a claim not satisfied by the public works bond, on the contractor's payment bond. ORS279C.600(2). The Commissioner's right of action exists without necessity of an assignment and extends to workers on the project who are not identified when the written notice of claim is given, but for whom the Commissioner has received information indicating that the workers have provided labor on the public works and have not been paid in full. *Id*. The Commissioner "shall" give notice of the claim, as prescribed in ORS 279C.605, to the contracting agency, the Construction Contractors Board, the contractor and, if appliable, the subcontractor. The Commissioner may not make claim for the same unpaid wages against more than one payment bond. *Id*.

2. Material

The Oregon Supreme Court has liberally construed Oregon public contract law to "'insure the payment of every person who should supply labor or material for the prosecution of any public work.'" *Oregon Willamette Lumber Corp. v. Lincoln Cnty.*, 232 Or. 540, 546, 376 P.2d 422, 425 (Or. 1962) [Lexis]. The term "material" is defined and applied broadly; it includes replacements and corrective parts. When "material" is ordered for the public works project and delivered pursuant to the order, absent evidence of "sham" deliveries, the fact the material was not used on the project "is immaterial." *City of The Dalles, Or. ex rel. Taylor Elec. Supply, Inc. v. D'Lectric Co.*, 105 Or. App. 46, 52, 803 P.2d 771, 774 (Or. Ct. App. 1990) [Lexis], *rev. den.*, 311 Or. 261 (Or. 1991).

3. Equipment

a. Repair

As defined in Oregon's Public Contracting Code, a "public improvement" is a project for the construction, reconstruction, or major renovation on real property by or for a public agency authorized by law to conduct a procurement; it generally does not include projects for which no funds of a contracting agency are directly or indirectly used, emergency work, minor alterations, and ordinary repair or maintenance that is necessary to preserve a public improvement. ORS 279A.010(1)(cc).

In *State ex rel. Robert Warren Trucking, LLC v. Smith & Smith Excavation, Inc.*, Oregon's intermediate appellate court held that Oregon's Little Miller Act, rather than the federal Miller Act, governed claims to collect unpaid amounts under the two payment bonds associated with Project. 280 Or. App. 766, 774, 386 P.3d 112, 117 (Or. Ct. App. 2016) [Lexis] (citing in part ORS 279A.030). The court reasoned that the federal Miller Act pertains only to contracts awarded for construction, alteration, or repair of any public building or public work of the Federal Government.

b. Rentals

Under a highway contractor's public works construction bond, a third party that rented earthmoving machinery to a logging company (a subcontractor for the construction of a state park facility) brought a claim to recover money alleged to be due from the subcontractor for the equipment rentals. The consent of the Highway Commission to all subcontracts was a requirement of the primary contract between the Highway Commission and the general contractor. The trial court ruled in favor of the bonding company and rejected the equipment supplier's claim on the ground the claimant had failed to plead and prove the underlying subcontracts had received the prior written consent of the State Highway Commission and of the bonding company. The Oregon Supreme Court reversed the trial court judgment and remanded the action, holding the bonding company was not relieved of liability on the bond simply because the subcontractor that had not paid his bills to the equipment supplier also had not secured highway department approval for entering the subcontract before contracting for the materials. *State ex rel. Thuney Logging, Inc. v. Fireman's Fund Ins. Co.*, 254 Or. 145, 146, 458 P.2d 413, 413 (Or. 1969) [Lexis] (interpreting former ORS 279.510).

4. Other

a. Attorneys' Fees

With respect to recovery of attorneys' fees by a claimant under a payment bond, the claimant may recover fees and costs in an action against the bond only if authorized by statute or contract. *Oregon Occupational Safety & Health Div. v. Don Whitaker Logging, Inc.*, 123 Or. App. 498, 500, 861 P.2d 368, 369 (Or. Ct. App. 1993) [Lexis], *rev. den.*, 318 Or. 326 (1994). Oregon's Little Miller Act does not contain an attorney fee provision and, as a result, courts apply the attorneys' fee provision relating to insurance providers, set forth in ORS 742.061(1). *See Oregon State Highway Comm'n v. DeLong Corp.*, 9 Or. App. 550, 585, 495 P.2d 1215, 1231–33 (Or. Ct. App. 1972) [Lexis]. Under that statutory provision, a successful claimant is eligible for an award

of reasonable attorneys' fees if: (1) Settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of the state upon any policy of insurance of any kind or nature; and (2) The claimant's recovery exceeds the amount of any tender of payment made by the defendant-insurer in the action. ORS 742.061(1). When a claimant is eligible for a fee award and demonstrates that the request for fees is reasonable, the court does not have discretion to deny the claimant's fee request. *Dockins v. State Farm Ins. Co.*, 330 Or. 1, 6 n. 7, 997 P.2d 859, 862 n.7 (Or. 2000) [Lexis]. Nonetheless, the insurance company is not liable for attorneys' fees if it accepts coverage; the only disputed issue is the amount of benefits due and owing to the insured claimant, and the insurer consents to binding arbitration. ORS 742.061(2).

Concerning collection of attorneys' fees by a surety defending a bond claim, a surety may obtain an award of fees and costs in defending an action on a bond if the plaintiff's recovery does not exceed the amount of any tender made by the defendant surety in the action. ORS 742.061(1). In the event a surety is awarded fees and costs, such fees and costs will first be applied to reimburse the contractor or subcontractor for expenses and costs incurred in defending the action and then, if any funds remain, the surety will recover such funds. *Id*. Moreover, the surety is not required to make any tender in order to recover attorney fees and costs under the statute. *N. Marion Sch. Dist. No. 15 ex rel. Trejo v. Acstar Ins. Co.*, 206 Or. App. 593, 605, 138 P.3d 876, 883 (Or. Ct. App. 2006) [Lexis], *rev. den.*, 344 Or. 670 (Or. 2008).

In connection with indemnity actions, as with an action on any other type of contract, an award of attorneys' fees is governed by the wording of the agreement itself. *City of Portland v. George D. Ward & Assocs., Inc.*, 89 Or. App. 452, 459–60, 750 P.2d 171, 176 (Or. Ct. App. 1988) [Lexis], *rev. den.*, 305 Or. 672 (Or. 1988).

b. Interest

A surety on a public works bond is liable for interest to unpaid laborers or materialmen "from the date their charges become due." *State ex rel. J. F. Konen Constr. Co. v. U. S. Fid. & Guar. Co.*, 234 Or. 554, 561, 380 P.2d 795, 798 (Or. 1963) [Lexis], *on reh'g*, 234 Or. 554, 382 P.2d 858 (Or. 1963) [Lexis]. Regarding awards of prejudgment interest on claims against a surety, without an express contract in writing establishing a different rate, prejudgment interest is allowed at 9% per annum on money after it becomes due and payable, on money received to the use of another and retained beyond a reasonable time without the owner's express or implied consent, and money due or to become due when there is a contract to pay interest and no rate is specified. ORS 82.010(1); *see e.g.*, *McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.*, 345 Or. 272, 287, 193 P.3d 9, 18–19 (Or. 2008) [Lexis]. However, prejudgment interest is only allowed when the monetary damages are "ascertained or easily ascertainable." *Spaid v. 4-R Equip., LLC*, 252 Or. App. 228, 235, 287 P.3d 1138, 1143 (Or. Ct. App. 2012) [Lexis], *rev. den.*, 353 Or. 280 (Or. 2013). An award of prejudgment interest may be proper even though damages are not ascertainable until issues of fact have been decided by the jury. *Strader v. Grange Mut. Ins. Co.*, 179 Or. App 329, 339, 39 P.3d 903, 909 (Or. Ct. App. 2002) [Lexis], *rev. den.*, 334 Or. 190 (2002).

Post-judgment interest accrues from the date of entry of the judgment unless the judgment specifies a different date. ORS 82.010(2)(a). The interest rate is 9% per anum and accrues on both the principal amount, including attorney fees and costs, and on any interest that accrued before the date of entry of judgment. ORS 82.010(2)(b)-(d). If judgment is entered on a contract bearing interest at a rate higher than 9% per anum, the judgment "shall" bear interest at the contractual

rate. ORS 82.010(2)(e). Interest on the judgment is calculated as "simple interest," unless otherwise provided by contract. ORS 82.010(b).

c. Financing Charges

Oregon's Little Miller Act does not expressly provide for the recovery of financing charges. Nonetheless, the Act does provide that some finance charges imposed under a contract subject to ORS 82.010 may be included in any interest calculation. *See* ORS 82.020(1) (providing that when an agreement obligates the borrower to pay the lender charges such as any commission, bonus, fee, premium, penalty or other charge, "the same shall be deemed a part of the interest charged on such loan.").

d. Insurance Premiums

Although Oregon's Little Miller Act does not include a provision that insurance premiums are recoverable, Oregon courts have included insurance premiums as part of the "labor" that a contractor is entitled to lien. *Mathis v. Thunderbird Vill., Inc.*, 236 Or. 425, 432, 389 P.2d 343, 346–47 (Or. 1964) [Lexis] (citing *Paget v. Peters*, 133 Or. 608, 619, 286 P. 983, 987 (Or. 1930) [Lexis], the court held that "a premium for insurance, paid by the contractor, and covering the possible liability of the contractor and landowner to laborers on the job was a lienable item")).

e. Loans

Oregon's Little Miller Act does not specifically address the recovery of loans. Oregon courts, however, have declined to construe loaned money as recoverable through a surety, even when used to pay for materials and labor. *See State ex rel. Hagquist v. U.S. Fid. & Guar. Co.*, 125 Or. 13, 33, 265 P. 775, 782 (Or. 1928) [Lexis] (holding that money loaned to further the project was not recoverable from the surety); *State ex rel. Weiser Loan & Tr. Co. v. Aetna Cas. & Sur. Co.*, 125 Or. 194, 196, 265 P. 782, 782 (Or. 1928) [Lexis] (same); c*f*, *U.S. Fid. & Guar. Co. v. Klamath Cnty.*, 143 Or. 471, 480, 23 P.2d 133, 136 (Or. 1933) [Lexis] (the surety's rights are superior to those of one who has voluntarily loaned money to the contractor where the surety takes over and completes the contract). Thus, money loaned, even in connection with bonded projects, generally is not recoverable from the surety.

f. Delay Damages

Under ORS 279C.315(1), clauses that purport to waive, release, or otherwise extinguish the rights of a contractor to damages or remedies arising out of an unreasonable delay are void and unenforceable as a matter of public policy. Generally, the surety's liability for any delay damages will be determined by construing the bond and the contract together. *See Biomass One, L.P. v. S-P Constr.*, 103 Or. App. 521, 529, 799 P.2d 152, 157 (Or. Ct. App. 1990) [Lexis]. The surety's liability for any delay damages is therefore determined by the contract and bond; however, a waiver or "no-damages-from-delay-clause" in a public contract generally will not be enforceable.

g. Profits

Oregon's Little Miller Act does not expressly address the recovery of profits from a surety. Nevertheless, the terms of the contract will control. Where a contract is materially breached or wrongfully terminated, the claimant is entitled to recover its lost profits. *Maclean & Assocs., Inc. v. American Guar. Life Ins. Co.*, 85 Or. App. 284, 296, 736 P.2d 586, 594 (Or. Ct. App. 1987) [Lexis], *rev. den.*, 304 Or. 55, 742 P.2d 1186 (Or. 1987). To prevail on a claim for loss profits, the claimant must show both the existence and the amount of lost profits with reasonable certainty. *State ex rel. Dep't of Transp. v. Scott*, 59 Or. App. 25, 30, 650 P.2d 158, 162 (Or. Ct. App. 1982) [Lexis]. However, if it is shown that a loss of profits probably occurred, mere uncertainty as to the amount lost will not preclude recovery. *Krause v. Bell Potato Chip Co.*, 149 Or. 388, 394, 39 P.2d 363, 366 (Or. 1935) [Lexis].

h. Extracontractual

Under Oregon law, there is an implied duty of good faith and fair dealing in the performance and enforcement of every contract. *Wenzel v. Klamath Cnty. Fire Dist. No. 1*, 1:15-CV-1371-CL, 2017 U.S. Dist. LEXIS 198914, 2017 WL 8948595, at *16 (D. Or. Aug. 29, 2017) [Lexis], *report and recommendation adopted*, 1:15-CV-1371-CL, 2017 U.S. Dist. LEXIS 192200, 2017 WL 5599478 (D. Or. Nov. 21, 2017) [Lexis] (citing in part *Sheets v. Knight*, 308 Or. 220, 233, 779 P.2d 1000, 1008 (Or. 1989) [Lexis], *abrogated on other grounds by McGanty v. Staudenraus*, 321 Or. 532, 551, 901 P.2d 841, 853 (Or. 1995) [Lexis]). This general obligation applies to actions taken in accordance with bond agreements where it is consistent with and in furtherance of the agreed-upon terms of the contract or where it effectuates "the reasonable contractual expectations of the parties." *City of Portland v. George D. Ward & Assocs., Inc.*, 89 Or. App. 452, 456, 750 P.2d 171, 174 (Or. Ct. App. 1988) [Lexis], *rev. den.*, 305 Or. 672 (Or. 1988). A surety may be liable for breach of contract if it violates its duty of good faith to the principal by settling with the obligee before reasonably investigating the obligee's claims against the principal or before reasonably taking into account the principal's counterclaims and defenses. *Id.*

In the context of insurance law, an insurance adjuster also must act in good faith and with due care in the negotiation and settlement of claims on behalf of its insured parties. ORS 746.230(1)(f). The insurer has a duty to exercise at least the same degree of care as to the insured's interests as it exercises as to its own. *Grumbling v. Medallion Ins. Co.*, 392 F. Supp. 717, 718 (D. Or. 1975) [Lexis], *aff'd.*, 545 F.2d 686 (9th Cir. 1976). Under ORS 746.230, an insurance adjuster's good faith and due care obligation extends to claims by the insured against the insurance company and to claims by third parties against the insured. *Mayes v. Am. Hallmark Ins. Co. of Texas*, 1:21-CV-01198-CL, 2021 U.S. Dist. LEXIS 248255, 2021 WL 6127887, at *4 (D. Or. Nov. 15, 2021) [Lexis], *report and recommendation adopted*, 1:21-CV-01198-CL, 2021 WL 6125796 (D. Or. Dec. 28, 2021) (citing *Farris v. U. S. Fid. & Guar. Co.*, 284 Or. 453, 457, 587 P.2d 1015, 1017 (1978) [Lexis]).

If an insurance adjuster fails to exercise good faith and due care, the insurance company may be liable in negligence for a judgment in excess of the insurance policy's liability limitation. *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or. 514, 524, 693 P.2d 1296, 1303 (Or. 1985) [Lexis]; *see also Goddard ex rel. Estate of Goddard v. Farmers Ins. Co. of Oregon*, 173 Or. App. 633, 641, 22 P.3d 1224, 1229 (Or. Ct. App. 2001) [Lexis], *rev. den.*, 332 Or. 631 (Or. 2001).

Furthermore, an insured-claimant bringing a breach of contract claim against an insurance company may also allege a negligence *per se* claim, seeking to recover emotional distress damages, for failing to follow the standard of care that ORS 746.230 requires. *Moody v. Oregon Cmty. Credit Union*, 317 Or. App. 233, 244–48, 505 P.3d 1047, 1054–57 (Or. Ct. App. 2022) [Lexis], *rev. allowed*, 369 Or. 855 (2022).

Awards of attorneys' fees, costs, and interest may be taxed in excess of the penal sum of the bond. ORS 742.061(1); *see also U.S. Fid. & Guar. Co. v. Zidell-Steinberg Co.*, 151 Or. 538, 555, 50 P.2d 584, 591 (Or. 1935) [Lexis], *as modified*, 151 Or. 538, 51 P.2d 687 (Or. 1935).

E. Contracts Excluded

Under Oregon's Little Miller Act, contracts for less than $100,000 are excluded from payment bond requirements; as are contracts for highways, bridges, and other transportation projects in amounts less than $50,000. ORS 279C.380(5). Additionally, certain governmental agencies are allowed to exempt certain contracts from all or a portion of the requirements for a payment bond. ORS 279C.390.

F. Time for Suit

An action on a contractor's public works bond or payment bond must be brought "no later than two years after the person last provided labor or materials or two years after the worker listed in the commissioner's notice of claim last provided labor." ORS 279C.610(3). Before the action may be brought, the claimant must provide written notice of its claim "…no later than 180 days after the day the person last provided labor or furnished materials or 180 days after the worker listed in the notice of claim by the Commissioner of the Bureau of Labor and Industries last provided labor." ORS 279C.605(1).

G. Remarks

The general rule under Oregon's Little Miller Act "is that the surety's liability under the payment bond is measured by the contractor's liability to the claimant for the labor or materials provided." *State v. Ross Bros. & Co.*, 268 Or. App. 438, 448, 342 P.3d 1026, 1032 (Or. Ct. App. 2015) [Lexis], *rev. den.* 357 Or. 551 (2015), *and rev. den.* 357 Or. 743 (2015). The purpose of Oregon's Little Miller Act is to "protect suppliers of materials and labor for a public works project by providing them with an alternative source of payment, as would a construction lien for a private project." *N. Marion Sch. Dist. #15 ex rel. Trejo v. Acstar Ins. Co.*, 343 Or. 305, 312, 169 P.3d 1224, 1228 (Or. 2007) [Lexis]. Oregon's Little Miller Act specifically requires that successful bidders on public improvement contracts secure a payment bond "in an amount equal to the full contract price, solely for the protection of claimants under ORS 279C.600." ORS 279C.380(1)(b).

Oregon's Little Miller Act, in contrast to the federal Miller Act, will govern state facilitated public bond projects unless (1) federal law is applicable to the project and (2) the federal law conflicts with state public contracting law, or federal law imposes additional requirements that are not provided under state law. ORS 279A.030; *see also State ex. rel. Robert Warren Trucking, LLC v. Smith & Smith Excavation, Inc.*, 280 Or. App. 766, 774, 386 P.3d 112, 117 (Or. Ct. App. 2016) [Lexis] (holding Oregon law applied to bond claims, not federal law, and citing the two requirements for federal law to apply under ORS 279A.030).

H. Case Annotations

Effect of Conditional Payment Clause

A surety's liability on payment bond claims is measured by the general contractor's liability to subcontractors and suppliers for labor and materials provided for the project. *State v. Ross Bros. & Co.*, 268 Or. App. 438, 342 P.3d 1026 (Or. Ct. App. 2015) [Lexis] *rev. den.* 357 Or. 551 (2015), *and rev. den.* 357 Or. 743 (2015). A conditional payment bond, or "pay-if-paid" clause, when present, will not void the surety's liability if amounts are owed for services or materials provided by a subcontractor or supplier. *Id.*

A conditional "pay-when-paid" clause must be unambiguous and clear that a condition precedent must occur before the clause will be enforceable. *Mignot v. Parkhill*, 237 Or. 450, 391 P.2d 755 (Or. 1964) [Lexis]. Where a "pay-when-paid" clause is ambiguous or otherwise unclear, courts will construe the provision "…merely for the purpose of fixing the time at which performance shall become due…" *Id.* at 457–58, 391 P.2d at 759.

Absent an express and clear contract term setting forth a "pay-when-paid" clause, there is no requirement that the general contractor be paid before the general contractor is required to pay subcontractors. *Shelter Prods., Inc. v. Steelwood Constr., Inc.*, 257 Or. App. 382, 405, 307 P.3d 449, 462 (Or. Ct. App. 2013) [Lexis].

Equitable Subrogation

A surety that has expended monies pursuant to the requirements of a payment bond has an equitable right to subrogation, and those rights are enforceable, even against the trustee of the bankrupt principal, so long as the bond was executed before period of preference. *United Pac. Ins. Co. v. First Nat'l Bank of Oregon*, 222 F. Supp. 243 (D. Or. 1963) [Lexis]; *see also Wasco Cnty. v. New England Equitable Ins. Co.*, 88 Or. 465, 172 P.126 (Or. 1918) [Lexis] ("A court of equity grants the right of subrogation because the surety has paid the debt of the principal..."); *U.S. Fid. & Guar. Co. v. Bramwell*, 108 Or. 261, 277, 217 P. 332, 338 (Or. 1923) [Lexis] (holding the surety had a valid claim and priority for equitable subrogation to available assets and funds, even where principal became insolvent.)

A bank, as the issuer of a standby letter of credit, was determined by the court to be a *de facto* surety. When the bank made payment to the beneficiary of the letter after the principal debtor defaulted, the bank was entitled to assert an equitable contribution claim against the principal debtor to recover its payment. *Ochoco Lumber Co. v. Fibrex & Shipping Co.*, 164 Or. App. 769, 777, 994 P.2d 793, 797 (Or. Ct. App. 2000) [Lexis], *rev. den.*, 331 Or. 193 (2000).

§ 2.0 PRIVATE PAYMENT BONDS

Contractors in Oregon, whether residential or commercial, are required to file bonds with the State of Oregon that will pay amounts as determined under ORS 701.145 and 701.146, respectively. ORS 701.068(3) (setting forth bonding requirements for residential and commercial contractors). The bond required under ORS 701 *et seq.* is "for the exclusive purpose of payment of amounts for which the board has determined the surety to have responsibility." ORS 701.068(7). Such are required for the contractor to obtain and/or maintain their licenses. ORS 701.068(1). The required amount for bonding will vary depending upon the type of residential or commercial

contractor, but each of these required amounts are set forth within ORS 701.081 and 701.084, respectively.

Other than the specifics set forth in ORS Chapter 701, Oregon's statutes do not set forth requirements for private payment bonds.

A. Rules of Construction

In general, claims made under private payment bonds are governed by the terms that are set forth in the bond. Peter C. Halls, *Issues for Designers, Contractors, and Suppliers to Public Private Partnership Projects*, 30-Sum CONSTR. LAW. 22, 26 (2010) (citing Restatement (Third) of Suretyship and Guaranty § 14) ("The standards that apply to interpretation of contracts in general apply to interpretation of contracts creating secondary obligations.")).

B. Time for Suit

Under Oregon law, a party submitting a bond claim must do so within the period specified in the parties' contract and/or bond. *See Reedsport Sch. Dist. No. 105 v. Gulf Ins. Co.*, 210 Or. App. 679, 687, 152 P.3d 988, 992 (Or. Ct. App. 2007) [Lexis] (reversing in favor of defendant-surety and applying contractual two-year limitation to bar the plaintiff's claim). If no limitation period is included within the contract or bond, Oregon's six-year statute of limitations for contracts will apply. *See* ORS 12.080.

C. Case Annotations

Liability Delimited by Bond Terms

Common-law surety bonds—private bonds not required by statute—may be acquired to protect owners, contractors, and suppliers on private projects. Such common law bonds are characterized as binding contracts and analyzed according to the ordinary rules of contract interpretation. *Dexter v. Homecomings Fin., L.L.C.*, 3:09-CV-00493-PK, 2012 U.S. Dist. LEXIS 70435, 2012 WL 1831787, at *9 n. 6 (D. Or. Jan 24, 2012) [Lexis], *report and recommendation adopted*, 3:09-CV-00493-PK, 2012 U.S. Dist. LEXIS 70434, 2012 WL 1831513 (D. Or. May 17, 2012) [Lexis]. The wording of such common-law bonds controls all aspects of the bond, *i.e.*, such as defining who can assert a claim, stating the penal limits, providing contractual limitations periods, and identifying all the documents that may be incorporated into the terms of the bond. *Royal Indus., Inc. v. Harris*, 52 Or. App. 277, 282, 628 P.2d 418, 420–21 (Or. Ct. App. 1981) [Lexis] (discussing suretyship law). Moreover, if the wording of the bond is determined to be ambiguous, the language will be construed in favor of the bond claimant and against the compensated surety. *United Pac. Ins. Co. v. Gregory Timber Res., Inc.*, 129 F.3d 129 (9th Cir. 1997) [Lexis] (Oregon) (citing *Jacobs Assocs. v. Argonaut Ins. Co.*, 282 Or. 551, 558, 580 P.2d 529, 532 (Or. 1978) [Lexis] ("The universal rule is that a compensated surety is regarded as an insurer and the contract it draws will be construed most strongly against it")).

Defenses of Principal

a. Unenforceability of Underlying Contract

Defenses of lack of capacity of the principal and *ultra vires* of the underlying contract are available to the principal but are "generally unavailable to a surety." *Eagle Trading Co. v. Fed. Transp. Corp.*, No. CIV. 88-1172-FR, 1989 U.S. Dist. LEXIS 484, 1989 WL 4077, at *3 (D. Or. Jan. 12, 1989) [Lexis]; *see also* *City of Portland v. Bituminous Paving & Imp. Co.*, 33 Or. 307, 317, 52 P. 28, 31 (Or. 1898) [Lexis] (holding that where an underlying contract is void, unenforceable, or otherwise the product of *ultra vires*, the principal may not be liable, but the surety will remain liable for bonds issued when such bonds are given voluntarily by competent parties); Restatement (Third) of Suretyship and Guaranty § 34, cmt. c (1996) (noting that secondary obligor, such a surety, may raise any defense the principal may except for, among others, the unenforceability of the underlying contract); *Man-Data, Inc. v. B & A Auto, Inc.*, 247 Or. App. 429, 437, 270 P.3d 318, 323 (Or. Ct. App. 2011) [Lexis] (holding that a secondary obligor, such as a surety, may raise any defenses available to the principal, even if an assignment has been made.)

b. Insolvency of Principal

A principal's insolvency may relieve its liability, and at which point the surety will be looked to for any payments owed under the bonds on behalf of the principal. *Great W. Coatings, Inc. v. Carboline Co.*, 746 F. Supp. 11, 14 (D. Or. 1990) [Lexis]; *see also* *In re Liquidation of Bank of Woodburn*, 149 Or. 649, 654, 42 P.2d 740, 742–43 (Or. 1935) [Lexis] (noting that when a principal becomes insolvent or deceased, and where the principal's estate and assets are insufficient to pay debts owed by the principal which fall under the bonds, the surety is liable for those debts in accordance with the issued bonds.)

c. Setoff

Where a principal was owed more from the owner in unpaid contract services than the owner was entitled to collect for damages based on principal's breach, the surety and principal were allowed to set off the amount of damages such that, despite liability for breach by the principal, judgment was found for principal and surety for the difference in amount owed by owner less damages. *Westwood Corp., Devs. & Contractors v. Bowen*, 108 Or. App. 310, 317–18, 815 P.2d 1282, 1286 (Or. Ct. App. 1991) [Lexis], *rev. dismissed*, 312 Or. 589 (Or. 1992); *see also* *Williams v. Culver*, 30 Or. 375, 380, 48 P. 365, 367 (1897) [Lexis] (in an action on a promissory note, delivery of property by debtor to creditor, while not specified as a "payment" nonetheless acted as a defense to the action and could be used to set-off or otherwise satisfy the amounts due under the promissory note.).

Tribal Sovereign Immunity

In general, Native American tribes have immunity to claims in state and federal courts, unless Congress has authorized a right to initiate suit or the tribe has waived its immunity. *Chance v. Coquille Indian Tribe*, 327 Or. 318, 321, 963 P.2d 638, 639 (Or. 1998) [Lexis] (citing *Kiowa*

Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 118 S. Ct. 1700 (1998) [Lexis]). A waiver by a sovereign tribe will not be implied and must be expressly provided. *Id.* at 321, 963 P.2d at 639 (internal citation omitted). Merely including a contract clause stating the sovereign tribe *may* consent to being sued is not sufficient to show a waiver, without further action by the tribe demonstrating its intention to waive immunity. *Id.*

Where the United States government sued a contractor on behalf of a Native American tribe, the contractor was permitted to bring counterclaims for recoupment relating to the project without violating sovereign immunity because the government had consented to allow limited suits of that kind through the Tucker Act. *United States v. Timber Access Indus. Co.*, 54 F.R.D. 36, 40 (D. Or. 1971) [Lexis] (citing 28 U.S.C. § 1346(a)(2)).

PENNSYLVANIA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Pennsylvania regulates public payment bonds according to two statutory authorities: Pennsylvania's Little Miller Act, codified at 8 P.S. §§ 191–202 (the "Bond Law"), as well as 62 Pa. C.S. §§ 101–2311 (the "Procurement Code"). The Bond Law governs "contracting bod[ies]" such as officers, boards, and bureaus of the state, in addition to state-aided bodies such as municipal corporations and school districts. 8 P.S. § 193(a)-(b). It requires contractors on public projects exceeding $5,000 in costs to obtain a bond for 100% of the contract amount. *Id.*

On the other hand, the Procurement Code governs statutorily specified "purchasing agencies" such as turnpike commissions and state systems of higher education. 62 Pa. C.S. § 903(a). "Purchasing agency" is defined as "[a] Commonwealth agency authorized by [the Procurement Code] or by other law to enter into contracts for itself or as the agent of another Commonwealth agency." 62 Pa. C.S. §§ 102(a), 103. This statute requires contractors on projects costing between $25,000 and $100,000 to obtain a bond for 50% of the contract amount, and a bond for 100% of the contract amount on projects exceeding $100,000 in costs. *Id.*

No particular form of bond is required under either the Bond Law or the Procurement Code.

B. Tiers Covered

For projects subject to the Bond Law, the payment bond or "financial security" is "solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned for the prompt payment of all such material furnished or labor supplied or performed in the prosecution of the work." 8 P.S. § 193(a)(2); 8 P.S. § 193.1(a)(2). The scope of this protection is limited to first- and second-tier claimants. 8 P.S. § 193(a)(2); *see* *Lezzer Cash & Carry, Inc. v. Aetna Ins. Co.*, 537 A.2d 857, 860–61 (Pa. Super. Ct. 1988) [Lexis] (denying claim of third-tier subcontractor); *Nicholson Constr. Co. v. Standard Fire Ins. Co.*, 760 F.2d 74, 77 (3d Cir. 1985) [Lexis] (language in a payment bond issued for a Pennsylvania public project providing a cause of action to every person who, whether as a "subcontractor or otherwise," furnished material or services on the project, should not be read expansively to confer standing on a "subcontractor to a subcontractor, or three steps removed from the prime contractor."); *Gateco, Inc. v. Safeco Ins. Co. of Am.*, No. 05-2869, 2006 U.S. Dist. LEXIS 50313, 2006 WL 2077011 (E.D. Pa 2006) [Lexis] (third-tier subcontractors are too remote from the prime contractor); *Webster Brick Co., Inc. v. Fid. & Deposit Co. of Maryland*, 27 Pa. D.&C.3d 7 (Erie Co. C.C.P. 1983) [Lexis] (brick company that supplied bricks to material supplier middleman who in turn had contract with bonded prime contractor is not entitled to recover under statutory payment bond).

Similarly, for projects subject to the Procurement Code, the "payment bond shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded or to any of its subcontractors in the prosecution of the work provided for in the contract, whether or not the labor or materials constitute a component part of the construction." 62 Pa. C.S. § 903(b).

C. Notice Required

Pursuant to the Bond Law, a claimant with a direct contractual relationship with a subcontractor, but no direct contractual relationship with the relevant prime contractor, may only bring an action on a public payment bond after furnishing written notice to the prime contractor within ninety days from the date on which the claimant performed the last of the labor (or provided materials). 8 P.S. § 194(b). Written notice must state with "substantial accuracy" the amount claimed and the names of those the claimant provided labor or materials. *Id.*

For projects subject to the Bond Law, a claimant may not bring an action under the payment bond until the expiration of ninety days after the date on which the claimant "performed the last of such labor or furnished the last of such materials for which he claims payments." 8 P.S. § 194(a). If the claimant has a direct contractual relationship with any subcontractor of the prime contractor, but no contractual relationship with the prime contractor, the claimant may only bring an action under the payment bond if the claimant gave written notice to the prime contractor within ninety days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which the claimant seeks payment. *Id*. The Pennsylvania Supreme Court has determined that a claimant under the Bond Law is not required to commence an action on a payment bond until after the 90-day waiting period. *See* *Centre Concrete Co. v. AGI, Inc.*, 559 A. 2d 516, 518–19 (Pa. 1989) [Lexis]. Therefore, for practical purposes, the limitations period under the Bond Law is one year and 90 days from the date that claimant last performed labor or supplied materials to the project. *See, e.g.*, *Preferred Fire Protection, Inc. v. Joseph Davis, Inc.*, 954 A.2d 20 (Pa. Super. Ct. 2008) [Lexis].

Additionally, under the Bond Law, the claimant must serve notice by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place where the contractor's office is "regularly maintained for the transaction of business." *Id.* Alternatively, the claimant may serve notice in "any manner in which legal process may be served" as permitted by law; a public officer need not serve notice. *Id.*

Unlike the Bond Law, the Procurement Code does not specify any notice provisions for public payment bond claims. 62 Pa. C.S. §§ 101–2311.

D. Coverage

The Bond Law and the Procurement Code mirror each other in their purposes, both including language stating that the public payment bonds they regulate "shall be solely for the protection of claimants supplying labor or materials to the prime contractor to whom the contract was awarded" or to any related subcontractors. 8 P.S. § 193(a)(2); 62 Pa. C.S. § 903(b).

When determining the scope of liability of a surety on a bond, the terms of the bond govern because the true intent and meaning of the bond are the primary determinates of liability. *Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc.*, 398 Pa. Super. 86, 92, 580 A.2d 853, 856 (Pa. Super. Ct. 1990) [Lexis].

For projects subject to the Bond Law, the payment bond or "financial security" covers all "material furnished or labor supplied or performed in the prosecution of the work." 8 P.S. § 193(a)(2); 8 P.S. § 193.1(a)(2). The Bond Law defines "labor or materials" to include "public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site." 8 P.S. § 193(a)(2).

For projects subject to the Procurement Code, the payment bond covers "all materials furnished or labor supplied or performed in the prosecution of the work." 62 Pa. C.S. § 903(a). The Procurement Code defines "labor or materials" to include "public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site." *Id.*

The Bond Law is similar to the federal Miller Act in its purpose and language. Accordingly, courts interpreting the Bond Law have relied upon decisions interpreting analogous statutory provisions in the Miller Act. *Commonwealth ex rel. Walters Tire Serv., Inc. v. Nat'l Union Fire Ins. Co.*, 434 Pa. 235, 239–40, 252 A.2d 593, 595 (Pa. 1969) [Lexis]; *Visor Builders, Inc. v. Devon E. Tranter, Inc.*, 470 F. Supp. 911, 920 (M.D. Pa. 1978) [Lexis]; *Lite-Air Prods., Inc. v. Fid. & Deposit Co. of Maryland*, 437 F. Supp. 801, 803 (E.D. Pa. 1977) [Lexis].

The Bond Law provides a substitute remedy for subcontractors that supply labor and materials on public projects, but who do not receive the protections afforded by the Pennsylvania Mechanics' Lien Law. *Valley Forge Indus., Inc. v. Armand Constr., Inc.*, 248 Pa. Super. 53, 58, 374 A.2d 1312, 1315 (Pa. Super. Ct. 1977) [Lexis]; *Can-Tex Indus. v. Safeco Ins. Co. of Am.*, 460 F. Supp. 1022, 1024–25 (W.D. Pa. 1978) [Lexis]. Accordingly, courts have found the scope of the Bond Law to be similar in scope to the Mechanics' Lien Law. *Id.* at 1024–25.

1. Labor

a. Professional Services

Neither the Bond Law nor the Procurement Code specify whether the labor or materials protected claimants supply specifically comprise professional services. 8 P.S. § 193(a)(2); 62 Pa C.S. § 903(b). However, a 2017 ruling suggests that design professionals cannot recover under the payment bond. *See Widmer Eng'g, Inc. v. Five-R Excavating, Inc.*, No. 257 C.D. 2016, 2017 WL 959485, at *10 (Pa. Commw. Ct. Mar. 13, 2017) [Lexis] (affirming lower court's ruling that engineering firm could not recover under the payment bond, on the basis that there was no authority to broaden the definition of "labor" to include professional services).

b. Union Benefits

Pennsylvania courts have found that, at least in disputes involving agreements that specifically contemplate prime contractor contributions to subcontractor union funds, union benefits fall under the definition of "labor" as included in the Bond Law, and further, are not preempted by ERISA. *See Carpenters Local 261 Health and Welfare Fund v. Nat'l Union Fire Ins. of Pittsburgh*, 686 A.2d 1373, 1379 (Pa. Commw. Ct. 1996) [Lexis].

2. Material

Both the Bond Law and the Procurement Code specify that public payment bonds cover "all materials furnished or labor supplied or performed in the prosecution of the work." 8 P.S. § 193 (a)(2); 62 Pa. C.S. § 903 (a)(2). The Procurement Code notes that such materials need not "constitute a component part of the construction." 62 Pa C.S. § 903(b). Pennsylvania courts have found that ordered but unused materials also fall within the scope of public payment bond coverage. *See Roman Mosaic & Tile Co. v. Thomas P. Carney, Inc.*, 729 A.2d 73, 78–79 (Pa. Super. 1999) [Lexis].

3. Equipment

a. Repairs

While neither the Bond Law nor the Procurement Code speak to equipment repairs, courts have found that a surety's liability can cover maintenance related to leased equipment. *See Commonwealth ex rel. Walter's Tire Serv., Inc. v. Nat'l Union Fire Ins. Co.*, 252 A.2d 593, 595 (Pa. 1969) [Lexis] (finding "tired and related products" for earth-moving equipment fell within coverage of payment bond). However, liability does not extend to "permanent" repairs to leased equipment. *See County Comm'rs of Tioga County ex rel. L.B. Smith, Inc.*, 266 A.2d 749, 751 [Lexis] (reasoning that replacement of tractor undercarriage not within scope of surety's obligations). Furthermore, surety liability does not include repairs to leased equipment in situations in which the prime contractor or its employees damage the leased equipment through negligence. *See Kuhn v. Torr Constr. Co.*, 64 Pa. D. & C.2d 332, 335 (Pa. Ct. Com. Pl. Cambria County 1974) [Lexis].

b. Rentals

Both the Bond Law and the Procurement Code contain identical language indicating that rentals of equipment are covered by public payment bonds, but that such rentals must be "reasonable" and that coverage extends only to "periods when the equipment rented is actually used at the site." 8 P.S. § 193(a)(2); 62 Pa. C.S. § 903(a)(2); *see also Kuhn v. Torr Constr. Co., Inc.*, 64 Pa. D. & C.2d 332, 334 (Pa. Ct. Com. Pl. Cambria County 1974) [Lexis] (reasoning sureties liable under Bond Law for minor but not permanent repairs to damaged leased equipment); *Roman Mosaic & Tile Co. v. Thomas P. Carney, Inc.*, 729 A.2d 73, 78–79 (Pa. Super. Ct. 1999) [Lexis] (bonds pursuant to the Bond Law cover include the cost of public utility services, rented equipment and ordered but unused materials).

4. Other

a. Attorneys' Fees

Unless statutory language expressly holds otherwise or an exception governs—for example, an agreement by the parties—a party cannot recover attorneys' fees in a public payment bond dispute. *See Chatham Commc'ns, Inc. v. Gen. Press Corp.*, 344 A.2d 837, 842 (Pa. 1975) [Lexis]; *see also J.C. Snavely, & Sons, Inc. v. Web M & E, Inc.*, 594 A.2d 333, 337 (Pa. Super.

1991) [Lexis] (finding surety on bond including "sums as may be justly due" excluded attorneys' fees); *R.W. Sidley v. United States. Fid. & Guar. Co.*, 319 F. Supp. 2d 554 (W.D. Pa. 2004) [Lexis]; *Can-Tex Indus. v. Safeco Ins. Co. of Am.*, 460 F. Supp. 1022, 1025 (W.D. Pa. 1978) [Lexis]; *Knecht, Inc. v. United Pac. Ins. Co.*, 860 F.2d 74 (3d Cir. 1988) [Lexis] (in the absence of a specific bond provision, "attorneys' fees are not recoverable"); *C. Arena & Co. v. St. Paul Fire & Marine Ins. Co.*, Civ. No. 91-7425, 1993 U.S. Dist. LEXIS 15797, 1993 WL 452184 (E.D. Pa. 1993) [Lexis] (rejecting argument that attorneys' fees were "consequential damages" under bond). *But see E. Steel Constr., Inc. v. Int'l Fid. Ins. Co.*, 282 A.3d 827, 859–65 (Pa. Super. Ct. 2022) [Lexis] (holding otherwise).

b. Interest

Neither the Bond Law nor the Procurement code recognize claims for interest payments, so long as the public payment bond in dispute is silent on the topic. *See, e.g.*, *R.W. Sidley, Inc. v. U.S. Fid. & Guar. Co.*, 319 F. Supp. 2d 554, 559–560 (W.D. Pa. 2004) [Lexis] (surety not liable for damages not specified in the bond); and see *id.* at 559 ("[I]n the absence of an express provision in the Payment Bond, 'finance charge' cannot be considered 'sums justly due' and are not recoverable from a surety."); *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co.*, 454 A.2d 39 (Pa. Super. Ct. 1982) [Lexis] (surety is not liable for finance charges because they are not labor or materials); *Lite-Air Prods., Inc. v. Fid. & Deposit Co. of Maryland*, 437 F. Supp. 801 (E.D. Pa. 1977) [Lexis] (holding that surety is not liable for finance charges, which are not labor or materials). *But see E. Steel Constr., Inc. v. Int'l Fid. Ins. Co.*, 282 A.3d 827, 859–65 (Pa. Super. Ct. 2022) [Lexis] (holding otherwise).

If the bond language permits recovery of interest, a surety may limit the accrual of interest by placing a notice provision in the bond. *Commonwealth ex rel. Fort Pitt Bridge Works v. Cont'l Cas. Co.*, 429 Pa. 366, 370, 240 A.2d 493, 494–95 (Pa. 1968) [Lexis] (where notifying the surety of the contractor's default was not required by the terms of the payment bond, and payment bond language permitted recovery of interest, surety was liable for interest from the time of the default and not from the date when the surety had notice of the default).

c. Financing Charges

Bonds governed by the Bond Law do not allow recovery against a surety "for finance charges that were included in subcontract agreements between a general contractor and subcontractor." *See R.W. Sidley, Inc. v. U.S. Fid. & Guar. Co.*, 319 F. Supp. 2d 554, 559 (W.D. Pa. 2004) [Lexis]; *see also J.C. Snavely, & Sons, Inc. v. Web M & E, Inc.*, 594 A.2d 333, 337 (Pa. Super. Ct. 1991) [Lexis] (finding surety on bond including "sums as may be justly due" excluded finance charges); *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co.*, 454 A.2d 39 (Pa. Super. Ct. 1982) [Lexis]; *Can-Tex Indus. v. Safeco Ins. Co. of Am.*, 460 F. Supp. 1022, 1025 (W.D. Pa. 1978) [Lexis]; *Lite-Air Prods., Inc. v. Fid. & Deposit Co. of Maryland*, 437 F. Supp. 801 (E.D. Pa. 1977) [Lexis] (holding that surety is not liable for finance charges, which are not labor or materials). *But see E. Steel Constr., Inc. v. Int'l Fid. Ins. Co.*, 282 A.3d 827, 859–65 (Pa. Super. Ct. 2022) [Lexis] (holding otherwise).

d. Insurance Premiums

There is no Pennsylvania opinion expressly allowing insurance premiums as part of a public payment bond claim.

e. Loans

There is no Pennsylvania opinion expressly allowing loans as part of a public payment bond claim.

f. Delay Damages

Courts have interpreted the Bond Law as precluding recovery of delay damages in suits against a surety, except for cases in which the bond in dispute specifies that such damages are recoverable. *See* *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co.*, 454 A.2d 39 (Pa. Super. Ct. 1982) [Lexis] (concluding delay damages do not count as "labor and materials" as protected by Bond Law); *Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc.*, 398 Pa. Super. 86, 92, 580 A.2d 853, 856 (Pa. Super. Ct. 1990) [Lexis]; *Lite-Air Prods., Inc. v. Fid. & Deposit Co. of Maryland*, 437 F. Supp. 801, 804 (E.D. Pa. 1977) [Lexis]; *Samuel Grossi & Sons, Inc. v. United States Fid. & Guar. Co.*, 2004 No. 3590, 2006 WL 3307465, *3 (Pa. Ct. Com. Pl. Nov. 10, 2006) [Lexis] (surety not liable for delay damages unless bond expressly covers them); *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d. Cir. 1995) [Lexis] (bond reference to "sums justly due" does not include liquidated damages.)

g. Lost Profits

Pursuant to the Bond Law, future profits are not considered either labor or materials under the Bond Law and are thus not recoverable, unless the bond states otherwise. *See* *Lite-Air Prods., Inc. v. Fid. & Deposit Co. of Maryland*, 437 F. Supp. 801, 803 (E.D. Pa. 1977) [Lexis].

h. Extracontractual

Pennsylvania's "bad faith" statute, governing claims arising under insurance policies, empowers a court to award interest, punitive damages, and/or court costs and attorney fees in cases where the insurer has acted in bad faith toward the insured. 42 Pa. C.S. § 8371. The statute provides that "[i]n any action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:[award interest, punitive damages, court costs and attorney fees.]"

Pennsylvania courts have consistently held that the statute does not apply to sureties because bonds are not insurance policies. *See, e.g.*, *U.S. ex rel. SimplexGrinnell, LP v. Aegis Ins. Co.*, No. 1:08-CV-01728, 2009 WL 90233, 2009 U.S. Dist. LEXIS 2381 (M.D. Pa. 2009) [Lexis] (listing differences between insurance and suretyship); *Intercon Constr., Inc. v. Williamsport Mun. Water Auth.*, No. 4:07-CV-1360, 2008 U.S. Dist. LEXIS 6022, 2008 WL 239554, at *3 (M.D. Pa. 2008) [Lexis] ("[W]e conclude that had the Pennsylvania legislature intended § 8371 to apply to a surety bond, it would have done so explicitly."); *Pullman Power Prods. Corp. v. Fid. & Guar. Ins. Co.*, No. CIV.A 96-636, 1997 U.S. Dist. LEXIS 23554, 1997 WL 33425288, at *4 (W.D. Pa. 1997)

[Lexis] ("Section 8371 is plain and unambiguous on its face in that it applies to insurance policies only. The ordinary meaning of insurance policies does not include surety bonds."); *Allegheny Valley Joint Sewage Auth. v. Am. Ins. Co.*, No. CIV.A. 94-2105, 1995 U.S. Dist. LEXIS 22091, 1995 WL 1944748, at *2 (W.D. Pa. 1995) [Lexis] ("The clear, unequivocal and unambiguous language of § 8371 states, in pertinent part, that that section applies only in an action arising under an insurance policy."); *Superior Precast, Inc. v. Safeco Ins. Co. of Am.*, 71 F. Supp. 2d 438 (E.D. Pa. 1999) [Lexis]; *Collier Dev. Co., Inc. v. Jeffco Constr. Co.*, 25 Pa. D. & C.4th 193 (Pa. Ct. Com. Pl. Allegheny County 2000) [Lexis].

Although certain of these cases involved analysis of the "bad faith" statute in connection with performance bond claims and not payment bond claims, the courts' reasoning in these cases did not depend on a distinction between the type of surety bond at issue.

E. Contracts Excluded

Under the Bond Law, contracts for less than $5,000 formed with "contracting bod[ies]" do not require payment bonds. 8 P.S. § 193(a). Similarly, contracts for less than $10,000 formed with these entities do not require "financial security." *Id.* § 193.1(a). Under the Procurement Code, contracts for less than $25,000 formed with Commonwealth agencies do not require payment bonds, but the Commonwealth agency can require one (or another security) at its discretion. 62 Pa. C.S. §§ 903(a), (c).

F. Time for Suit

Pennsylvania law provides that claimants must bring actions on payment bonds within one year. 42 Pa. C.S. § 5523(3). However, a claimant cannot bring actions on public payment bonds governed by the Bond Law until the expiration of ninety days after the day "on which such claimant performed the last of such labor or furnished the last of such materials for which" the claimant seeks payment. 8 P.S. § 194(a).

The Pennsylvania Supreme Court has relatedly held that the ninety-day waiting period tolls the one-year payment bond statute of limitations; therefore, the Bond Law's limitation period effectively totals one year and ninety days. *See Centre Concrete Co. v. AGI, Inc.*, 559 A.2d 516, 518–19 (Pa. 1989) [Lexis]; *see also Preferred Fire Protection, Inc. v. Joseph Davis, Inc.*, 954 A.2d 20 (Pa. Super. Ct. 2008) [Lexis] ("[U]nder Pennsylvania law, the applicable one-year statute of limitations commences upon the expiration of that statutory ninety-day waiting period.").

G. Remarks

The Pennsylvania Supreme Court has held that the Contractor and Subcontractor Payment Act does not apply to public projects. *See Clipper Pipe & Serv., Inc. v. Ohio Cas. Ins. Co.*, 115 A.3d 1278 (Pa. 2015) [Lexis].

H. Case Annotations

Mechanics' Lien Law

The Bond Law is intended to provide a remedy for subcontractors supplying labor and materials on public projects but who are otherwise excluded from the protective reach of the Mechanics' Lien Law of 1963. *See* *Can-Tex Indus. v. Safeco Ins. Co. of Am.*, 460 F. Supp. 1022, 1024–25 (W.D. Pa. 1978) [Lexis]. In *Can-Tex*, the Western District Court of Pennsylvania declined to recognize a subcontractor's claim of finance charges and attorney's fees on a bonded public work project, concluding that the purpose of the Bond Law is to afford subcontractors the kind of protection "that they would have enjoyed by virtue of a mechanic's lien on a private construction project." *Id.* at 1025.

Bad Faith Claims

Pennsylvania courts have asserted that the state's bad faith statute "provides no cause of actions against sureties." 42 Pa. C.S. § 8371; *see* *Superior Precast, Inc. v. Safeco Ins. Co. of Am.*, 71 F. Supp. 2d 438, 450 (E.D. Pa. 1999) [Lexis]. In coming to this conclusion in *Superior Precast*, the Eastern District Court of Pennsylvania specifically pointed to the language of the bad faith statute—which on its face applies to insurance claims—as well as the body of caselaw distinguishing between suretyship and insurance. *See id.* at 450–53; *see also* *W. Sur. Co. v. WGG, Inc.*, No. 1:07-CV-1551, 2009 U.S. Dist. LEXIS 6220, 2009 WL 222429 (M.D. Pa. 2009) [Lexis]; *U.S. ex rel. SimplexGrinnell, LP v. Aegis Ins. Co.*, No. 1:08-CV-01728, 2009 WL 90233, 2009 U.S. Dist. LEXIS 2381 (M.D. Pa. 2009) [Lexis]; *Intercon Constr., Inc. v. Williamsport Mun. Water Auth.*, No. 4:07-CV-1360, 2008 U.S. Dist. LEXIS 6022, 2008 WL 239554, at *3 (M.D. Pa. 2008) [Lexis]; *Ferrick Constr. Co. v. One Beacon Ins. Co.*, No. 3858, 2004 Phila. Ct. Com. Pl. LEXIS 70, 2004 WL 3051443 (C.C.P. 2004) [Lexis]; *Norwood Co. v. RLI Ins. Co.*, No. 01-CV-6153, 2002 U.S. Dist. LEXIS 5560, 2002 WL 485694 (E.D. Pa. 2002) [Lexis]; *M.A. Bruder & Sons, Inc. v. Williams*, 47 Pa. D. & C.4th 243 (Pa. C.C.P. 2000) [Lexis]; *Pullman Power Prods. Corp. v. Fid. & Guar. Ins. Co.*, No. CIV.A 96-636, 1997 U.S. Dist. LEXIS 23554, 1997 WL 33425288, at *4 (W.D. Pa. 1997) [Lexis]; *Allegheny Valley Joint Sewage Auth. v. Am. Ins. Co.*, No. CIV.A. 94-2105, 1995 U.S. Dist. LEXIS 22091, 1995 WL 1944748, at *2 (W.D. Pa. 1995) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Pennsylvania courts assess the scope a surety's liability on a private payment bond according to the terms and provisions of the bond. *See* *Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc.*, 580 A.2d 853, 856 (Pa. Super. Ct. 1990) [Lexis]. Obligations covered by the bond "cannot be created by judicial construction or interpretation." *See* *Peter J. Mascaro Co. v. Milonas*, 166 A.2d 15, 17 (Pa. 1960) [Lexis]. Private payment bonds are interpreted as contracts are, the Pennsylvania Supreme Court has asserted. *See* *Peter J. Mascaro Co. v. Milonas*, 166 A.2d 15, 17 (Pa. 1960) [Lexis]. Thus, in a controversy between a subcontractor and a sub-subcontractor, the *Peter J. Mascaro Co.* court looked to the language of the bonds in dispute and concluded that "the obligation of a bond cannot be extended beyond the plain import of the words used." *Id.*

B. Time for Suit

Pennsylvania law provides that claimants must bring actions on private payment bonds within one year, unless the private payment bond states otherwise. 42 Pa. C.S. § 5523(3).

Pennsylvania courts will uphold reasonable notice provisions in a bond, finding that they are "sensible and necessary provisions" that "permit general contractors to make payments to subcontractors without fear of subsequent suits by material suppliers who have not made their claims known." *Barati v. M.S.I. Corp.*, 212 Pa. Super. 536, 542–43, 243 A.2d 170, 174 (Pa. Super. Ct. 1968) [Lexis].

If the bond language permits recovery of interest, a surety may limit the accrual of interest by placing a notice provision in the bond. *Commonwealth ex rel. Fort Pitt Bridge Works v. Cont'l Cas. Co.*, 429 Pa. 366, 370, 240 A.2d 493, 494–95 (Pa. 1968) [Lexis] (where notifying the surety of the contractor's default was not required by the terms of the payment bond, and payment bond language permitted recovery of interest, surety was liable for interest from the time of the default and not from the date when the surety had notice of the default).

C. Case Annotations

See the foregoing sections for cases of note.

PUERTO RICO

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Puerto Rico's "Little Miller Act", 22 L.P.R.A. § 41 *et seq*., requires payment bonds for public projects: "Every contractor who is awarded a contract for the construction, reconstruction, enlargement, alteration, or preparation of any public work, shall post a payment bond in behalf of the Commonwealth of Puerto Rico, which shall be obligatory and effective on and after the date on which the contract is executed." 22 L.P.R.A. § 47.

The payment bond "shall be posted by the contractor in cash, by certified check, or through the surety of a bonding company authorized to do business in Puerto Rico, and said payment bond shall secure jointly and severally with the contractor, to the extent of liability covered by the bond . . . . *The amount of this payment bond shall be not less than one-half of the total value of the contract, plus any amplification, enlargement, or addition thereto*." 22 L.P.R.A. § 48 (emphasis added).

B. Tiers Covered

The Bond provided under the Little Miller Act secures "(1) the payment, to *the workers and employees of the contractor*, of the salaries and wages earned by them in their work; and (2) the payment, to the *persons selling, supplying, or delivering equipment, tools, and materials for the work*, of the price or value of the materials, equipment, and tools supplied, sold, or delivered. 22 L.P.R.A. § 48 (emphasis added).

The Little Miller Act provides that any person or entity that worked on or has supplied, sold, or delivered materials, equipment, or tools for the work of a project where public bond is required, is entitled to compensation from the contractor's bond. 22 L.P.R.A. § 51. The Little Miller Act does not state a limitation on coverage below the subcontractor level, but the claim must be made for work performed or materials delivered to a construction project protected with a public bond. As of this writing, there does not appear to be a case interpreting the "downstream" scope of coverage under Puerto Rico's Little Miller Act.

C. Notice Required

Puerto Rico requires notice before subcontract suppliers may make a claim under the Little Miller Act; they must give the Contractor 30 days' advance notice. 22 L.P.R.A. § 51. By law:

> *Every person, natural or artificial, who has worked as a worker or employee on, or who has supplied, sold, or delivered materials, equipment, and tools for, the work* referred to under § 47 of this title, with regard to which work the bond required by §§ 47—58 of this title has been posted, and who has not been paid, in whole or in part, as required by §§ 47—58 of this title, his salaries or wages, or the

> price of the materials, equipment, and tools sold, delivered, or supplied for the work, *shall have the right to file suit, without necessity for previous notice, against the contractor, against the bond of the contractor, against the bondsmen of the contractor, or against any of said bondsmen,* for recovery of any amount which may for such reason be owing him. *Any person or persons who have a direct contractual relationship with a subcontractor on the work* and who have or do not have an expressed or implied contractual relationship with the contractor on the work, who has posted the bond, *may institute action against the contractor, the bond of the contractor, the bondsmen of the contractor, or against any of the said bondsmen*, for the recovery of all or any part of: (1) any amount which may be owed them by the subcontractor for salaries or wages they have earned as employees or workers of the subcontractor on the work; and (2) any amount which may be owed them by reason of their having supplied, sold, or delivered materials, equipment, and tools for the subcontractor on the works. *Suppliers or sellers of materials, equipment and tools to the subcontractor shall be obligated, before instituting action* against the contractor, his bond, or his bondsmen, *to notify the contractor, by registered mail, of their claim. At the expiration of thirty days from the mailing of the said notice they may institute the action herein authorized. Workers and employees of the subcontractor may institute action at any time without previous notice to the contractor of their claim*. In all other respects they shall abide by the rights and remedies granted by §§ 47—58 of this title to the workers and employees and the suppliers of materials, equipment, and tools, of the contractor and the liabilities imposed by § 47—58 of this title shall apply to the contractor, his bond and his bondsmen.

22 L.P.R.A. § 51 (emphasis added).

D. Coverage

1. Labor

a. Professional Services

Puerto Rico Law does not specifically allow for professional service bond claims and the case law only provides that the bond applies to manpower and supplies. 22 L.P.R.A. § 48; *Antonio Carro, Inc. v. Jura Constr., Inc.*, 107 P.R. Dec. 808 (P.R. 1978) [Westlaw]; *Cristy & Sánchez v. Commonwealth*, 84 P.R. Dec. 234 (P.R. 1961) [Westlaw].

b. Union Benefits

Puerto Rico Law does not specifically address claims against a payment bond for union benefits and the case law indicates that coverage is available only for manpower and supplies. 22 L.P.R.A. § 48; *Antonio Carro, Inc. v. Jura Constr., Inc.*, 107 P.R. Dec. 808 (P.R. 1978) [Westlaw]; *Cristy & Sánchez v. Commonwealth*, 84 P.R. Dec. 234 (P.R. 1961) [Westlaw].

2. Material

Puerto Rico Little Miller Act payment bonds cover materials that are sold, supplied, or delivered for the work to the extent of the "price or value of the materials." 22 L.P.R.A. § 48. At the time of this writing, however, there does not appear to be a case holding whether the materials covered must be permanently adhered to or incorporated into the project, delivered and stored, or merely ordered or allocated to the project.

3. Equipment

a. Repairs

Equipment repairs are not expressly addressed in the Puerto Rico Act, and there does not appear to be a case on point as of the time of this writing.

b. Rentals

Equipment rentals are not expressly addressed in the Puerto Rico Little Miller Act, but equipment rentals and transportation costs have been found to be covered by the bond. *Goss v. Structural Concrete Prods.*, 92 P.R. Dec. 391 (P.R. 1965) [Westlaw] (renter of crane is entitled to coverage of the payment bond for unpaid rental fees.).

4. Other

According to the PR Little Mille Act, payment bond protection only applies to wages for manpower and cost of supplies. The Little Miller Act does not address the below components of a claim and at the time of this writing there does not appear to be a case determining coverage for these categories of claims.

a. Attorneys' Fees
b. Interest
c. Financing Charges
d. Insurance Premiums
e. Loans
f. Delay Damages
g. Profits
h. Extracontractual

E. Contracts Excluded

See section "A", *supra*.

F. Time for Suit

"*The cause for action authorized* under §§ 47—58 of this title against the bond and the bondsmen of the contractor *shall be understood to have prescribed six months after final acceptance of the work by the Commonwealth of Puerto Rico*. After such period has elapsed, the

bond may be cancelled, *unless some judicial claim under §§ 47—58 of this title is found pending. In such case, the bond shall not be cancelled until final judgment has been entered with respect to the pending claim or claims and same have been satisfied to the limit of the liability of the bond and the bondsmen*." 22 L.P.R.A. § 55 (emphasis added).

The six-month limitations period in which a claimant may file a claim against a surety begins once the construction contract is completed so that the contractor's responsibilities under the contract end. *Antonio Carro, Inc. v. Jura Constr., Inc.*, 107 P.R. Dec. 808 (P.R. 1978) [Westlaw]; *Jiménez Y Salellas v. Md. Cas. Co.*, 92 P.R. Dec. 207 (P.R. 1965) [Westlaw] (the six-month term within which a subcontractor may institute an action to recover against the bond is not tolled by making other claims outside of instituting a legal action).

G. Remarks

"Puerto Rico's 'Little Miller Act' sets up a similar scheme [as the Federal Miller Act] for work on projects undertaken by the Puerto Rican government." *United States of Am., Inc. v. G.R.G. Eng'g*, 9 F.3d 996 (1st Cir. 1993) [Westlaw]. Accordingly, Puerto Rico Courts may look to the Federal Miller Act for guidance on interpretation of the Puerto Rico Little Miller Act. Interpretation of the Little Miller Act under Federal Miller Act precedent, of course, is merely guidance and not binding on Puerto Rico courts.

H. Case Annotations

The project owner is entitled to file tort claims against a Little Miller Act surety if the surety fails to make the proper payments under the bond; these claims are not limited by the penal sum of the bond. *800 Ponce de León Corp. v. Am. Int'l Ins. Co.*, 2020 TSPR 104, 205 P.R. Dec. 163 (P.R. 2020) [Westlaw].

In *Cristy & Sánchez v. Commonwealth*, 84 P.R. Dec. 234 (P.R. 1961) [Westlaw], the Puerto Rico Supreme Court held:

- In Puerto Rico, claims against surety bonds are subject to broad interpretation. *Id.*
- A bond executed in connection with a public works contract favors suppliers and laborers and is not given in favor of the Commonwealth itself. *Id.*
- The statutory provisions regarding public works bonds, the bond instrument, and the contract with a determined party are to be considered together as a single instrument when determining the party's entitlement to bond proceeds. *Id.*
- When in a public works contract, the contractor is allowed to assign or subcontract part of the work, and the subcontractor may recover the cost of materials and labor used in the project from the bond. *Id.*
- A surety company that has issued a contract bond to guarantee the construction of a public work by a contractor is not exonerated from liability as a result of the contractor filing bankruptcy or having its debts discharged. *Id.*

§ 2.0 PRIVATE PAYMENT BONDS

A. Private Payment Bond Required

"*Any contractor in charge of the construction, reconstruction, extension, modification or repair of a work, building or structure* whose *estimated cost* as specified in the construction permit issued by the Permit Office of the Planning Board is *greater than fifteen thousand dollars ($15,000) shall post a payment bond* in favor of the Secretary of Labor and Human Resources, which shall be binding and effective on and after the date the work is started." 29 L.P.R.A. § 195 (emphasis added).

"The above-mentioned bond shall be posted by the contractor in cash, certified check or with the security of a bonding company licensed to do business in Puerto Rico, and said payment bond shall answer jointly and severally with the contractor, up to the limit of the bond liability, for the payment to the contractor's laborers and employees of the wages earned by them in the work. *The amount of this payment bond shall not be less than twenty percent (20%) of the estimated cost of the work under construction.*" 29 L.P.R.A. § 196 (emphasis added). As the next section clarifies:

> (a) It shall be the duty of the contractor to pay weekly and in cash all the wages of the laborers employed in the work under construction.
>
> (b) The salaries earned by the workers employed in the work shall enjoy absolute preference, as to payment, over all other debts of the contractor, with the exception of mortgage credits on certain real or personal property or property rights of the debtor, recorded in the registry of property prior to the date on which the salary has been earned, and with the exception of any taxes which the contractor may owe to the Commonwealth or its municipalities.
>
> (c) *Any person who has been employed in any work, building or construction as to which the bond required by this chapter has been posted and to whom his salary has not been paid* in whole or in part, as required by this chapter, in the form and terms established by law, *shall be entitled to bring judicial action, without previous notice or demand, against the contractor, the bond of the contractor, the sureties of the contractor, or against any of them, to recover the sum due him for such reason. Any person having a direct contractual relation with a subcontractor*, regardless of whether or not he has any express or implicit contractual relation with the contractor of the work, *shall have a chose in action against the contractor, the bond of the contractor, the sureties of the contractor, or against any of them, to recover* in full or in part any sum due him by the subcontractor of the work for salaries earned as employee of the subcontractor of the work. *The workers or employees of the subcontractor may bring said action against the contractor at any time without notice or previous demand of their claim to the subcontractor.*
>
> (d) Any judicial action brought under this chapter may be prosecuted in accordance with the provisions of Act No. 10, approved Nov. 14, 1917, as amended, and there may be a joinder in one sole complaint of all claims for wages in connection with the same work.

29 L.P.R.A. § 197 (emphasis added).

"No technical defect in the bond, including, but without limitation, that it has not been attached to the contract, shall have the effect of altering the liability established by this chapter." 29 L.P.R.A. § 198.

B. Rules of Construction

"It shall not be necessary in any judicial action brought under this chapter to accompany the complaint with a copy of the contract or subcontract for the work, it being sufficient for its identification to make in the complaint reference to the contract or subcontract." 29 L.P.R.A. § 199.

"All actions under this chapter shall be brought in the name of the person or persons in interest, but the Secretary of Labor and Human Resources may also demand, *motu proprio* or at the instance of one or more workers with interest in the matter, and in representation and for the benefit of one or more of such workers who are in similar circumstances, payment of any sum due them for wages. Said action may be brought in the Part of the Court of First Instance or District Court corresponding to the place where the work is being carried out or where the worker or employee lives on the date of the claim. *All workers are entitled to collect in the civil action that may be instituted, in addition to the unpaid amounts, another equal sum as additional compensation, plus costs, expenses and attorney's fees, and the bond shall answer for the payment of the judgment that may be passed, up to the amount of the bond.*" 29 L.P.R.A. § 201 (emphasis added).

"When the contractor of a work under construction subcontracts any part or labor to be performed therein, he shall file with the Secretary of Labor and Human Resources a copy of the subcontract executed with the subcontractor not later than ten (10) days after its execution. The contractor shall have this same duty if the subcontractor, in his turn, contracts with a second subcontractor for any part or labor of the work under construction." 29 L.P.R.A. § 202.

It is the contractor's responsibility to file the subcontract with the Secretary of Labor and Urban Resources. The Laws of Puerto Rico are not clear on the impact of a failure to file the subcontract, but the subcontractor should not be denied its bond claim if the contractor fails to comply.

"*If a contractor or subcontractor starts labor in a construction work with laborers without the contractor's having first posted the bond* required by this chapter to insure to said laborers the payment of their wages, *or without his having complied with any of the other requirements established in this chapter, the Secretary of Labor and Human Resources may*, through an injunction issued by a competent court, *stop the labor* being carried out in the work, building, or construction, until the contractor or subcontractor shall fully comply with the provisions of this chapter." 29 L.P.R.A. § 204 (emphasis added).

"In every construction project where the contractor or subcontractor performs activities through contracts or subcontracts with any natural or [juridical] person, *it shall be the duty of said contractor or subcontractor to post a public notice* at the payment sites accepted by the Secretary of Labor and Human Resources for the duration of said contract or subcontract stating the name of the contractor or subcontractor, the nature of the work performed and the name of the bonding company that secures the bond. Any labor union that represents the workers or employees of a contractor or subcontractor shall be entitled to request and obtain from the latter a copy of the payment bond contract which has been posted in accordance with the requirements of this chapter." 29 L.P.R.A. § 205 (emphasis added).

"*Any contractor who starts a work*, building or construction *without having posted the bond* required by this chapter in behalf of the Secretary of Labor and Human Resources *shall be guilty of a felony* and upon conviction shall be punished by a fine of not less than one thousand dollars

($1,000) nor more than five thousand dollars ($5,000), or by imprisonment in jail for a term of not less than one month nor more than one year, or both penalties in the discretion of the court." 29 L.P.R.A. § 206 (emphasis added).

B. Time for Suit

"*The chose in action authorized by this chapter against the bond and the sureties* of the contractor *shall be understood as lapsed one year after the work and all labor thereon have been completed*. Upon expiration of said term the bond may be cancelled, *unless there is pending any judicial action under this chapter*. In such case, the bond shall not be cancelled until final and conclusive judgment has been passed with respect to such pending claim or claims and the same have been settled to the limit of the liability of the bond and of the sureties." 29 L.P.R.A. § 200 (emphasis added).

C. Case Annotations

Claimants

A sub-subcontractor may claim directly against the sureties of a first subcontractor—a surety company which had issued a bond to secure to the owner of the works payment of the claims of all the persons performing labor or furnishing materials. *Ferrer v. All. Co. of P.R.*, 93 P.R. Dec. 1 (P.R. 1966) [Westlaw].

For the purpose of claiming directly against the sureties of a first subcontractor, a sub-subcontractor who furnishes and pays for labor, in the performance of his sub-subcontract, occupies the same legal position of a worker. *Id.*

Contractors, subcontractors, and suppliers have no construction lien rights in Puerto Rico, but they have rights to assert a claim under 31 L.P.R.A. § 10271 ("Article 1374"). The Article 1374 letter is served on the Owner for the Owner to make payment for liquidated amounts due to the claimant and service of the letter obligates the Owner for payment which may result in double payment by the Owner. An expanded reading of *Puerto Rico Wire Products v. C. Crespo & Asociados, Inc.* might allow an Article 1374 claimant to bring a direct action against the Surety. 2008 TSPR 189, 175 P.R. Dec. 139 [Westlaw].[1]

While suppliers do not have lien rights in Puerto Rico (*see Ferrer v. All. Co. of P.R.*, 93 P.R. Dec. 1 (P.R. 1966) [Westlaw]), workers (laborers) do have certain lien rights pursuant to Puerto Rico Act No. 73 of May 4, 1931:

> Whenever a worker or employee works on the construction, extension, maintenance or repair of any improvement, house or building, the total amount of the wages earned by him shall constitute a lien on said property, both when the work is done under the immediate direction of the owner and when contractors, subcontractors, jobbers, or builders intervene.
>
> *With the exceptions provided by law, the said lien shall have preference as to payment over all other debts of the property owner.*

29 L.P.R.A. § 186 (emphasis added).

[1] The protections of Article 1374 are analogous to what was previously codified in 31 LPR 4130. *See Plumbing Contractor v. Mapfre Praico Ins. Co.*, K AC2012-0301, 2021 PR App. LEXIS 2475, 2021 WL 4958674 (P.R. Cir. Sept. 9, 2021) [Westlaw].

Subrogation

"Under both the general common and commercial law and under Puerto Rican law, laborers and materialmen have rights to contract retainages which are superior to those of general creditors, even where such funds have been attached by the outside creditor first. Since the surety is subrogated to these rights as a result of satisfaction of its payment and performance bonds, its rights are also superior to those of any general creditor or those who assume the role of such a creditor through their status under the Bankruptcy Act." *Segovia Dev. Corp. v. Constructora Maza, Inc.*, 628 F.2d 724 (1st Cir. 1980) [Westlaw].

THE INFORMATION CONTAINED IN THIS REFERENCE SHOULD BE USED FOR INFORMATIONAL PURPOSES ONLY AND SHOULD NOT BE RELIED UPON. EACH CASE, CLAIM, AND ACTION IS DIFFERENT AND MUST BE EVALUATED THOROUGHLY BY COUNSEL LICENSED IN PUERTO RICO. THIS IS NOT LEGAL ADVICE AND SHOULD NOT BE CONSIDERED AS SUCH. PLEASE CONTACT THE AUTHORS WITH ANY QUESTIONS.

RHODE ISLAND

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

The Rhode Island Little Miller Act, R.I. Gen. Laws §§ 37-12-1 through 37-12-9 ("R.I. Little Miller Act"), requires every person awarded a contract over $50,000.00 by the R.I. Department of Transportation or department of administration and every person awarded such a contract as a general contractor or project manager for the construction, improvement, completion, or repair of any public road or bridge or any person awarded a contract in any dollar amount by any state entity for the construction, improvement, or repair of any public building must furnish a bond in an amount not less than fifty percent (50%) but not more than one hundred percent (100%) of the contract price "conditioned upon the payment for labor performed and material furnished in connection therewith." *See* R.I. Gen. Laws § 37-12-1; *see also* R.I. Gen. Laws § 37-13-14 (contractor awarded a contract for public works with a contract price in excess of $50,000.00 must file a bond containing the terms and conditions set forth in R.I. Gen. Laws § 37-12-2).

Rhode Island has two bonding statutes which come into play in determining which entities are covered by contractors' bonds: R.I. Gen. Laws §§ 37-12-1 *et seq*. deals exclusively with bonds under public works projects (as discussed above) while R.I. Gen. Laws § 34-28-30 deals with all bonded projects, public and private. Due to the interplay as discussed below between the R.I. Little Miller Act and the Rhode Island Mechanics' Lien statute, R.I. Gen. Laws §§ 34-28-1, *et seq.*, the mechanics' lien statute is also relevant and must be considered.

The Rhode Island Public Works Arbitration Act provides that every contract for the construction, alteration, repair, painting, or demolition of any public building, sewer, water treatment, or disposal project, highway, or bridge which has a contract price of $10,000.00 or more shall contain a provision for arbitration of disputes and claims arising out of or concerning the performance or interpretation of the contract. R.I. Gen. Laws § 37-16-2. This Act applies to sureties "for all disputes involving questions of the claimant's right of recovery against the surety." *See* R.I. Gen. Laws § 37-16-27.

B. Tiers Covered

According to the Rhode Island statutory scheme, all tiers of subcontractors are covered by the bond. Like the Federal Miller Act, the R.I. Little Miller Act covers only first and second tier subcontractors. *See* R.I. Gen. Laws § 37-12-2. However, R.I. Gen. Laws § 34-28-30 broadly covers all contractors irrespective of privity with the principal on the bond:

> If *any bond* be given to secure payment for work done or materials furnished on account of construction, such bond shall inure to the benefit of *any person* who does any work or who furnishes any materials notwithstanding the fact that he furnished materials for use on *any subcontract, mediate or immediate*, to such contract between such owner and such other person. (emphasis added).

Thus, effectively, subcontractors having a more remote contractual relationship may recover under a R.I. Little Miller Act bond. *See* *Bethlehem Rebar Indus. v. Fid. & Deposit Co.*, 582 A.2d 442, 445 (R.I. 1990) [Lexis].

C. Notice Required

In order to come under the protection of the act, R.I. Gen. Laws § 37-12-2 requires that all claimants who lack a direct contractual relationship with the contractor furnishing the bond must provide written notice to the contractor within ninety (90) days of the date on which the claimant last performed labor or furnished or supplied materials or equipment. The notice must be sent to the contractor by certified mail, postage prepaid, at the contractor's office, place of business, or residence and must state the amount claimed and the name of the party to whom the labor, materials or equipment were supplied.

A provision of the Rhode Island Mechanics' Lien statute, R.I. Gen. Laws § 34-28-30, however, allows persons not in privity with the contractor furnishing the bond to sue on *any* bond. The Rhode Island Supreme Court has held that this effectively abrogates the notice and privity requirements of R.I. Gen. Laws § 37-12-2. *Air Distrib. Corp. v. Airpro Mech. Co.*, 973 A.2d 537, 541 (2009) [Lexis] (citing *Vaudreuil v. Nelson Eng'g and Constr. Co.*, 121 R.I. 418, 399 A.2d 1220, 1222 (1979) [Lexis]); *see also* *Extrusions Inc., Win-Vent Div. v. Nat'l Grange Mut. Ins. Co.*, 824 A.2d 439 (R.I.2003) [Lexis]; *Bethlehem Rebar Indus., Inc. v. Fid. and Deposit Co. of Md.*, 582 A.2d 442 (R.I.1990) [Lexis]; *Providence Elec. Co. v. Diso Corp.*, 440 A.2d 751 (R.I.1981) (mem.) [Lexis]. Accordingly, lack of or improper notice is not an effective defense for a surety under the R.I. Little Miller Act.

D. Coverage

1. Labor

The bond's coverage is broad in scope and covers all labor whether directly or indirectly performed upon the project at issue. *See* R.I. Gen. Laws § 37-12-2 ("all such labor performed or furnished, together with penalties assessed pursuant to R.I. Gen. Laws § 37-13-14.1(b) . . . as shall be used in the carrying on of the work covered by the contract . . . whether or not the labor is directly performed for or furnished to the contractor or is even directly performed upon the work covered by the contract…"). In addition to covering all wages, the surety may also be liable for penalties levied by the Department of Labor and Training against a contractor/employer for failure to pay wages otherwise due. Such penalties may be levied up to three (3) times the total amount found to be due to the employee. *See* R.I. Gen. Laws § 37-13-14.1(b).

a. Professional Services

There are no reported Rhode Island decisions considering whether professional services are covered under the R.I. Little Miller Act. Consistent with its otherwise broad application, however, if such services are provided with respect to an otherwise covered public project to which the bond applies, it is likely to be covered by the bond, even if the work is not performed on site.

Notably, mechanics liens by architects and engineers are specifically authorized and controlled by R.I. Gen. Laws § 34-28-7. However, the Rhode Island Supreme Court has interpreted this section to preclude architects and engineers from enforcing liens when the projects they

provided work for did not actually use their work or did not commence construction. "[I]n order to maintain a valid lien for preconstruction services, 'the work must actually be used in the construction of the project."' *Anthony & Assocs., Div. of Land Use Specialists, Inc. v. Vera A. Muller*, 598 A.2d 1378 (R.I. 1991) [Lexis] (quoting *Federici & Assocs. v. Lantini*, 589 A.2d 1202, 1204 (R.I. 1991) [Lexis]). Thus, arguably, when work by surveyors, architects, engineers, or another is not used in a project, the project never starts or it consists primarily of preconstruction work, just as with the mechanics' lien statute, there should be no recovery on a bond issued pursuant to R.I. Gen. Laws § 37-12-1.

b. Union Benefits

Union benefits are covered by the R.I. Little Miller Act. *See Int'l Broth. of Elec. Workers, Local No. 99 v. United Pac. Ins. Co.*, 573 A.2d 270 (1990) [Lexis]. *But see Int'l Union of Operating Eng'rs Local 57 v. Seaboard Sur. Co.*, 946 F. Supp. 141 (D.R.I. 1996) [Lexis] (surety not an "employer" obliged to make contributions under ERISA and therefore federal subject matter jurisdiction lacking and suit against surety for recovery of ERISA benefits dismissed).

2. Material

Although there are no reported cases discussing any limitations on compensable materials, the R.I. Little Miller act provides that it is "conditioned upon the payment for . . . material furnished in connection [with the bonded project]." *See* R.I. Gen. Laws § 37-12-1. Arguably, given the broad coverage afforded to bonds issued pursuant to the statute, this language would allow for recovery of monies due for materials intended for use at the jobsite, whether or not actually delivered thereto.

3. Equipment

a. Repairs

There is no reported Rhode Island opinion considering whether the cost of repair to equipment furnished for use on a covered project is a covered component of a payment bond claim.

b. Rental

"Reasonable rental value" for use of equipment during "the period of its use" is covered by the bond. *See* R.I. Gen. Laws § 37-12-1 ("shall also promptly pay for all . . . such materials and equipment furnished (which, as to equipment, shall mean payment of the reasonable rental value, as determined by the respective department, of its use during the period of its use. . .").

4. Other

a. Attorneys' Fees

The R.I. Little Miller Act does not contain any provision for the award of attorneys' fees. The R.I. Mechanics' Lien statute, however, permits the trial court, in its discretion, to award costs, legal interest, expenses and attorneys' fees to the prevailing party. R.I. Gen. Laws § 34-28-19.

Claimants' attorneys in Rhode Island often attempt to obtain fees using Rhode Island's generic prevailing party attorneys' fee statute, R.I. Gen. Laws § 9-1-45, which provides that the court may award a reasonable attorney's fee to the prevailing party in any civil action arising from a breach of contract in which the court finds that there was "a complete absence of a justiciable issue of either law or fact raised by the losing party" or where the court "renders a default judgment against the losing party." This statute has been construed narrowly, however, and is intended to cover situations where there are no reasonable grounds for denying the claim. *Allstate Interiors & Exteriors, Inc. v. Stonestreet Constr., LLC*, 907 F. Supp. 2d 216 (2012) [Lexis], *aff'd* 730 F.3d 67 (1st Cir. 2013).

b. Interest

The R.I. Little Miller Act does not contain any provision for the award of interest. In accordance with the general Rhode Island statute governing prejudgment interest, however, claimants are routinely awarded interest at a rate of twelve percent (12%) per year from the date the cause of action accrued. R.I. Gen. Laws § 9-12-10.

c. Financing Charges

Unless deemed part of the cost of "labor or materials" supplied "in the carrying on of the work covered by the contract," finance charges should not be allowed under a statutory payment bond. R.I. Gen. Laws § 37-12-1.

d. Insurance Premiums

Unless deemed part of the cost of "labor or materials" supplied "in the carrying on of the work covered by the contract," insurance premiums should not be allowed under a statutory payment bond. R.I. Gen. Laws § 37-12-1.

e. Loans

There is no reported Rhode Island opinion allowing a lender to recover on a payment bond claim. Given the language of the R.I. Little Miller Act, however, it is not likely that a lender would qualify as a proper claimant because it would not have "furnished or supplied labor, material, or equipment in the prosecution of the work." R.I. Gen. Laws § 37-12-2.

f. Delay Damages

There is no reported Rhode Island opinion considering whether a claimant may recover delay damages as a component of a payment bond claim.

g. Profits

There is no reported Rhode Island opinion considering whether a claimant may recover lost profits as a component of a payment bond claim.

h. Extracontractual

There is no statutory basis for asserting a claim for bad faith against a surety. The Rhode Island "bad faith" statute, R.I. Gen. Laws § 9-1-33, is specific to insurers and has not been applied to sureties by any court in Rhode Island. Similarly, the Rhode Island Unfair Claims Settlement Practices Act, R.I. Gen. Laws § 27-9.1, does not provide a private cause of action and specifically provides that it does not apply to contracts of suretyship. R.I. Gen. Laws § 27-9.1-2(5).

A payment bond claimant may assert a common law tort claim of bad faith directly against the surety. However, a surety does not breach the implied duty of good faith if the claim is "fairly debatable." *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980) [Lexis]. To prove a claim for common law bad faith, a plaintiff must show the absence of a reasonable basis for denying the claim and the surety's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Id.* at 319.

E. Contracts Excluded

The R.I. Little Miller Act requires the posting of payment bonds only for contracts in excess of $50,000.00.

F. Time for Suit

Any suit on a statutory payment bond must be commenced no later than two (2) years after the date on which the claimant last performed the labor or furnished the material or equipment, or the maximum time limit contained in the bond, whichever is greater. R.I. Gen. Laws §§ 37-12-3 and 37-12-5.

G. Remarks

As noted above, due to the application of the R.I. Mechanics Lien statute as an alternative means of recovery, the notice and privity requirements of the R.I. Little Miller Act are not effective to provide a defense to a surety on a Little Miller Act bond.

H. Case Annotations

Notice and Privity Requirements

In *Air Distribution Corp. v. Airpro Mechanical Co., Inc.*, 973 A.2d 537 (2009) [Lexis], the court held that a supplier of materials to a subcontractor could recover against the general contractor's payment bond surety on its mechanic's lien claim after the subcontractor went into receivership, even though the supplier could not recover under the contractor's bond statute, R.I. Gen. Laws § 37-12-2. In re-affirming its earlier decisions in this regard, the Rhode Island Supreme Court made clear that the remedies provided under R.I. Gen. Laws § 37-12-2 and R.I. Gen. Laws § 34-28-30 are *alternative* remedies. The fact that a party cannot recover under R.I. Gen. Laws § 37-12-2 does not bar it from recovering on a bond pursuant to R.I. Gen. Laws § 34-28-30. This decision effectively eliminates the notice and privity requirements provided by the R.I. Little Miller Act.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

"Under established contract law principles, when there is an unambiguous contract and no proof of duress or the like, the terms of the contract are to be applied as written." *Gorman v. Gorman*, 883 A.2d 732, 739 n. 11 (R.I. 2005) [Lexis]; *see also Rivera v. Gagnon*, 847 A.2d 280, 284 (R.I. 2004) [Lexis].

"[C]lear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions." *Dovenmuehle Mortg., Inc. v. Antonelli*, 790 A.2d 1113, 1115 (R.I. 2002) [Lexis] (quoting *Burke v. Potter*, 771 A.2d 895, 895 (R.I. 2001) [Lexis] (mem.)).

"That the parties to a contract intended to make time of the essence may appear by express stipulation therein or it may be found in the nature or purpose of the contract or in the circumstances under which it was made. There must, however, be some evidence from which such intent can be ascertained, and the party contending that time is of the essence of the contract has the burden of proof thereon. . . . If that party is unable to satisfy his or her burden, then performance within a reasonable time of the contemplated date is sufficient" *Safeway Sys., Inc. v. Manuel Bros., Inc.*, 228 A.2d 851, 856–57 (1967) [Lexis].

It is a long established rule under Rhode Island law that a surety bond is to be strictly construed and that, "[i]n the absence of ambiguity, the extent of the liability of the surety on a common-law bond is determined solely by the language of the bond." *ADP Marshall, Inc. v. Noresco, LLC*, 710 F. Supp. 2d 197, 242 (D.R.I. 2010) [Lexis] (quoting *Narragansett Pier R. Co. v. Palmer*, 38 A.2d 761, 763 (R.I. 1944) [Lexis]); *see also State of Rhode Island Dep't of Corr. v. ADP Marshall, Inc.*, C.A. No. PB99-4704, 2004 WL 877560, at *8, 2004 R.I. Super. LEXIS 66 (R.I. Super. March 29, 2004) [Lexis].

B. Time for Suit

All civil actions shall be commenced within ten (10) years next after the cause of action accrues. R.I. Gen. Laws § 9-1-13. The Rhode Island Superior Court has specifically held that R.I. Gen. Laws § 9-1-13 is applicable to a breach of contract action involving a construction contract and not the Rhode Island statute of repose, R.I. Gen. Laws § 9-1-29, which provides that no action in tort may be filed against architects and engineers "more than ten years after substantial completion of" an improvement to real property. *Boghossian v. Ferland Corp.*, 600 A.2d 288, 289 (R.I. 1991) [Lexis].

C. Case Annotations

Enforcement of Liquidated Damages Clause

In *Allstate Interiors & Exteriors, Inc. v. Stonestreet Construction, LLC*, 907 F. Supp. 2d 216 (2012) [Lexis], the court held that a liquidated damages clause is not enforceable if the delay is due in whole or in part to the fault of the party claiming the benefit of the provision. The court also held that, because the purpose of a liquidated damages clause is to compensate for loss, not to punish, such a provision is enforceable under Rhode Island law only when a loss has been sustained; otherwise, a liquidated damages provision amounts to an unenforceable penalty. Finally,

the court noted that, under Rhode Island law, in order to recover under a liquidated damages clause for a delay, a claimant must prove that (1) the delay affected activities on the critical path, and (2) the asserted delay was attributable only to the party from which the claimant seeks to recover. This action involved a claim by a subcontractor against a general contractor; the general contractor then brought a third party action against the owner. The court ultimately held that the hotel renovation project owner was not entitled to collect from the general contractor under liquidated damages clause in construction contract because it failed to provide evidence that it had sustained any loss as a result of the alleged delay.

SOUTH CAROLINA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

South Carolina has three statutes requiring payment bonds on public projects:

S.C. Code Ann.	Coverage
§ 11-35-3030	state projects governed by the South Carolina Consolidated Procurement Code ("Procurement Code")
§ 57-5-1660	state highway projects
§ 29-6-250	local projects and any other public works projects under the Suppliers' Payment Protection Act ("SPPA")

Additional requirements for payment bonds, though no requirement that a payment bond be issued, are contained in S.C. Code Ann. § 29-5-440. This statute is within the mechanics' lien statute and applies to "any payment bond, whether statutory, public, common law, or private in nature, that is issued in connection with a construction project or other improvements to real property within South Carolina when such payment bonds are not otherwise required or governed by any other applicable section of the South Carolina Code of Laws." *Id*.

State Contracts Covered by the Procurement Code

Payment bonds equal to 100% of the "the portion of the contract price that does not include the cost of operation, maintenance, and finance" are required under the Procurement Code when State funds are utilized by a governmental body in a contract for construction. S.C. Code Ann. § 11-35-3030(2)(a)(ii). "Governmental body" includes "a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation" and excludes "the General Assembly or its respective branches or its committees, Legislative Council, the Legislative Services Agency, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts." S.C. Code Ann. § 11-35-310(18). Local governments, including municipalities, are not bound by the Procurement Code. *See Simpson Plastering, LLC v. Skanska*, No. 2:16-3439-RMG, 2017 U.S. Dist. LEXIS 28107, 2017 WL 773550 (D.S.C. Feb. 27, 2017) [Westlaw].

Where the construction contract is valued at $50,000 or less the government may waive the bond requirements, "if the governmental body has protected the State." S.C. Code Ann. § 11-35-3030(2)(a)(iii). In the case of a construction manager at-risk contract, bonds are not required during the preconstruction phase. S.C. Code Ann. § 11-35-3030(2)(a)(iv). In design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contracts, bonds may be

provided separately for one or more designated portions of the project. S.C. Code Ann. § 11-35-3030(2)(a)(v).

The Procurement Code authorizes the State Fiscal Accountability Authority, transferred from the State Budget and Control Board under the Restructuring Act of 2014 (2013 S.C. S.B. 22), "to require a performance bond or other security in addition to these bonds, or in circumstances other than specified" by the Act. S.C. Code Ann. § 11-35-3030(2)(b). The Office of State Engineer (Construction) prepares a manual that establishes guidelines and policies for planning and execution of state projects. OSE Manual; *see also* S.C. Code Ann. Regs. 19-445.2145(C)(2). The manual contains the form payment bond authorized for projects covered by the Procurement Code. Form SE-357.

Public Highway Contracts

For the construction on every public highway, exceeding $10,000, a contractor is required to furnish "the Department of Transportation, county, or road district" with a payment bond from "a surety or sureties satisfactory to the awarding authority, and in the amount of not less than fifty per cent of the contract." S.C. Code Ann. § 57-5-1660(a)(2). The code allows any contracting authority "to require a performance bond or other security in addition to those specified in this section." S.C. Code Ann. § 57-5-1660(c).

All Other Public Contracts

For all other public contracts, the Suppliers' Payment Protection Act ("SPPA") requires that when a "governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars," that the government "shall require the contractor to provide a labor and material payment bond in the full amount of the contract." S.C. Code Ann. § 29-6-250.

"Governmental body" is defined by the SPPA to largely mirror the definition of "governmental body" contained in the Procurement Act. S.C. Code Ann. § 11-35-310(18). However, the SPPA adds "all local political subdivisions." S.C. Code Ann. § 29-6-250(4).

SPPA requirements are layered on top of the other bonding requirements contained within the code. "In our view, the enactment of the SPPA in 2000 illustrates the legislature's intent to, in essence, pick up where the Little Miller Acts left off by outlining a more extensive payment protection scheme dedicated specifically to subcontractors and suppliers." *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 118, 659 S.E.2d 158 (2008) [Westlaw]. Thus, the bonding requirements of the SPPA not only apply to bonds that were issued under the express terms of the SPPA but also to Procurement Code bonds and public highway bonds.

The SPPA requires that all payment bonds be issued by a surety "licensed in the State with an 'A' minimum rating of performance as stated in the most current publication of 'Best Key Rating Guide, Property Liability.'" S.C. Code Ann. § 29-6-250(1). For bonds less than $100,000 "the governmental body may permit the use of a 'B+' rated bond if it justifies that use in writing." S.C. Code Ann. § 29-6-250(2). Additionally, where a payment bond is issued that is not otherwise covered by the provisions of the SPPA, the act requires it be executed by a surety with a "B+" rating or higher. S.C. Code Ann. § 29-6-270.

The form of any payment bond issued pursuant to the SPPA is within the control of the contracting entity. S.C. Code Ann. § 29-6-250(3). The SPPA prohibits the State from placing any

provision in a contract that would "operate to derogate the rights of a construction contractor, subcontractor, supplier, or other proper claimant against a payment bond or other form of payment security or protection established by law." S.C. Code Ann. § 29-6-290.

B. Tiers Covered

Each public bond statute defines "bonded contractor" to mean "the contractor or subcontractor furnishing the payment bond." S.C. Code Ann. § 11-35-3030(2)(c); § 57-5-1660(b); § 11-1-120; § 29-5-440. Claims are limited to direct subcontractors of the bonded contractor and "remote claimants." A remote claimant is "a person having a direct contractual relationship with a subcontractor or supplier, but no relationship expressed or implied with the bonded contractor." S.C. Code Ann. § 11-35-3030(2)(c); § 57-5-1660(b); § 11-1-120; § 29-5-440. Remote claimants, but not direct subcontractors, may be required to meet certain notice requirements, but only if the notice of project commencement is filed.

C. Notice Required

No notice is required for claimants in direct privity with the bonded contractor. Remote claimants, as defined above, must give notice within 90 days from the last day work was performed. The notice provisions are stated within each of the four payment bond statutes and with limited exceptions, discussed below, require the following:

> 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 must generally conform to the requirements of Section 29-5-20(B) and sent by certified mail or registered mail 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.

S.C. Code Ann. § 11-1-120. *See also* § 57-5-1660(b) (adds "by certified or registered mail" to the first sentence in addition to including that requirement in the last sentence); § 11-35-3030(2)(c) (states the mailing requirements twice in what appears to be a unintended duplication); § 29-5-440 (changes "certified mail or registered mail" to "certified or registered mail").

The notice requirements are waived if the prime contractor does not comply with the Notice of Project Commencement provisions. *See* S.C. Code Ann. § 29-5-23. "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." *Id*.

To be valid, notice of project commencement must be filed with the "clerk of court or register of deeds in the county or counties where the real property is situate" The notice must contain:

(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.

S.C. Code Ann. § 29-5-23. This must be filed within 15 days of commencement of work. "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.'" *Id*.

D. Coverage

Each public payment bond statute covers "labor, material or rental equipment" furnished for the construction work provided for in the contract. S.C. Code Ann. § 11-35-3030(2)(c); *see also* S.C. Code Ann. § 57-5-1660(b); S.C. Code Ann. § 11-1-120 ("for the protection of persons who furnish labor, material, or rental equipment to the contractor or its subcontractors for the work specified in the contract"), S.C. Code Ann. § 29-5-440 ("[e]very 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.").

The coverage required within these sections are "minimum requirements" and the contracting authority may require "any other bond it considers necessary." *Rish v. Theo Bros. Constr. Co.*, 269 S.C. 226, 233, 237 S.E.2d 61, 63 (1977) [Westlaw].

The South Carolina Supreme Court has held that the Little Miller Act is "patterned after the federal Miller Act," and thus "[a]bsent a contrary expression of legislative intent, cases construing the federal Miler Act will be given great weight in the interpretation of its South Carolina counterpart." *Syro Steel Co. v. Eagle Constr. Co.*, 319 S.C. 180, 460 S.E.2d 371 (1995) [Westlaw]; *see also Rish v. Theo Bros. Constr. Co.*, 269 S.C. 226, 232, 237 S.E.2d 61, 63 (1977) [Westlaw]. However, the SPPA is not characterized as a Little Miller Act and Miller Act cases may be inapplicable to interpreting the Act. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 118, 659 S.E.2d 158 (2008) [Westlaw].

1. Labor

a. Professional Services

South Carolina public payment bond coverage does not include administrative professional services or office work. *Quality Lightning Prot. v. H.C. Brown Constr. Co.*, 311 S.C. 62, 427 S.E.2d 676 (Ct. App. 1992) [Westlaw] (holding that a remote subcontractor who processed an application to receive an Underwriter's Laboratory label, and even visited the project before

issuing a report which showed corrective work required to be completed, did not furnish labor within the meaning of the Act.).

b. Union Benefits

There are no South Carolina cases addressing union benefits. Cases concerning union benefits decided under the Miller Act will be given great weight. *Syro Steel Co. v. Eagle Constr. Co.*, 319 S.C. 180, 460 S.E.2d 371 (1995) [Westlaw].

2. Material

Materials are directly referenced in the public bond statutes and are thus covered. Delivery to the project is not necessary. *Syro Steel Co. v. Eagle Constr. Co.*, 319 S.C. 180, 182, 460 S.E.2d 371, 373 (1995) [Westlaw] (relying on Miller Act precedent to hold that "[d]elivery of supplies and material to the project site is not a prerequisite to recovery for suppliers"). The material must be "consumed in the work or in connection to the work." *Kline v. McMeekin Constr. Co.*, 220 S.C. 281, 285, 67 S.E.2d 304, 306 (1951) [Westlaw] (holding that material "made use of in furnishing the so-called contractor's plant and available not only for the particular contract but for other work" are not covered). "Tools, machinery and appliances used by the contractor, although worn out in the progress of the work, are not such labor and materials as are ordinarily contemplated by contractor's bonds." *Id*.

3. Equipment

a. Repairs

Reviewing case law in other jurisdictions, and addressing material furnished at the claimant's plant, the South Carolina Supreme Court has held that incidentals such as "coal, gasoline, and current repairs to machinery, etc., should be included within the purview of the bond." *Kline v. McMeekin Constr. Co.*, 220 S.C. 281, 285, 67 S.E.2d 304, 306 (1951) [Westlaw]. There is a limit to coverage for repairs. Only those repairs that are "incidental and comparatively inexpensive" such that they represent "only ordinary wear and tear or its equivalent" are within the scope of public bonds. *Morrow Crane Co. v. T. R. Tucker Constr. Co.*, 296 S.C. 427, 432, 373 S.E.2d 701, 703 (Ct. App. 1988) [Westlaw].

b. Rentals

Rental equipment is directly included within the coverage of each public bond statute. *Rish v. Theo Bros. Constr. Co.*, 269 S.C. 226, 237 S.E.2d 61 (1977) [Westlaw]. S.C. Code Ann. § 11-35-3030(2)(a)(ii) states that the bond required by the Procurement Code is "for the protection of all persons supplying labor and material." That language was found by the South Carolina Supreme Court to exclude rental equipment. *Kline v. McMeekin Constr. Co.*, 220 S.C. 281, 67 S.E.2d 304 (1951) [Westlaw]. However, the statute of limitations included within the Procurement Code now provides for a lawsuit to be brought by "[a] person who has furnished labor, material, or rental equipment to a bonded contractor." S.C. Code Ann. § 11-35-3030(2)(c). This section was amended

in 2014 and to make the statute of limitations consistent among all of the payment bond statutes. *See* 2014 S.C. Acts 264 [Westlaw]. There have been no reported cases since this amendment.

Charges incurred for the loss of the equipment are not covered. *S.C. Supply & Equip. Co. v. James Stewart & Co.*, 238 S.C. 106, 119 S.E.2d 517 (1961) [Westlaw].

4. Other

a. Attorneys' Fees

Attorneys' fees are only allowed if included within the terms of the contract or bond. "It is settled law that there is no liability for attorney's fees in actions of this kind in the absence of a statute or contract provision creating such liability." *Roberts v. Lawrence*, 243 S.C. 158, 160, 133 S.E. 2d 74, 75 (1963) [Westlaw] (finding no support for the award of attorneys' fees in the public bond statute); *see also Tomlinson v. Sentry Eng'g & Constr., Inc.*, 777 F.2d 918, 919 (4th Cir. 1985) [Westlaw].

Liability for attorneys' fees may also exist under S.C. Code Ann. § 27-1-15. This code section provides:

> Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

To bring a claim for attorney's fees under this section the claimant must send a demand by certified or registered mail and no payment is made within 45 days after a "fair investigation" or if the person liability "unreasonable refuses to pay the claim or proper portion." *Id.*; *see also Phillips & Jordan, Inc. v. McCarthy Improvement Co.*, No. 5:18-cv-00559-JMC, 2020 U.S. Dist. LEXIS 179302, 2020 WL 5793377 (D.S.C. Sep. 29, 2020) [Westlaw].

b. Interest

Interest may be recovered under S.C. Code Ann. § 27-1-15. *See supra*. This code section requires a demand be made for payment by certified or registered mail and the unjust refusal to pay the amount due within 45 days.

Furthermore, the South Carolina Supreme Court has found that a surety may be liable for interest where the amount due were certain or at least capable of being reduced to a certainty. *Crane Co. v. Continental Cas. Co.*, 234 S.C. 44, 106 S.E. 2d 674 (1959) [Westlaw].

c. Financing Charges

There are no South Carolina cases addressing financing charges. Cases concerning financing charges decided under the Miller Act will be given great weight. *Syro Steel Co. v. Eagle Constr. Co.*, 319 S.C. 180, 460 S.E.2d 371 (1995) [Westlaw].

d. Insurance Premiums

There are no South Carolina cases addressing insurance premiums. Cases concerning insurance premiums decided under the Miller Act will be given great weight. *Syro Steel Co. v. Eagle Constr. Co.*, 319 S.C. 180, 460 S.E.2d 371 (1995) [Westlaw].

e. Loans

There are no South Carolina cases addressing loans. Cases concerning loans decided under the Miller Act will be given great weight. *Syro Steel Co. v. Eagle Constr. Co.*, 319 S.C. 180, 460 S.E.2d 371 (1995) [Westlaw].

f. Delay Damages

In *U.S. ex rel. Williams Electric Co. v. Metric Constructors, Inc.*, the South Carolina Supreme Court took up a certified question from the district court on whether any exceptions to an unambiguous no-damages-for-delay clause would be recognized in South Carolina. 325 S.C. 129, 480 S.E.2d 447 (1997) [Westlaw]. The underling claim was a Miller Act payment bond claim in which the subcontractor sought delay damages. The court adopted fraud, misrepresentation, or other bad faith, active interference, delay amounting to abandonment of the contract, and gross negligence as exceptions to an otherwise valid no-damages-for-delay clause. *Id*. Thought the case did not directly involve delay damages on a South Carolina Little Miller Act bond, it does indicate, along with other president applying Miller Act cases, that South Carolina will allow for delay damages a claimant is entitled to under its contract with the bonded contractor.

g. Profits

There are no South Carolina cases addressing profits. Cases concerning profits decided under the Miller Act will be given great weight. *Syro Steel Co. v. Eagle Constr. Co.*, 319 S.C. 180, 460 S.E.2d 371 (1995) [Westlaw].

h. Extracontractual

There is no bad faith statute in South Carolina. There is also no tort claim for bad faith failure to pay against a surety. *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 556 S.E.2d 371 (2001) [Westlaw]. Finally, there is no claim for negligence by the surety in refusing to pay a bond claim. *Kennedy v. Henderson*, 289 S.C. 393, 346 S.E.2d 526 (1986) [Westlaw]. *See also S & S Constr., Inc. v. Reliance Ins. Co.*, 42 F. Supp. 2d 622 (D.S.C. 1998) [Westlaw].

As stated above, there may be a claim for extracontractual attorneys' fees under S.C. Code Ann. § 27-1-15 where the claimant files the statutory requirements for bringing a demand and the

amount owed is not paid after a "fair investigation" or if the person liability "unreasonable refuses to pay the claim or proper portion." *Id*.

E. Contracts Excluded

Under the Procurement Act, where the construction contract is valued at $50,000 or less the government may waive the bond requirements, "if the governmental body has protected the State." S.C. Code Ann. § 11-35-3030(2)(a)(iii).

The South Carolina Department of Transportation has the authority to waive bonding on set aside contracts in amounts not exceeding $250,000. S.C. Code Ann. Regs. 63-708. This waiver applies for contracts for highway or bridge construction, where payment bonds are otherwise required by § 57-5-1660(a)(2), and for building construction or renovation contracts executed by the department, where bonds would be required by § 11-35-3030(2)(a)(ii). *Id*.

F. Time for Suit

State Contracts Covered by the Procurement Code

The time for suit on a contract with the state covered by the Procurement Code is one year from the last day labor, material, or services were provided by the claimant:

> Suits on Payment Bonds-Where and When Brought. Every suit instituted upon a payment bond must be brought in a court of competent jurisdiction for the county or circuit in which the construction contract was to be performed; except that a suit must not be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in the suit.

S.C. Code Ann. § 11-35-3030(2)(d).

Public Highway Contracts

For bonds issued on public highway contracts, a payment bond lawsuit must be filed within one year of the "final settlement" of the contract:

> No suit under this section shall be commenced after the expiration of one year after the date of the final settlement of the contract.

S.C. Code Ann. § 57-5-1660(b).

Local Government and All Other Public Contracts

On all other bonds issued on for contracts with other governmental entities a suit on a payment bond must be brought within one year from the last day labor, material, or services were provided by the claimant:

> No suit under this section shall be commenced after the expiration of one year after the last date of providing or furnishing labor, materials, rental equipment, or services.

S.C. Code Ann. § 11-1-120.

G. Remarks

The South Carolina Supreme Court has distinguished the SPPA, S.C. Code Ann. § 29-6-210 et seq., from the Procurement Code, S.C. Code Ann. § 11-35-10 et seq., and the statute governing the State Highway System, S.C. Code Ann. § 57-5-10 et seq.

The court referred to the bond provisions within the Procurement Code and the statute governing the State Highway System as Little Miller Acts. *See* *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008) [Westlaw]. On the other hand, the court held that "[t]he SPPA has neither ever been characterized as a Little Miller Act nor does it otherwise appear to be patterned after the Miller Act, which seeks to protect both the owner/government entity and the subcontractor through its bonding requirements." *Id*. at 114. Thus, the SPPA applies to all subcontractors and suppliers on public projects, even those where the bond requirements are set forth in the separate Little Miller Acts.

> In our view, the enactment of the SPPA in 2000 illustrates the legislature's intent to, in essence, pick up where the Little Miller Acts left off by outlining a more extensive payment protection scheme dedicated specifically to subcontractors and suppliers.

Id. at 117-118.

At issue in *Sloan* is whether an unpaid subcontractor or supplier has a right of action against the government for its failure to require a contractor obtain valid payment bonds. Under existing law, and relying on Miller Act cases, the lower court had found that no right of action existed against the government. The court overruled, and upon holding that the SPPA provided additional protections to subcontractors and suppliers in addition to their rights under the Little Miller Act, held that the SPPA did create a duty on the part of the government for which a private right of action could be maintained by an unpaid claimant for breach. *Id.* at 118.

Ultimately the court found that an unpaid claimant on a public project where the government had failed to require the contractor to obtain payment bonds, has a right of action under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* and a breach of contract claim as a third-party beneficiary. *Id*.

Other Provisions of the SPPA

The Subcontractors' and Suppliers' Payment Protection Act, S.C. Code Ann. § 29-6-210 et seq. ("SPPA") contains three provisions aside from the provision requiring payment bonds on all government projects.

First, S.C. Code Ann. § 29-6-230, prohibits the application of pay-if-paid clauses in South Carolina. The act states as follows:

> Notwithstanding any other provision of law, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. The payment by the owner to the contractor or

> the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.

Second, S.C. Code Ann. § 29-6-270, requires that where any contract requires a payment bond, the bond "may only be issued by a surety company licensed in the State with a 'B+' minimum rating as stated in the most current publication of 'Best Key Rating Guide, Property Liability'."

Finally, S.C. Code Ann. § 29-6-290 "A provision in a contract for the improvement of real property in the State must not operate to derogate the rights of a construction contractor, subcontractor, supplier, or other proper claimant against a payment bond or other form of payment security or protection established by law."

Prompt Pay Act

The provisions of S.C. Code Ann. § 29-6-10 et seq. provide for a prompt payment process for subcontractors. S.C. Code Ann. § 29-6-20 establishes the contractor or subcontractor's right to payment. Next, S.C. Code Ann. § 29-6-30 establish the time and manner of payment, stating that the owner must pay the contractor within twenty-one days of the pay request and that "the contractor shall pay to his subcontractor and each subcontractor shall pay his subcontractor, within seven days of receipt by the contractor or subcontractor of each periodic of final payment." S.C. Code Ann. § 29-6-40 provides the grounds on which payment may be withheld.

Finally, S.C. Code Ann. § 29-6-50 provides for interest on late payments. That section states, as follows:

> If a periodic or final payment to a contractor is delayed by more than twenty-one days or if a periodic or final payment to a subcontractor is delayed by more than seven days after receipt of periodic or final payment by the contractor or subcontractor, the owner, contractor, or subcontractor shall pay his contractor or subcontractor interest, beginning on the due date, at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due. However, no interest is due unless the person being charged interest has been notified of the provisions of this section at the time request for payment is made. Nothing in this chapter shall prohibit owners, contractors, and subcontractors, on private construction projects only, from agreeing by contract to rates of interest and payment periods different from those stipulated in this section, and in this event, these contractual provisions shall control, provided the requirements of Section 29-6-30 and this section are specifically waived, by section number, in conspicuous bold-faced or underlined type. In case of a willful breach of the contract provisions as to time of payment, the interest rate specified in this section shall apply.

The failure of the subcontractor to provide notice of the application of the statue is fatal to a claim of interest. *EllisDon Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 707 S.E.2d 399 (2011) [Westlaw]; *see also Phillips & Jordan, Inc. v. McCarthy Improvement Co.*, Civil Action No. 5:18-cv-00559-JMC, 2021 U.S. Dist. LEXIS 19000, 2021 WL 346533 (D.S.C. Feb. 1, 2021) [

H. Case Annotations

Commencement of Notice Period

The notice provisions require that a remote subcontractor give written notice to the 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 upon which such claim is made." S.C. Code Ann. § 11-35-3030(2)(c). In *Quality Lightning Protection, Inc. v. H.C. Brown Construction Co.*, 311 S.C. 62, 427 S.E.2d 676 (Ct. App. 1992) [Westlaw], the issue before the court was what constitutes "work" to trigger the ninety day notice period. Adopting the rule set forth in U.S. ex rel. Noland Co. v. Andrews, 406 F.2d 790 (4th Cir. 1969) [Westlaw], the held that "if the work was done or the material was supplied as part of the original contract" then the notice period is triggered; however, "if the work was done or the material was supplied for the purpose of correcting defects or making repairs following inspection of the premises" then the notice period is not triggered. 311 S.C. at 64.

Burden of Proof on Attorneys' Fees and Interest

When a claim is made for attorneys' fees under S.C. Code Ann. § 27-1-15, "the party seeking the award of attorney's fees and interest under the statute, [has] the initial burden of presenting prima facie evidence that [the surety] did not make a fair and reasonable investigation." *Moore Elec. Supply, Inc. v. Ward*, 316 S.C. 367, 450 S.E.2d 96 (Ct. App. 1994) [Westlaw].

Liability of Government to Remote Claimant

The government on a project awarded under the Procurement Code does not have any liability to a remote claimant under the Little Miller Act payment bond even after receiving notice from the claimant of non-payment and paying the contract funds to the bonded general contractor. *Gateway Supply Co. v. Richland Cnty. Sch. Dist. One*, No. 2005-UP-241, 2005 S.C. App. Unpub. LEXIS 14, at *5, 2005 WL 7083708 (Ct. App. Apr. 6, 2005) [Westlaw].

Commencement of Statute of Limitations

In a case brought by a subcontractor on a highway project for a portion of pass-through claims that were ultimately paid, in part, by the South Carolina Department of Highways and Public Transportation, the court found that the date the department issued final payment to the general contractor was the date the one-year statute of limitations began to run under S.C. Code Ann. § 57-5-1660. *S & S Constr., Inc. v. Reliance Ins. Co.*, 42 F. Supp. 2d 622 (D.S.C. 1998) [Westlaw].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

The language of a bond, as in every contract under South Carolina law, determines "the full force and effect of the document when it is perfectly plain and capable of legal construction." *Emp'rs Ins. of Wausau v. Constr. Mgmt. Eng'rs, Inc.*, 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989) [Westlaw]. "The liability of the surety under its bond depends upon its terms and the intention of the parties." *Nat'l Loan & Exch. Bank v. Gustafson*, 157 S.C. 221, 249, 154 S.E. 167, 177 (1930) [Westlaw]. Thus, the surety's obligation cannot be extended by implication beyond the terms of the bond. *See also S.C. Pub. Serv. Com. v. Colonial Constr. Co.*, 274 S.C. 581, 266 S.E.2d 76 (1980) [Westlaw] (holding that when an agreement is incorporated by reference into a bond, the two documents are read together and construed as a whole to ascertain the intent of the parties).

"The obligation of the surety being accessory or collateral to the obligation contracted by the principal, it follows as a general rule that the liability of the surety is measured precisely by the liability of the principal." *Greenville Airport Com. v. United States Fid. & Guar. Co.*, 226 S.C. 553, 560, 86 S.E.2d 249, 252 (1955) [Westlaw].

South Carolina will use similar rules for the construction of contracts that apply to insurance but recognizes that this is limited to those rules of construction and that a surety's right of recourse against its principal are not analogous to contracts for insurance. *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 411, 556 S.E.2d 371, 375 (2001) [Westlaw]. However, "a surety's liability cannot extend beyond the penal amount of the bond." *Id.* "Suretyship is a lending of credit to aid a principal who has insufficient credit of his own, and is a direct contract to pay the principal's debt or perform his obligation in case of his default." *Philco Fin. Corp. v. Mehlman*, 245 S.C. 139, 143, 139 S.E.2d 475, 476 (1964) [Westlaw].

B. Time for Suit

Under, S.C. Code Ann. § 29-5-440, no suit "shall be commenced after the expiration of one year after the last date of furnishing or providing labor, services, materials, or rental equipment." This section applies to private bonds except where a contractual period of limitations in the bond extends the time for suit. *Westbrook Co. v. Hanover Ins., Co.*, 2011 U.S. Dist. LEXIS 70825, at *4-9, 2011 WL 2600983 (D.S.C. June 30, 2011) [Westlaw]. *See also* S.C. Code Ann § 15-3-140, prohibiting parties to a contract from shortening the statute of limitations.

C. Case Annotations

Application of Mechanics' Lien Statute Provisions to Private Bonds

There is no statute requiring payment bonds on private projects. However, to the extent a payment bond is provided, S.C. Code Ann. § 29-5-440 may apply. This statute is provided under the Mechanics' Lien statute and applies by its terms "to any payment bond, whether statutory, public, common law, or private in nature, that is issued in connection with a construction project or other improvements to real property within South Carolina." *Id.*

In *Hard Hat Workforce Solutions, LLC v. Mechanical HVAC Services, Inc.*, 406 S.C. 294, 750 S.E.2d 921 (2013) [Westlaw], the South Carolina Supreme Court held that private bonds may

provide greater coverage than what is called for in S.C. Code Ann. § 29-5-440. *Hard Hat* involved a bond that did not have any notice provisions. The court held that the lack of any notice provisions in the private bond provided broader coverage than the restrictive notice provisions required in S.C. Code Ann. § 29-5-440, and thus, the "no notice" requirements of the bond would apply. *Hard Hat*, 406 S.C. at 304. In summary, the Mechanics' Lien statute may apply to private bonds where those bonds specifically incorporate the provisions or where the provisions of the Mechanics' Liens statute would broaden the coverage of the bond beyond its written terms.

Remote Claimants

In *William M. Bird & Co. v. Whitmire*, 306 S.C. 558, 413 S.E. 2d 804 (1992) [Westlaw], the court examined whether the supplier of materials to a company contracted to build furniture to furnish a dormitory, was a claimant under a payment bond. The court reviewed the definition of claimant in the bond as well as subcontractor and sub-subcontractor in the bonded contract and determined that the supplier was not intended to be covered by the bond.

SOUTH DAKOTA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Chapter 5-21 of the South Dakota Codified Laws sets forth the general requirements for performance and payment bonds for public improvement contracts but does not specify the actual terms of the bonds. Pursuant to S.D.C.L. § 5-21-1:

> when any contract is entered into for the construction of public improvement or the furnishing of any material or labor therefor, the contractor is required, before commencing such work, to furnish surety in an amount not less than the contract price, for the faithful performance of the contract, with the additional obligation that the contractor shall promptly pay all persons supplying him with labor or material in the prosecution of the work provided for in the contract.

An exception exists for projects governed by S.D.C.L. § 31-12-15 (concerning County Highway Systems), whereby the board of county commissioners, county highway board, or board of township supervisors, has the discretion to set the amount of a bond conditioned upon the faithful performance of the contract according to the plans and specifications.

B. Tiers Covered

South Dakota law does not limit claimants according to contracting tier or degree of remoteness from the contractor responsible for providing a payment bond. Under S.D.C.L. § 5-21-5, a claimant is any "person who has furnished labor or material used in the construction of [a] public improvement[.]"

C. Notice Required

The South Dakota Code does not contemplate a procedure whereby individual claimants give notice of claim and then prosecute actions on the payment bond; instead, the statute contemplates that the *public body* will bring suit, and all unpaid claimants can join in the action by intervention. Claimants' rights are subject to the priority of the claim of the public agency. *See* S.D.C.L. § 5-21-5.

If, however, the public agency does not bring suit within six months from the completion and final settlement of the public contract, a claimant must first furnish an affidavit to the entity that it supplied labor or material for the project but was not paid. Once the claimant provides such an affidavit, it then has a right of action and is authorized to bring suit in the name of the public corporation. *See* S.D.C.L. § 5-21-6.

Notably, the payment bond itself may also provide for a reasonable notice provision, satisfaction of which will be a condition precedent to recovery against the surety. *Cnty. of*

Pennington ex rel. Nw. Pipe Fittings, Inc. v. St. Paul Fire & Marine Ins. Co., 508 N.W.2d 376 (S.D. 1993) [Lexis].

D. Coverage

Public payment bonds exist for the protection of "all persons supplying…labor or material in the prosecution of the work provided for in the contract." S.D.C.L. § 5-21-1. A bond may be conditioned more broadly than the minimum requirements of the statute. *State ex rel. J. D. Evans Equip. Co., Sioux Road v. Johnson*, 83 S.D. 444, 160 N.W.2d 637 (1968) [Lexis].

Because the South Dakota statutory requirements for public improvement bonding "are patterned after the federal [Miller] [A]ct" (*id.* at 450, 160 N.W. at 640) decisions construing "labor" and "materials" under the federal Miller Act are likely to be persuasive to South Dakota courts.

1. Labor

a. Professional Services

In the absence of express case law on point, South Dakota courts may find federal Miller Act jurisprudence persuasive with respect to determining whether architects, engineers, surveyors, or those performing supervisory work furnish "labor" sufficient to maintain a payment bond claim.

b. Union Benefits

There is no authority directly on point.

2. Material

Items furnished to the project and used in the prosecution of the work are materials within the coverage of the payment bond. *State ex rel. J. D. Evans Equip. Co., Sioux Road v. Johnson*, 83 S.D. 444, 160 N.W.2d 637 (1968) [Lexis]; *J.F. Anderson Lumber Co. v. Nat'l Sur. Co.*, 207 N.W. 53 (S.D. 1926) [Lexis]. Materials need not necessarily be incorporated into the contract work in order to be covered. *See id.*

A payment bond was held not to be required of a public contractor for the provision of gravel stockpiled for general use in public construction and not destined for a particular public improvement. *Pete Lien & Sons, Inc. v. City of Pierre*, 1998 S.D. 38, ¶ 9, 577 N.W.2d 330, 332 [Lexis].

3. Equipment

a. Repair

Equipment repair costs incidental to keeping the equipment of the contractor in operating condition for performance of the work are likely to be adjudged valid components of claims against South Dakota public payment bonds. *See W. Material Co. v. Deltener*, 64 S.D. 62, 264 N.W. 207, 209 (1935) [Lexis] (citing cases).

b. Rentals

See *W. Material*, 64 S.D. 62, 264 N.W. at 209 [Lexis] ("rentals of equipment are within the coverage of the bond.").

4. Other

a. Attorneys' Fees

Chapter 5-21 of the South Dakota Codified Laws does not address recoverability of attorneys' fees, and there does not appear to be case law considering the question, either.

b. Interest

Prejudgment interest may be awarded pursuant to S.D.C.L. § 21-1-13.1; *and see* S.D.C.L. § 54-3-16.

c. Financing Charges

Under S.D.C.L. § 54-3-1.1, there is generally no maximum interest rate or charge, or usury rate restriction, for parties contracting pursuant to written agreement. However, any interest rate appearing on a bill, statement, or invoice may not exceed eighteen percent. S.D.C.L. § 54-3-5. In light of these statutes, it is possible that a financing charge or late payment penalty in a subcontract, purchase order, or otherwise may constitute a valid claim against a public improvements payment bond.

d. Insurance Premiums

There is no published authority expressly on point.

e. Loans

See *State ex rel. Farmers State Bank of Parkston v. Kuipers Constr. Co.*, 86 S.D. 27, 190 N.W.2d 769 (1971) [Lexis] (Small Business Administration, as a money lender, had no recourse against bonds required by statute for public improvement, including where terms of bond contained "no definite and prices promise" to pay those who had loaned money to contractor).

f. Delay Damages

There is no published authority expressly on point.

g. Profits

There is no published authority expressly on point.

h. Extracontractual

See *Double H Masonry, Inc. v. Liberty Mut. Ins. Co.*, CIV 15-5004, 2016 WL 5816997, *11, 2016 U.S. Dist. LEXIS 136466 (D.S.D. Sept. 30, 2016) [Lexis] ("Based upon an analysis of the South Dakota Insurance Code, the nature of surety instruments, other policy considerations previously discussed, and an analysis of fellow jurisdictions that had addressed the issue, this Court finds that suretyship is a type of insurance and thus Double H is allowed to proceed on its tortious bad faith claim.")

E. Contracts Excluded

The payment bond requirements of S.D.C.L. § 5-21-1 do not apply to county highway projects undertaken pursuant to S.D.C.L. § 31-12-15. Requirements for "performance security" may additionally be waived for public contracts that involve the expenditure of less than $100,000 (S.D.C.L. § 5-18-A-14), or emergency procurements (S.D.C.L. § 5-18A-9). *See* S.D.C.L. §§ 5-21-1.1, -1.3.

Tribal governments are not "public corporations" within the meaning of S.D.C.L. Chapter 5-21 to which public bonding requirements apply. *Midstates Excavating, Inc. v. Farmers and Merchants Bank & Tr. of Watertown*, 410 N.W.2d 190 (S.D. 1987) [Lexis].

F. Time for Suit

As discussed above, the South Dakota statutory scheme envisions that suit will be commenced by the public body, with claimants seeking payment intervening in that action. If, however, no suit is brought by the public body within six months from the contract's completion and final settlement, then a claimant may initiate a suit upon furnishing an affidavit of nonpayment, "provided that where suit is instituted by any such person on the surety of the contractor, it shall not be commenced until six months after the complete performance of such contract and final settlement thereof but *must be commenced within one year thereafter*; provided, further, that where such suit is so instituted…only one action shall be brought, and any person may file his claim in such action and be made a party thereto within *one year from the completion of the work* under such contract, and not later[.]" S.D.C.L. § 5-21-6 (emphasis added).

G. Remarks

Liability for Use and Excise Taxes

Under S.D.C.L. § 5-21-3, an additional obligation is imposed upon the surety that the contractor/subcontractor shall promptly pay all taxes that may be due to the State of South Dakota. This additional obligation on the surety ceases six months after completion of the contract and acceptance of the improvement by the owner, unless within that time the secretary of revenue gives the surety notice of unpaid use taxes and contractors' excise taxes. S.D.C.L. § 5-21-4.

Pro Rata Distribution in Event Claims Exceed Bond Penalty

Under S.D.C.L. § 5-21-5, "[i]f the full amount of liability of the surety company is insufficient" to cover all payment bond claimants' claims and demands, "then, after paying the full amount due the public corporation, the remainder shall be distributed pro rata among such intervenors." *And see* S.D.C.L. § 5-21-7 ("The surety company may pay into court for distribution among such claimants and creditors the full amount of the penalty named in the bond, less any amount which such surety company may have paid to the public corporation by reason of the execution of such bond, and upon so doing the surety company shall be relieved from further liability.").

Exclusive Venue and "One Lawsuit" Rule

Under S.D.C.L. § 5-21-6, claimant suits are to be brought in the circuit court for the county in which the contract was to be performed and not elsewhere. Additionally, only one action shall be brought, and other bond claimants are then entitled to intervene and assert their claims in this action. *Id.* When suit is initiated by the public body or a claimant, a notice of the pendency of such suit is to be given to all known creditors and noticed by publication in a newspaper of general circulation in the county where the contract is being performed to enable intervention in this single suit. *See* S.D.C.L. § 5-21-8.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

South Dakota does not require payment bonds on private construction projects, and common-law payment bonds will be construed according to their terms in accordance with ordinary principles of contract interpretation. Pursuant to South Dakota suretyship statutes: "A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty." S.D.C.L. § 56-2-12.

Readers are encouraged to review the State's suretyship statutes at Title 56, chapter 2 of the South Dakota Codified laws, in full, as they set forth a number of background principles of importance, *e.g.*, the surety's right to require a creditor to first proceed against the principal (S.D.C.L. § 56-2-6), the surety's exoneration to the extent prejudiced by an act of the creditor (S.D.C.L. § 56-2-10), the surety's subrogation rights (S.D.C.L. § 56-2-17), etc.

B. Time for Suit

Pursuant to S.D.C.L. § 53-9-6, "any provision in a surety contract which limits the time for enforcement is valid and enforceable if the limitation of time is not less than two years after the cause of action has accrued." *See also* *Sheehan v. Morris Irrigation*, 410 N.W.2d 569 (S.D. 1987) [Lexis]; *F.D.I.C. v. Hartford Accident & Indem. Co.*, 97 F.3d 1148 (D.S.D. 1996) [Lexis]. In the absence of a limitations provision in the bond or underlying contract, the six-year statute of limitations applicable to contract actions is likely to apply. S.D.C.L. § 15-2-13.

C. Case Annotations

Coextensive Liability

"The general rule is that the liability of a surety is no greater than that of the principal, but defenses personal to the principal are available only to the principal and do not pass to the surety. Where the principal waives such personal defenses and becomes bound, the surety may not set up such defenses in his favor." *Rathgaber v. Horton*, 52 S.D. 436, 218 N.W. 148, 150 (1928) [Lexis].

TENNESSEE

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

In the state of Tennessee, payment bond requirements differ based on project type. The legislature has distinguished payment bonds for projects conducted through the Tennessee Department of Transportation ("TDOT Projects") from those for projects conducted through all other arms of the state ("Public Works Projects"). As a result, requirements for each type of project differ in certain respects.

The payment bond requirements for Public Works projects are set forth in Tenn. Code Ann. § 12-4-201. The statute provides that a payment bond is to be issued for 25% of the contract price on all projects in excess of a threshold $100,000. In practice, a payment bond is often issued for the full sum of the Public Works project.

Tenn. Code Ann. § 12-4-201 applies to all Public Works projects, including TDOT projects. However, TDOT projects are also subject to the more specialized Tenn. Code Ann. § 54-5-119. This statute takes precedence over those that govern all Public Works projects when there is a conflict between the two sections. *Inryco, Inc. v. Eatherly Constr. Co.*, 793 F.2d 767, 770 (6th Cir. 1986) [Lexis] (citing *Pan Am. Petroleum Corp. v. McQuary*, 51 S.W.2d 854, 855 (Tenn. 1932) [Lexis]). According to the TDOT statute, a general contractor on a TDOT project is to post a payment bond "for the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work." Tenn. Code Ann. § 54-5-119. This is required of all TDOT projects, regardless of their contract price. TDOT itself fixes the bond amount—but the amount is presumed to be equal to that of the underlying contract.

In light of the material differences that exist between the bond requirements for each project, the following sections discuss Public Works Payment Bonds separately from TDOT Bonds.

B. Tiers Covered

1. Public Works Payment Bond

Tenn. Code Ann. § 12-4-204 allows for "any laborer or furnisher of labor or material to the contractor, or to any immediate or remote subcontractor under the contractor," to bring a claim under a Public Works Payment Bond, so long as the labor or materials furnished were indeed used while completing the Public Works Project. The Public Works Payment Bond statute does not set out a specific degree of remoteness. However, courts in Tennessee have long relied on the state's mechanics' lien statutes to construe Public Works Payment Bond statutes. *See Inryco, Inc. v. Eatherly Constr. Co.*, 793 F.2d 767, 769–770 (6th Cir. 1986) [Lexis]; *see also Safeco Ins. Co. v.*

W.B. Browning Constr. Co., 886 F.2d 807, 810 (6th Cir. 1989) [Lexis]. The mechanics' lien statute, Tenn. Code Ann. §§ 66-11-101 *et seq.*, defines a "remote contractor" as "a person … who provides work or labor or who furnishes material, services, equipment, or machinery in furtherance of any improvement under a contract with a person other than an owner." Tenn. Code Ann. § 66-11-101(14). Case law since Tenn. Code Ann. § 66-11-101 was amended in 2007 has not yet clarified which parties qualify as a remote contractor in practice.

2. TDOT Bond

Tennessee statutes do not expressly define the classes of subcontractors, laborers, or supplies that are covered by a TDOT Bond other than to reference that "all materials purchased and for all labor employed in the contemplated work." Tenn. Code Ann. § 54-5-119(a). However, the Tennessee Supreme Court has long held that remote subcontractors are not protected by a TDOT Bond. *See Pan Am. Petroleum Corp. v. McQuary*, 51 S.W.2d 854, 855 (Tenn. 1932) [Lexis]. This means that a TDOT Bond only covers two tiers of claimants. The Sixth Circuit Court of Appeals has also found that the labor or materials must be supplied directly to the TDOT contractor or its subcontractors, although it based its ruling on a pre-2007 version of the mechanics' lien statute. *Inryco*, 793 F.2d at 767 [Lexis] (holding that a dealer who fabricated materials for the principal's supplier could not make a claim against the TDOT Bond because the dealer did not provide the materials directly to the TDOT contractor or its subcontractors). This means that a dealer that provides materials to a supplier for a TDOT contractor or its subcontractors may not be able to assert a claim against the TDOT Bond. *Id.*

Neither of the respective statutes governing each payment bond type sets forth a specific bond form to be used on Public Works Projects or TDOT Projects. Thus, municipalities, for instance, tend to use their own bond forms.

C. Notice Required

1. Public Works Payment Bond

The general rule is that unpaid subcontractors, suppliers, or laborers on Public Works Projects must provide written notice of their claims after furnishing labor or material, and within 90 days after the completion of the project. Tenn. Code Ann. § 12-4-205. The claimant must provide such notice to either (1) the public works contractor that executed the bond or (2) the public official who had charge of letting or awarding the Public Works Project. However, the claimant does not have to provide notice of its potential claim to the surety.

Pursuant to Tenn. Code Ann. § 12-4-205, the written notice must be provided via return receipt certified mail or personal delivery. Its content must set forth (1) a description of the nature of the Public Works Project, (2) an itemized statement of the material furnished or labor provided and the balance due as a result, and (3) a description of the property improved. Tenn. Code Ann. § 12-4-205.

To whom the written notice should be provided depends on which arm of the government undertook that specific Public Works Project. If the Project was undertaken by the State of Tennessee or one of its commissions, written notice is proper when it is mailed or delivered to the governor of Tennessee. If the Project was undertaken by a municipality or one of its commissions, notice is proper when it is mailed or delivered to the mayor. If the Project was undertaken by a

county or one of its commissions, notice is proper when it is mailed or delivered to the county executive.

2. TDOT Bond

Since its amendment in 2005, Tenn. Code Ann. § 54-5-122 has been read to require unpaid laborers and suppliers that wish to assert a claim against a TDOT Bond to adhere to the notice provisions contained in the statutes relating to TDOT Projects. Tennessee courts have not construed the new language contained in the provision as of the date of this publication. As a result, a claimant must await TDOT's notice of final settlement before asserting a potential claim regarding a specific TDOT Project. TDOT is required to publish the notice of final settlement in a newspaper circulated in the county where the work is done—or if there is no such newspaper in the county, in an adjoining one. Tenn. Code Ann. § 54-5-122. In addition, unpaid subcontractors, laborers, and suppliers must file notice of their claims with TDOT as well as the surety within 30 days of the last publication of TDOT's notice of final settlement—but not prior to the first publication of TDOT's notice of final settlement. The claimant must also ensure that its notice is verified under oath.

D. Coverage

1. Public Works Payment Bond

The legislature has not defined the specific categories of labor or materials covered under Public Works Payment Bonds. However, Tenn. Code Ann. § 12-4-201 does state that a Public Work Payment Bond is to be issued "to the effect that the contractor will pay for all the labor or materials used by the contractor," or to any of its immediate or remote subcontractors as well. According to that statute, a Public Work Payment Bond must also provide for the contractor to pay for the labor and materials used by "any immediate or remote subcontractor under the contractor." *Id.* Some specific categories of expenses are discussed below.

a. Labor

i. Professional Services

Tennessee statutes do not state whether professional services are considered labor that would be recoverable under a Public Works Payment Bond. However, the Tennessee mechanics' lien statute provides a lien in favor of land surveyors and licensed architects and engineers who perform work on the property at issue, Tenn. Code Ann. § 66-11-102, and Tennessee courts attempt to provide "a uniform construction and application of [mechanics' lien statutes and public works bond statutes]," *Nicks v. W.C. Baird & Co.*, 165 Tenn. 89, 52 S.W.2d 147 (1932) [Lexis]. Thus, Tennessee courts are likely to consider the services of land surveyors and licensed architects and engineers to be labor recoverable under a Public Works Payment Bond. Regarding other professionals, Tennessee courts provide little guidance, but cases interpreting the federal Miller Act serve as persuasive authority. Courts considering this issue fall across a spectrum. On one end are those that limit the term "labor" in such statutes to "physical labor rather than technical and professional skill and judgment," *Tri-State Emp. Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d

256, 266 (2d Cir. 2002) [Lexis], and on the other those that allow claims for any professional services necessary to and that forward the progress of the project. *Am. Sur. Co. of N.Y. v. United States* ex rel. *Barrowagee Labs.*, 76 F.2d 67, 68 (5th Cir. 1935) [Lexis]. In between, many courts interpret "labor" as covering professional services as long as they are provided on site, such as superintending, supervision, and inspection. *United States* ex rel. *Olson v. W.H. Cates Constr. Co.*, 972 F.2d 987, 990 (8th Cir. 1992) [Lexis]. Based these cases, claimants seeking reimbursement under a Public Works Payment Bond for professional services other than those covered by Tenn. Code Ann. § 66-11-102 are more likely to succeed if they provided their services on-site or exerted some measure of physical toil while doing so.

ii. Union Benefits

It is unclear if labor union benefits are recoverable under a Public Works Payment Bond. Tennessee has yet to address this issue even in its mechanics' lien statutes.

b. Material & Equipment

i. Repairs

Tennessee's Public Works Payment Bond statute, unlike that of several states, does not specifically authorize recovery against a project payment bond for the repair of equipment used in carrying out the contract. *See, e.g.*, N.H. Rev. Stat. Ann. § 447:16; Tex. Gov't Code Ann. § 2253.001(6). Case law from other jurisdictions suggests that the cost of repairs for damages incidental to the work and that represent ordinary wear and tear are covered even in the absence of a statutory authorization.[1] However, the specific question of whether the cost of repairs to the equipment of the general contractor are covered under a Public Works Payment Bond has not yet been addressed in Tennessee.

ii. Rentals

The cost of renting equipment that is actually used by the general contractor, its immediate subcontractors, or its remote subcontractors is covered under a Public Works Payment Bond, so long as the equipment rented was actually utilized in completing the Project. *See R. L. Harris, Inc. v. Cincinnati, N. O. & T. P. Ry. Co.*, 280 S.W.2d 800 (Tenn. 1955) [Lexis] (stating that statutory payment bonds cover "arising from the rental of machinery used on the contract"); Tenn. Code Ann. § 12-4-201.

[1] *See* 11A COUCH ON INS. § 165:135 (stating that payment bonds cover claims based on "labor performed in the repair or replacement of inexpensive minor parts which ordinarily wear out quickly and, thus, would normally be substantially consumed in the project") (citing *Fid. & Cas. Co. of N.Y. v. Allstate Ins. Co.*, 146 N.W.2d 869 (Minn. 1966) [Lexis]).

c. Other

i. Attorneys' Fees

Tennessee has long adhered to the "American Rule," under which litigants are responsible for their own attorneys' fees—absent a contractual agreement or a statute providing otherwise. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000) [Lexis]. No statute governing Public Work Payment Bonds does so. As a result, the sole means to recover attorneys' fees is pursuant to contractual agreement. However, bond language authorizing recovery of attorneys' fees need not be explicit for such fees to be awarded. In 2015, the Tennessee Court of Appeals upheld an award of attorneys' fees to a prime contractor and its surety where the bonded contract incorporated the Construction Industry Rules of the American Arbitration Association. *Lasco Inc. v. Inman Constr. Corp.*, 467 S.W.3d 467 (Tenn. Ct. App. 2015) [Lexis].

ii. Interest & Financing Charges

The language of Tenn. Code Ann. § 25-1-102 seems to prohibit bond claimants from recovering prejudgment interest from sureties. The statute provides:

> In actions brought on bonds or agreements for the payment of money, or with collateral conditions, and recovery had by the plaintiff, the judgment shall be entered for the stipulated penalty, to be discharged by the payment of the principal and interest due thereon, or the damages assessed by the jury, and execution shall issue accordingly.

Tenn. Code Ann. § 25-1-102. However, the Tennessee Supreme Court has given this language a somewhat less than strict construction. It has construed the statute to prohibit courts from awarding prejudgment interest against sureties—if it is in excess of the bond's penal sum. *Peoples Bank & Tr. Co. v. U.S. Fid. & Guar. Co.*, 3 S.W.2d 163, 164 (Tenn. 1928) [Lexis] (stating judgment on a fidelity bond claim "cannot exceed the stipulated penalty . . . [and] interest is allowed only after judgment and upon the judgment"); *see also In re Mike Rose Oil Co.*, BK No. 90-23604-B, Adversary Proceeding No. 91-0006, 1991 WL 110209, at *4–5, 1991 Bankr. LEXIS 834, at *10 (Bankr. W.D. Tenn. June 17, 1991) [Lexis]. In other words, payment bond claimants can be awarded prejudgment interest if it is less than the bond's penal sum. *Id.* The decision to award prejudgment interest lies "within the sound discretion of the trial court." *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998) [Lexis].

Tenn. Code Ann. § 47-14-121 imposes a general post-judgment interest rate of 2% less than the formula rate per annum published by the commissioner of financial institutions. There are no statutes establishing an interest rate specific to Public Works Payment Bonds. As a result, sureties can expect to be responsible for the post-judgment interest rate set forth in Tenn. Code Ann. § 47-14-121 until the judgment is satisfied, unless the bond language provides otherwise.

iii. Insurance Premiums

Insurance premiums, such as for worker' compensation insurance, are most likely not considered labor or materials recoverable under a Public Works Payment Bond. Some states include insurance premiums in their public works payment bond statute's definition of "labor and materials," but Tennessee has not done so. *See* Minn. Stat. Ann. § 574.26. While no Tennessee

case has yet decided this issue, the majority rule is that absent a statute authorizing coverage of or express assumption of liability for insurance premiums, the surety on a statutory bond covering "labor and materials" is not liable for them. 164 A.L.R. 1468 (citing cases). *See also* *U.S. ex rel Cobb-Strecker-Dunphy & Zimmerman, Inc. v. M.A. Mortenson Co.*, 706 F. Supp. 685, 690 (D. Minn. 1989) [Lexis].

iv. Loans

While Tennessee courts have not ruled on this issue, they are likely to follow the uniform holding of courts in other jurisdictions that loans, even if used to pay for labor and materials, are not labor or materials recover-able under payment bonds. 3 BRUNER & O'CONNOR CONSTR. LAW § 8:199 (citing cases).

v. Delay Damages

Absent any contractual provision to the contrary, additional expenses incurred as a result of delays may be recoverable to the extent that they represent the value of labor and material necessary for the completion of the contract, but other delay damages, such as for equipment standby time, are not. *See* *U.S. ex rel. E. & R. Constr. Co. v. Guy H. James Constr. Co.,* 390 F. Supp. 1193, 1244 (M.D. Tenn. 1972) [Lexis] (interpreting the federal Miller Act). However, Public Works Payment Bonds often contain clauses restricting damages for delay, which Tennessee courts have enforced. As is true of all contracts, "where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties were encountered." *Brown Bros., Inc. v. Metro. Gov't. of Nashville & Davidson Cnty*, 877 S.W.2d 745 (Tenn. Ct. App. 1993) [Lexis]. However, Tennessee courts allow recovery of delay damages despite an applicable "no damages for delay" clause if the claimant can establish that the delay in question "(1) was of a kind not contemplated by the parties, (2) amounted to an abandonment of the contract, (3) was caused by bad faith, or (4) was caused by active interference." *Thomas & Assocs., Inc. v. Metro. Gov't of Nashville,* No. M2001-00757-COA-R3CV, 2003 Tenn. App. LEXIS 425, 2003 WL 21302974, at *14 (Tenn. Ct. App. June 6, 2003) [Lexis].

vi. Profits

While no Tennessee case has addressed this issue with regard to Public Works Payment Bonds, it appears that certain lost profits may be considered labor or materials recoverable under a Public Works Payment Bond in Tennessee. The Tennessee Supreme Court has held in relation to mechanics' liens that "Profits and commissions ordinarily are not lienable items unless included in the contract price . . . or . . . in the reasonable worth of the labor or materials furnished," but that "no lien may be allowed for profits or commissions not earned." *Hamilton Nat'l Bank v. Long*, 226 S.W.2d 293, 297 (Tenn. 1949) [Lexis]. As noted above, Tennessee courts seek to construe the payment bond and mechanics' lien statutes uniformly, so the reasoning in this case likely applies to Public Works Payment Bonds as well. This approach conforms to the general rule that "an unpaid supplier of materials may recover the reasonable value of the materials actually furnished, ordinarily computed as the cost of those materials plus a reasonable profit thereon, without right of recovery under the breach of contract measure for expected profits that the supplier would have

earned on materials contracted for but not actually furnished." 3 BRUNER & O'CONNOR CONSTR. LAW § 8:200.

2. TDOT Bond

As with Public Works Payment Bonds, no Tennessee statute defines the specific categories of labor or materials that are covered by TDOT Bonds. However, Tenn. Code Ann. § 54-5-119 provides that a TDOT Bond is to be "conditioned … for the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work." This has been interpreted to mean that a TDOT Bond will provide coverage for labor and materials that are actually used or consumed in the Project. *Inryco, Inc. v. Eatherly Constr. Co.*, 793 F.2d 767, 767 (6th Cir. 1986) [Lexis].

a. Labor

i. Professional Services

Tennessee statutes do not state whether professional services are considered labor that would be recoverable under a TDOT Bond . However, the Tennessee mechanics' lien statute provides a lien in favor of land surveyors and licensed architects and engineers who perform work on the property at issue, Tenn. Code Ann. § 66-11-102, and Tennessee courts attempt to provide "a uniform construction and application of [mechanics' lien statutes and public works bond statutes]," *Nicks v. W.C. Baird & Co.*, 165 Tenn. 89, 52 S.W.2d 147 (1932) [Lexis]. Thus, Tennessee courts are likely to consider the services of land surveyors and licensed architects and engineers to be labor recoverable under a TDOT Bond. Regarding other professionals, Tennessee courts provide little guidance, but cases interpreting the federal Miller Act serve as persuasive authority. Courts considering this issue fall across a spectrum. On one end are those that limit the term "labor" in such statutes to "physical labor rather than technical and professional skill and judgment," *Tri-State Emp. Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d 256, 266 (2d Cir. 2002) [Lexis], and on the other those that allow claims for any professional services necessary to and that forward the progress of the project. *Am. Sur. Co. of N.Y. v. United States* ex rel. *Barrowagee Labs.*, 76 F.2d 67, 68 (5th Cir. 1935) [Lexis]. In between, many courts interpret "labor" as covering professional services as long as they are provided on site, such as superintending, supervision, and inspection. *United States* ex rel. *Olson v. W.H. Cates Constr. Co.*, 972 F.2d 987, 990 (8th Cir. 1992) [Lexis]. Based these cases, claimants seeking reimbursement under a TDOT Bond for professional services other than those covered by Tenn. Code Ann. § 66-11-102 are more likely to succeed if they provided their services on-site or exerted some measure of physical toil while doing so.

ii. Union Benefits

It is unclear if labor union benefits are recoverable under a TDOT Bond. Tennessee has yet to address this issue even in its mechanics' lien statutes.

b. Material & Equipment

i. Repairs

Tennessee's TDOT Bond statute does not specifically authorize recovery against a project payment bond for the repair of equipment used in carrying out the contract. Case law from other jurisdictions suggests that the cost of repairs for damages incidental to the work and that represent ordinary wear and tear are covered even in the absence of a statutory authorization.[2] However, the specific question of whether the cost of repairs to the equipment of the general contractor are covered under a TDOT Bond has not yet been addressed in Tennessee.

ii. Rentals

The cost of renting equipment that is actually used by the TDOT contractor, its immediate subcontractors, or its remote subcontractors is covered under a TDOT Bond, so long as the equipment rented was actually utilized in completing the Project. *See* *U.S. Fid. & Guar. Co. v. Thompson & Green Mach. Co.*, 568 S.W.2d 821, 824 (Tenn. 1978) [Lexis] (interpreting an earlier version of Tenn. Code Ann. § 54-5-119).

c. Other

i. Attorneys' Fees

No statute governing TDOT Bonds awards attorneys' fees to prevailing parties. As a result, the American Rule applies. This means that such fees are not to be awarded unless the bond language provides otherwise. The same is true in regard to Public Works Payment Bonds.

ii. Interest & Financing Charges

As noted in the Public Works Payment Bond section, the language of Tenn. Code Ann. § 25-1-102 seems to prohibit bond claimants from recovering prejudgment interest from sureties. The Tennessee Supreme Court, however, has construed the statute to only prohibit courts from awarding prejudgment interest against sureties if it is in excess of the bond's penal sum. *Peoples Bank & Tr. Co. v. U.S. Fid. & Guar. Co.*, 3 S.W.2d 163, 164 (Tenn. 1928) [Lexis] (stating judgment on a fidelity bond claim "cannot exceed the stipulated penalty . . . [and] interest is allowed only after judgment and upon the judgment"); *see also* *In re Mike Rose Oil Co.*, BK No. 90-23604-B, Adversary Proceeding No. 91-0006, 1991 WL 110209, at *4–5, 1991 Bankr. LEXIS 834, at *10 (Bankr. W.D. Tenn. June 17, 1991) [Lexis]. In other words, payment bond claimants can be awarded prejudgment interest if it is less than the bond's penal sum. *Id.* The decision to award prejudgment interest lies "within the sound discretion of the trial court." *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998) [Lexis].

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[2] *See* 11A COUCH ON INS. § 165:135 (stating that payment bonds cover claims based on "labor performed in the repair or replacement of inexpensive minor parts which ordinarily wear out quickly and, thus, would normally be substantially consumed in the project") (citing *Fid. & Cas. Co. of N.Y. v. Allstate Ins. Co.*, 146 N.W.2d 869 (Minn. 1966) [Lexis]).

Tenn. Code Ann. § 47-14-121 imposes a general post-judgment interest rate of 2% less than the formula rate per annum published by the commissioner of financial institutions. There are no statutes establishing an interest rate specific to TDOT Bonds. As a result, sureties can expect to be responsible for the post-judgment interest rate set forth in Tenn. Code Ann. § 47-14-121 until the judgment is satisfied, unless the bond language provides otherwise.

iii. Insurance Premiums

Insurance premiums, such as for worker' compensation insurance, are most likely not considered labor or materials recoverable under a TDOT Bond. Some states include insurance premiums in their public works payment bond statute's definition of "labor and materials," but Tennessee has not done so. *See* Minn. Stat. Ann. § 574.26. While no Tennessee case has yet decided this issue, the majority rule is that absent a statute authorizing coverage of or express assumption of liability for insurance premiums, the surety on a statutory bond covering "labor and materials" is not liable for them. 164 A.L.R. 1468 (citing cases). *See also See also U.S. ex rel Cobb-Strecker-Dunphy & Zimmerman, Inc. v. M.A. Mortenson Co.*, 706 F. Supp. 685, 690 (D. Minn. 1989) [Lexis].

iv. Loans

While Tennessee courts have not ruled on this issue, they are likely to follow the uniform holding of courts in other jurisdictions that loans, even if used to pay for labor and materials, are not labor or materials recover-able under payment bonds. 3 BRUNER & O'CONNOR CONSTR. LAW § 8:199 (citing cases).

v. Delay Damages

Absent any contractual provision to the contrary, additional expenses incurred as a result of delays may be recoverable to the extent that they represent the value of labor and material necessary for the completion of the contract, but other delay damages, such as for equipment standby time, are not. *See U.S. ex rel. E. & R. Constr. Co. v. Guy H. James Constr. Co.*, 390 F. Supp. 1193, 1244 (M.D. Tenn. 1972) [Lexis] (interpreting the federal Miller Act). However, Public Works Payment Bonds often contain clauses restricting damages for delay, which Tennessee courts have enforced. As is true of all contracts, "where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties were encountered." *Brown Bros., Inc. v. Metro. Gov't. of Nashville & Davidson Cnty*, 877 S.W.2d 745 (Tenn. Ct. App. 1993) [Lexis]. However, Tennessee courts allow recovery of delay damages despite an applicable "no damages for delay" clause if the claimant can establish that the delay in question "(1) was of a kind not contemplated by the parties, (2) amounted to an abandonment of the contract, (3) was caused by bad faith, or (4) was caused by active interference." *Thomas & Assocs., Inc. v. Metro. Gov't of Nashville*, No. M2001-00757-COA-R3CV, 2003 Tenn. App. LEXIS 425, 2003 WL 21302974, at *14 (Tenn. Ct. App. June 6, 2003) [Lexis].

vi. Profits

While no Tennessee case has addressed this issue with regard to TDOT Bonds, it appears that certain lost profits may be considered labor or materials recoverable under a TDOT Bond. The Tennessee Supreme Court has held in relation to mechanics' liens that "Profits and commissions ordinarily are not lienable items unless included in the contract price . . . or . . . in the reasonable worth of the labor or materials furnished," but that "no lien may be allowed for profits or commissions not earned." *Hamilton Nat'l Bank v. Long*, 226 S.W.2d 293, 297 (Tenn. 1949) [Lexis]. As noted above, Tennessee courts seek to construe the payment bond and mechanics' lien statutes uniformly, so the reasoning in this case likely applies to TDOT Bonds as well. This approach conforms to the general rule that "an unpaid supplier of materials may recover the reasonable value of the materials actually furnished, ordinarily computed as the cost of those materials plus a reasonable profit thereon, without right of recovery under the breach of contract measure for expected profits that the supplier would have earned on materials contracted for but not actually furnished." 3 BRUNER & O'CONNOR CONSTR. LAW § 8:200.

E. Contracts Excluded

1. Public Works Payment Bond

Tennessee does not require a Public Works Payment Bond for projects contracted for a price less than or equal to $100,000. Tenn. Code Ann. § 12-4-201. If the project is over $100,000, such a bond is required—but it can be substituted with certain securities or cash according to Tenn. Code Ann. § 12-4-201(c).

2. TDOT Bond

All road and bridge contracts with TDOT must have a TDOT Bond. Further, no contract with TDOT is excluded from the bond requirement. Tenn. Code Ann. § 54-5-119.

F. Time for Suit

1. Public Works Payment Bond

Unless the language of the bond itself states otherwise, unpaid subcontractors, laborers, or suppliers must file suit against the surety within six months of completing the Public Works Project, or within six months of furnishing labor or materials for the Project. Tenn. Code Ann. § 12-4-206.

The Tennessee Supreme Court has long construed Tenn. Code Ann. § 12-4-206 to bar Public Work Payment Bond actions against sureties when brought after the six month deadline. *See Knoxville v. Melvin F. Burgess, Inc.*, 175 S.W.2d 548 (Tenn. 1943) [Lexis]. In its words, "the purposes of [this] section were to prevent a multiplicity of suits and to fix a short period of limitation in which suits of this nature might be brought." *Id.* at 553. The Tennessee Court of Appeals has likewise explained that this provision "limits all actions by all claimants against sureties on public contract bonds to six months." *Thompson & Green Mach. Co. v. Travelers*

Indem. Co., 421 S.W.2d 643, 646 (Tenn. App. 1967) [Lexis]. As a result, it is clear that these higher courts consider it to be a statute of limitations rather than a mere notice provision.

2. TDOT Bonds

According to the TDOT Bond statute, unpaid subcontractors, laborers, and suppliers have one year following the date of TDOT's first notice of final settlement publication in which to bring claims against the surety arising from the project at issue. Tenn. Code Ann. § 54-5-119.

G. Remarks

1. Statutory Bonds versus Common Law Bonds

The statutes governing both Public Works Payment and TDOT Bonds impose the minimum level of protection that sureties must provide with respect to a Project. BRAGGINS ET AL., PAYMENT BOND MANUAL 534 (3d ed. 2006). The initial presumption is that parties intend to execute bonds as the law requires. The bonds that do so are referred to as Statutory Bonds. *Wal-Board Supply Co. v. Daniels*, 629 S.W.2d 686, 688 (Tenn. Ct. App. 1981) [Lexis]. This means that all bonds are thought to be Statutory Bonds by default. *Aetna Cas. & Sur. Co. v. Woods*, 565 S.W.2d 861, 864-65 (Tenn. 1978) [Lexis]. However, sureties can take on more than the level of protection that is required pursuant to statute. The bonds that reflect this greater contractual undertaking are referred to as Common Law Bonds.

Tennessee courts look to three factors to determine which of these categories the underlying bond at issue falls under. These factors are:

(1) whether the obligations of the surety and contractor go beyond the statutory obligations;
(2) whether the bond references the relevant Tennessee Code provisions; and
(3) whether the bond contains notice or time limitations.

See BRAGGINS ET AL., *supra*, at 534; *White's Elec., Heating Air & Plumbing v. Lewis Constr. Co.*, Appeal No. 02A01-9803-CH-00064, 1999 WL 605654, 1999 Tenn. App. LEXIS 548 (Tenn. Ct. App. Aug. 11, 1999) [Lexis]. If the payment bond at issue is considered to be a Statutory Bond, the claimant must have satisfied all statutory notice and limitation provisions to maintain a suit. However, the claimant need not do so if the payment bond at issue is considered a Common Law Bond. It would need only to have satisfied the notice and limitations provisions in its specific bond language.

2. Relation to Prompt Pay Act

Tennessee has a Prompt Pay Act that is codified in Tenn. Code Ann. §§ 66-34-101 *et seq*. That statute provides in relevant part:

> Any sums received by the prime contractor as payment for work, services, equipment, and materials supplied by the remote contractor for improvements to real property must be held by the prime contractor in trust for the benefit and use of the remote contractor, and are subject to all legal and equitable remedies.

Tenn. Code Ann. § 66-34-304. The same is true in regard to remote contractors as well. Tenn. Code Ann. § 66-34-401.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

There are no statutes governing Private Payment Bonds in Tennessee. As a result, the coverage and notice requirements of such a bond are interpreted as all contracts are: in a manner that gives effect to the intentions of both parties. *See* *In re Microwave Prods. of Am., Inc.*,118 B.R. 566, 570 (Bankr. W.D. Tenn. 1990) [Lexis] (stating that "[t]he liability of the surety is measured by the terms of his contract"); *see also* *Fid. Bond & Mortg. Co. v. Am. Sur. Co.*, 14 Tenn. App. 211, 224 (Tenn. Ct. App. 1931) [Lexis]. The express language of the payment bond at issue governs its construction. *See* *Microwave Prods.*, 118 B.R. at 570 [Lexis]. However, ambiguities in the bond language are construed in favor of the potential claimant. *See* *Fid. Bond & Mortg. Co.*, 14 Tenn. App. at 224 [Lexis].

B. Time for Suit

When a Private Payment Bond contains an express contractual provision limiting the time in which to bring suit, that provision will be enforced so long as it is reasonable. The Tennessee Court of Appeals has held:

> [I]t is a well established general rule that in the absence of a prohibitory statute, a contract provision is valid which limits the time for bringing suit, if a reasonable period of time is provided, and that the general statutes of limitations are not prohibitory of such contractual provisions as between private individuals or corporations.

Morgan v. Tellico Plains, No. E2001-02733-COA-R3-CV, 2002 Tenn. App. LEXIS 790 (Tenn. Ct. App. Oct. 30, 2002) [Lexis].

Tennessee courts have enforced as reasonable a contractual limitation period of less than six months. *See* *Evans v. FedEx Express*, No. W2013-01717-COA-R3-CV, 2014 WL 309351, 2014 Tenn. App. LEXIS 34 (Tenn. Ct. App. Jan. 29, 2014) [Lexis]. However, in the absence of an express provision in the bond language, Private Payment Bond claims must be brought within the general six-year statute of limitations for contracts. Tenn. Code Ann. § 28-3-109.

TEXAS

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Chapter 2253 of the Texas Government Code, formerly referred to as the McGregor Act, is the governing statutory authority regarding payment bonds on public work projects. A statutory payment bond is required when a governmental entity enters into a public work contract with a prime contractor. Tex. Gov't Code Ann. § 2253.021 (West) [Lexis]. Generally speaking, a payment bond is required when the public work contract is in an amount in excess of $50,000.00, though some limited exceptions apply. *Id.* The bond required by the applicable statute must have a penal sum equal to the amount of the public work contract and be issued solely for the benefit and protection of payment bond beneficiaries. *Id*. In addition, the bond is required to name the contracting governmental entity as the obligee and must contain certain information regarding the appropriate methods by which to contact the surety and make a claim. *Id.*

B. Tiers Covered

The McGregor Act essentially provides coverage to all tiers, regardless of contractual proximity to the prime contractor. By statutory definition, the public work payment bond covers persons/entities "who have a direct contractual relationship with the *prime contractor* or a *subcontractor* to supply public work labor or materials." Tex. Gov't Code Ann. § 2253.021 (West) [Lexis] (emphasis added). A prime contractor is defined exactly as expected: a person or entity entering into a public work contract with a governmental entity (first-tier). Tex. Gov't Code Ann. § 2253.001 (West) [Lexis]. A subcontractor is defined as follows: a person or entity that provides public work labor or material to fulfill an obligation to a prime contractor or subcontractor for the performance and installation of work required by a public work contract. *Id.*

C. Notice Required

In order to recover on a public work payment bond, a payment bond beneficiary must mail notice of the claim to the prime contractor and the surety on or before the 15th day of the third month after *each* month in which any of the claimed labor was performed or any of the claimed material was delivered. Tex. Gov't Code Ann. § 2253.041 (West) [Lexis]. The notice must also include a sworn statement that states that the amount claimed is just and correct, that all just and lawful offsets, payments and credits have been allowed, and the amount of any retainage that has not become due under the terms of the public work contract. *Id.* In lieu of a notice of claim, a payment bond beneficiary can enclose with the sworn statement of account the written agreement for payment for the public work labor performed or material delivered and a statement of the completion or the value of partial completion of the agreement. Tex. Gov't Code Ann. § 2253.042 (West) [Lexis]. On a claim for payment of retainage, a payment bond beneficiary whose contract

with a prime contractor or a subcontractor provides for retainage must mail written notice of its claim to the prime contractor and the surety on or before the 90th day after the date of completion of the public work contract. Tex. Gov't Code Ann. § 2253.046 (West) [Lexis]. Such notice must include the amount of the contact, any amount paid, and the outstanding balance. *Id.* If the payment beneficiary made a prior claim and such claim included retainage, then notice of a claim for payment of retainage is not required. *Id.*

Additionally, any payment bond beneficiary who does not have a direct contract with the prime contractor must also mail written notice to the contractor on or before the 15th day of the second month after *each* month in which any of the claimed labor was performed or any of the claimed material was delivered. Tex. Gov't Code Ann. § 2253.047 (West) [Lexis]. A copy of the notice or statement for payment sent to the subcontractor is sufficient as notice. *Id.* If a payment bond beneficiary contracts with a subcontractor for retainage, it must mail written notice to the prime contractor on or before the 15th day of the second month after the date that the public work labor started or the public work material was delivered. *Id.* The notice must state that the contract provides for retainage and must indicate the nature of the retainage. *Id.* If a payment bond beneficiary has a claim for specially fabricated material, it must mail written notice to the prime contractor on or before the 15th day of the second month after the receipt and acceptance of an order for specially fabricated material that such order has been received and accepted. *Id.*

All notices required by the Texas Government Code must be sent by certified or registered mail. Tex. Gov't Code Ann. § 2253.048 (West) [Lexis]. Notice to the prime contractor must be addressed to the prime contractor at its residence or last known business address. *Id.* Notice to the surety must be sent to the surety at the address stated in the bond, the address on file with the Texas Department of Insurance, or any other address allowed by law. *Id.*

D. Coverage

Chapter 2253 of the Texas Government Code is remedial in nature, and therefore, should be "given the most comprehensive and liberal construction possible." *Suretec Ins. Co. v. Myrex Indus.*, 232 S.W.3d 811, 816 (Tex. App. 2007) [Lexis] (quoting *Featherlite Bldg. Prods. Corp. v. Constructors Unlimited, Inc.*, 714 S.W.2d 68, 69 (Tex. App. 1986) [Lexis]). Texas courts have consistently held that a payment bond beneficiary must strictly adhere to the notice deadlines but substantial compliance with the other notice provisions is sufficient. *United Fire & Cas. Co. v. Boring & Tunneling Co. of Am.*, 321 S.W.3d 24, 28 (Tex. App. 2010) [Lexis].

1. Labor

a. Professional Services

A payment bond beneficiary who provides labor to "directly" carry out a public work project is covered by Tex. Gov't Code §2253.001. The definition for public work labor neither specifically includes nor excludes professional services. *Id.* Moreover, there are no reported cases on this topic. Thus, the only criteria by which to determine whether such services are the subject of a proper bond claim is whether the services were provided to "directly" carry out the public work. *Id.*

b. Union Benefits

Tex. Gov't Code 2253.001(5) [Lexis] neither specifically includes nor excludes union benefits from the definition of "public work labor." There are no reported cases on this topic in Texas. Thus, again, the only criteria by which to determine whether such benefits are the subject of a proper bond claim is whether the benefits were provided to "directly" carry out the public work. *Id.* That being said, it would seem difficult to envision a court finding that union benefits were used to "directly" carry out a public work. Additionally, many sureties write Union Benefit Bonds in the State of Texas, which would appear to indicate that the industry perceives union benefits as an improper subject of a Texas Government Code bond claim.

2. Material

Public work material is defined by the Texas Government Code to include the following: 1) material used, or ordered and delivered for, use, directly to carry out a public work contract; 2) specially fabricated material for use in a public work; 3) reasonable rental and actual running repair costs for construction equipment used, or reasonably required and delivered for use, directly to carry out work at the project site; or power, water, fuel, and lubricants used, or ordered and delivered for use, directly to carry out a public work. Tex. Gov't Code Ann. § 2253.001 (West) [Lexis].

3. Equipment

a. Repair

Tex. Gov't Code 2253.001(6)(C) [Lexis] specifically defines public work material to include actual running repair costs for construction equipment used, or reasonably required and delivered for use, directly to carry out work at the project site.

b. Rentals

Tex. Gov't Code 2253.001(6)(C) [Lexis] specifically defines public work material to include reasonable rental costs for construction equipment used, or reasonably required and delivered for use, directly to carry out work at the project site.

4. Other

a. Attorneys' Fees

Suits on payment bonds allow the payment bond beneficiary to sue for the unpaid balance of the claim as well as reasonable attorney's fees. Tex. Gov't Code Ann. § 2253.073 (West) [Lexis]. However, an award of attorney's fees is not mandatory. The Texas Government Code gives broad discretion to courts to award attorney's fees and costs as are just and equitable to enforce a payment bond claim or to determine that the claim is not proper. Tex. Gov't Code Ann. § 2253.074 (West) [Lexis].

b. Interest

Tex. Gov't Code 2253.074 [Lexis] does not explicitly provide for prejudgment and post-judgment interest on a payment bond claim. However, some Texas courts have awarded prejudgment and post-judgment interest on payment bond claims brought pursuant to the Texas Government Code. *See, e.g.*, *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 897 (Tex. App. 1996) [Lexis], *writ denied* (Feb. 13, 1998).

c. Financing Charges

The definitions for public work labor and public work material do not encapsulate financing charges. Tex. Gov't Code Ann. § 2253.001 (West) [Lexis]. Further, no subsection of Tex. Gov't Code § 2253 explicitly provides for the recovery of financing charges on a payment bond claim.

d. Insurance Premiums

The definitions for public work labor and public work material do not encapsulate insurance premiums. Tex. Gov't Code Ann. § 2253.001 (West) [Lexis]. Further, no subsection of Tex. Gov't Code § 2253 explicitly provides for the recovery of insurance premiums on a payment bond claim. One court that was presented with deciding the issue of whether or not insurance premiums were recoverable determined that they were not. *Trinity Universal Ins. Co. v. Patterson*, 570 S.W.2d 475 (Tex. Civ. App. 1978) [Lexis].

e. Loans

The definitions for public work labor and public work material do not encapsulate loans. Tex. Gov't Code Ann. § 2253.001 (West) [Lexis]. Further, no subsection of Tex. Gov't Code § 2253 explicitly provides for the recovery of loans on a payment bond claim.

f. Delay Damages

The Texas Government Code does not specifically include or exclude delay damages. However, the essence of a delay damage claim is that the labor and/or materials provided should be repriced to accommodate the extended duration of performance. As such, and given that the labor and/or material is actually provided to the project, an argument could be made that delay damages are in fact recoverable on a payment bond claim. *See* Tex. Gov't Code Ann. § 2253.001 (West) [Lexis]. Nonetheless, there are no reported cases in Texas specifically addressing the recoverability of delay damages on a Government Code payment bond claim.

g. Profits

Chapter 2253 of the Texas Government Code specifically requires that the public work labor and/or material made the subject matter of a bond claim must have been delivered to and/or incorporated into the public works project. As such, a claim for lost profits—a claim for a loss due to labor and/or material admittedly not provided to the public works project—would not appear to

meet the statutory requirements for a Government Code payment bond claim. However, there are no reported decisions in the State of Texas on this particular issue.

h. Extracontractual

There are no Texas cases holding a statutory payment bond surety liable for punitive damages to a bond claimant.

E. Contracts Excluded

On public works projects for which the contract is $25,000.00 or less, no payment bond under Tex. Gov't Code §2253 is required. Tex. Gov't Code Ann. § 2253.021 (West) [Lexis].

F. Time for Suit

A payment bond beneficiary may sue the principal or the surety, jointly or severally, if the claim on the payment bond remains unpaid for sixty days from the date notice of the claim was mailed. Tex. Gov't Code Ann. § 2253.073 (West) [Lexis]. However, a payment bond beneficiary must bring suit on the payment bond on or before one year from the date notice for a claim is mailed. Tex. Gov't Code Ann. § 2253.078 (West) [Lexis]. Practically speaking, a payment bond beneficiary has a ten-month window to file suit from the expiration of sixty days from the date notice of the claim was mailed until the statute of limitations expires.

G. Remarks

The purpose of the Chapter 2253 payment bond is to protect claimants who provide labor or materials in the construction of public works because public property may not be made the subject of a mechanics' lien. *City of LaPorte v. Taylor*, 836 S.W.2d 829, 831–32 (Tex. App. 1992) [Lexis].

A bond furnished by a prime contractor in an attempt to comply with the requirements will be construed to comply with Government Code regarding the rights given, the limitations of those rights, and the remedies available. Tex. Gov't Code Ann. § 2253.023 (West) [Lexis]. If any provision of such a bond expands or restricts a right or liability, such provision shall be disregarded and Section 2253.023 shall apply to the bond. *Id.*

A payment bond claimant must perfect its payment bond claim before filing suit against the surety. Tex. Gov't Code Ann. § 2253.073 (West) [Lexis].

Chapter 2253 sets forth certain guidelines for the prime contractor, the payment beneficiary and the governmental entity for responding to requests for information on a public work project. Tex. Gov't Code Ann. §§ 2253.024 (West) [Lexis]; 2253.025 (West) [Lexis]; 2253.026 (West) [Lexis].

H. Case Annotations

Adequacy of Notice

In *Blue Ribbon Staffing, LLC v. Flatiron Constructors, Inc.*, the United States District Court for the Western District of Texas dismissed the payment bond claims of a third-tier subcontractor for its failure to give notice to the prime contractor and surety by registered or certified mail. No. 5-20-CV-00686-RBF, 2021 WL 256824, 2021 U.S. Dist. LEXIS 14030 (W.D. Tex. Jan. 26, 2021) [Lexis]. The *Blue Ribbon* court expressly declined to find email notice sufficient.

§ 2.0 PRIVATE PAYMENT BONDS

An original contractor may furnish a statutory payment bond for the benefit of claimants on private construction projects. Tex. Prop. Code Ann. § 53.201 (West) [Lexis]. The bond and the contract between the original contractor and the owner shall be filed in the county in which the property on which the work is being performed is located. Tex. Prop. Code Ann. § 53.203 (West) [Lexis]. If the bond meets the statutory requirements and is properly filed, a claimant cannot file suit against the owner or the owner's property. Tex. Prop. Code Ann. § 53.201 (West) [Lexis].

The bond must be in the penal sum amount of at least the original contract amount and name the owner as obligee. Tex. Prop. Code Ann. § 53.202 (West) [Lexis]. The bond must also be executed by the owner, the original contractor as the principal and the corporate surety, who must be licensed and authorized to do business in the State of Texas. *Id.*

This section is intended to provide a cursory overview of statutory private payment bonds. The requirements of the statute are extremely detailed, and readers are encouraged to review Title 5, subtitle B, chapter 53 of the Texas Property Code in full.

A. Rules of Construction

Tex. Prop. Code Ann. § 53.211 (West) [Lexis] provides:

> (a) A bond shall be construed to comply with this subchapter, and the rights and remedies on the bond are enforceable in the same manner as on other bonds under this subchapter, if the bond:
>
> (1) is furnished and filed in attempted compliance with this subchapter; or
>
> (2) evidences by its terms intent to comply with this subchapter.
>
> (b) Any provision in any payment bond furnished or filed in attempted compliance with this subchapter that expands or restricts the rights or liabilities provided under this chapter shall be disregarded and the provisions of this subchapter shall be read into that bond.

In *Staff Industries, Inc. v. Hallmark Contracting, Inc.*, 846 S.W.2d 542, 550 (Tex. App. 1993) [Lexis], the Texas Court of Appeals described § 53.211 as "provid[ing] for attempted compliance" with the statutory bond scheme. Nonetheless, § 53.211 may not be used to modifying a nonconforming bond into a statutory private payment bond absent indications it was intended to be such a bond; a Texas court "has no authority to completely restructure such a bond so that it will comply[.]" *Id.* (and holding that claimant was not entitled to enforce a bond form which referenced the McGregor Act applicable to public construction as a § 53.201 bond). The *Staff*

Industries decision therefore underscores that a bond failing to comply with the statutory requirements of the Texas Property Code may be construed as a common-law bond.

Common-law bonds are interpreted as a matter of law and according to ordinary contract principles. *See* *N. and W. Ins. Co. v. Sentinel Inv. Group, LLC*, 419 S.W.3d 534, 538 (Tex. App. 2013) [Lexis]; *see also* *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992) [Lexis] ("The liability of a surety is determined by the language of the bond itself.").

B. Time for Suit

Texas requires that a bond claimant wait at least 60 days after perfection of its claim before filing suit against the principal and/or the surety. Tex. Prop. Code Ann. § 53.208 (West) [Lexis]. If the bond is recorded at the time the lien is filed, then the bond claimant must file suit on the bond in the county in which the property improved is located within one year following the date it perfected its claim. *Id.* If the bond is not recorded at the time the lien is filed, the bond claimant must file suit on the bond within two years following the date it perfected its claim. *Id.*

A private bond claimant can perfect its claim in one of two ways. The claimant can perfect its lien claim by filing the appropriate lien affidavit and sending the required notices to the owner. Tex. Prop. Code Ann. § 53.205 (West) [Lexis]; Tex. Prop. Code Ann. § 53.051 (West) [Lexis]. Or, the claimant can send the surety, instead of the owner, all notices required by Tex. Prop. Code §§ 53.206 [Lexis] and 53.207 [Lexis].

C. Case Annotations/Remarks

Location of Suit

A private bond claimant must bring suit on a statutory payment bond claim in the county in which the property being improved is located. Tex. Prop. Code Ann. § 53.208 (West) [Lexis].

Liability Delimited by Bond Terms

The surety's liability is determined by the language of the bond. *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992) [Lexis]. Texas applies the rule of *strictissimi juris* ("of the strictest right or law") in interpreting the bond to prevent extending the surety's obligation beyond the written terms of the agreement. *Vastine v. Bank of Dallas*, 808 S.W.2d 463, 464 (Tex. 1991) [Lexis].

Defenses of Principal

A surety may assert and rely upon all defenses available to the principal as to the debt owed to the bond claimant. *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 419 (Tex. 1995) [Lexis].

UTAH

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Payment bonds are required on all construction contracts with the state in an amount equal to 100% of the price specified in the contract and executed by an authorized surety company for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided in the contract. Utah Code § 63G-6a-1103(1)(b) [Lexis]; *see also* § 14-1-18 [Lexis].

B. Tiers Covered

Previously in Utah, the law (like the Miller Act) limited recovery to those "providing labor or materials to contractors or its subcontractors." *See W. Coating, Inc. v. Gibbons & Reed Co.*, 788 P.2d 503, 504 (Utah 1990) [Lexis] (holding that a third tier supplier could not receive under Utah's procurement code). The language cited in *Gibbons*, however, has since been modified to state that a public payment bond is "for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided for in the contract." Utah Code Ann. § 63G-6a-1103 [Lexis]. Accordingly, all tiers are now covered.

C. Notice Required

Any person furnishing labor, service, equipment, or material for which a payment bond claim may be made must provide preliminary notice to the Utah State Construction Registry, accessible online at www.scr.utah.gov. Utah Code Ann. §§ 63G-6a-1104(1) [Lexis], 14-1-20(1) [Lexis]; *see also* § 38-1b-202 [Lexis]. However, preliminary notice need not be given:

(1) by an individual performing labor for wages, §§ 63G-6a-1104(1)(a) [Lexis]; 14-1-20(1)(a) [Lexis]; or

(2) if a notice of commencement was not filed by the original contractor or owner within 15 days after physical construction work began at the government project. §§ 63G-6a-1104(1)(b) [Lexis]; 14-1-20(1)(b) [Lexis]; 38-1b-201(1), (7) [Lexis]. *Cf.* § 38-1b-202(8) [Lexis] (starting the 15-day period from the date after which the *claimant* begins work, but arguably only as to liens, not bonds.).

Unless one of the two exceptions above applies, a claimant who fails to provide preliminary notice may not maintain a payment bond claim. Utah Code Ann. §§ 63G-6a-1104(2) [Lexis], 14-1-20(2) [Lexis].

The preliminary notice must be provided prior to commencement of any action on the payment bond. Utah Code Ann. §§ 63G-6a-1104(3) [Lexis], 14-1-20(3) [Lexis].

For government projects, the claimant must have filed the preliminary notice within 20 days after starting the work. Utah Code Ann. § 38-1b-202(1)(a) [Lexis]. An exception is made if the claimant began work before the original contractor or owner filed a notice of commencement for the project, in which case the 20-day period begins to run from the date the notice of commencement was filed. *Id.* As described above, however, the claimant is excused from filing a preliminary notice if the notice of commencement was filed more than 15 days after physical construction work at the government project. Utah Code Ann. §§ 38-1b-201(1) [Lexis], 63G-6a-1104(1)(b) [Lexis].

All preliminary notices, notices of commencement, and the like must be filed through the State Construction Registry, Utah's "central repository for all required notices." Utah Code. Ann. § 38-1a-201(1)(c) [Lexis]. The Registry, found at www.scr.utah.gov, is established and maintained by the State's third-party designated agent. Utah Code Ann. § 38-1a-202 [Lexis].

D. Coverage

A person shall have a right of action on a payment bond for any unpaid amount if he has furnished labor, service, equipment, or material for the work *and* he has not been paid in full within 90 days after the last date on which he worked or supplied equipment or material. Utah Code Ann. § 63G-6a-1103(4) [Lexis].

1. Labor

a. Professional Services

Utah's procurement code defines professional services as follows:

> "Professional service" means labor, effort, or work that requires specialized knowledge, expertise, and discretion, including labor, effort, or work in the field of:
> (a) accounting;
> (b) administrative law judge service;
> (c) architecture;
> (d) construction design and management;
> (e) engineering;
> (f) financial services;
> (g) information technology;
> (h) the law;
> (i) medicine;
> (j) psychiatry; or
> (k) underwriting.

Utah Code Ann. § 63G-6a-103 [Lexis]. At present, this author is not aware of any statute interpreting whether professional services are included within the scope of the public bonding provisions but given the reference to "labor" in the definition, and breadth of the statute, it appears likely. *See* Utah Code Ann. § 63G-6a-1103(1)(b) [Lexis] (statute is for the "protection of each person supplying labor, service, equipment, or material for the performance of the work provided in the contract.").

b. Union Benefits

The Utah Court of Appeals held that union trust funds stand in the shoes of union laborers and are entitled to enforce the rights of the laborers. *Forsberg v. Bovis Lend Lease, Inc.*, 184 P.3d 610, 614 (Utah Ct. App. 2008) [Lexis]. Union trust funds thus have standing to pursue lien and bond claims for unpaid union benefits. *Id.*

Moreover, the Federal District of Utah held that since union trust funds stand in the shoes of the union laborers, they are not required to comply with statutory notice requirements for which those laborers are exempted. *See Richards v. Acme Heating & Air Conditioning, Inc.*, No. 2:13-CV-00034-DAK, 2015 WL 339702, at *1, 2015 U.S. Dist. LEXIS 9263 (D. Utah Jan. 26, 2015) [Lexis].

The Utah Supreme Court held that, under the public payment bond statute, a union trust fund could recover only "traceable amounts that are ultimately 'due' an individual employee," rather than a "general contribution that vaguely benefits all employees … even if it could be viewed as *for* an employee or *on her behalf*." *McDonald v. Fid. & Deposit Co. of Maryland*, 462 P.3d 343, 347 (Utah 2020) [Lexis] (original emphasis) (applying predecessor statute to Utah Code Ann. § 63G-6a-1103 [Lexis]). The Court provided non-conclusive illustrations of union trust benefits that might be traceable to the specific employees and which might not, but the Court remanded this determination to the district court.

The *McDonald* Court declined to interpret how a more recent amendment of this statute, which limits the payment bond claim to "any unpaid amount due *to* the person," might change the outcome there. *Id.* ¶ 23 n.9. But because the amendment comports with the surety's position in *McDonald* that the older statute should be interpreted as allowing only amounts "to" the employee (as opposed to the trust funds' position of "for" the employee), a future case applying the amendment would likely favor the surety's restricted view of unpaid trust benefits.

2. Material

Utah courts have, in interpreting a prior (and arguably more narrow) version of the statute held that a claimant's burden under public contractors' bond statute is to show only that materials were "furnished" in connection with particular project and not that specific materials furnished were actually incorporated into structure, and that proof of "delivery" is not an absolute requirement or element of claimant's burden. *See City Elec. v. Indus. Indem. Co.*, 683 P.2d 1053 (Utah 1984) [Lexis]. The current statute states that a person has a right of action if that person has furnished material "for the work provided for in the contract for which the payment bond is furnished." Utah Code Ann. § 63G-6a-1103(4) [Lexis].

3. Equipment

a. Repairs

There are no cases presently addressing whether repairs to rental equipment would be excluded or treated differently than equipment rental costs. The present procurement code statute specifically states payment bonds are "for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided in the contract. Utah Code Ann. § 63G-6a-1103(1)(b) [Lexis]; *see also* § 14-1-18 [Lexis]. Although there are Utah cases holding

that equipment rental is not covered by the procurement code, the case of *Trench Shoring Services, Inc. v. Saratoga Springs Development, L.L.C.* makes it clear that this precedent is applying a prior version of said code, and that the statute was subsequently modified to cover rental equipment. 2002 UT App 300, ¶ 16, 57 P.3d 241, 245 [Lexis].

b. Rentals

See Section 3a above.

4. Other

a. Attorneys' Fees

In any suit upon a payment bond, the court shall award reasonable attorney fees to the prevailing party, which fees shall be taxed as costs in the action. Utah Code Ann. § 63G-6a-1103(6) [Lexis].

b. Interest

Interest is not specifically addressed in the procurement code or payment bond statutes. Absent an agreed upon rate, the interest rate on a contract is 10% per annum. Utah Code Ann. § 15-1-1 [Lexis]. Also, case law supports a position that prejudgment interest accrues, not from the due date on underlying contracts or invoices, but on the first notice of demand for payment. *See Triple I Supply, Inc. v Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982) [Lexis] (applied to claim against owner for failure to require a payment bond).

c. Financing Charges

Unless deemed part of the cost of "labor, service, equipment, or material for the performance of the work provided in the contract" finance charges would not be allowed under a statutory payment bond. Utah Code Ann. § 63G-6a-1103(1)(b) [Lexis].

d. Insurance Premiums

Unless deemed part of the cost of "labor, service, equipment, or material for the performance of the work provided in the contract" insurance premiums would not be allowed under a statutory payment bond. Utah Code Ann. § 63G-6a-1103(1)(b) [Lexis].

e. Loans

We are not aware of any reported Utah opinion allowing someone who loans money to a contractor to assert a payment bond claim. Loans do not appear to be within the scope of the statute, which covers "labor, service, equipment, or material for the performance of the work provided in the contract." Utah Code Ann. § 63G-6a-1103(1)(b) [Lexis].

f. Delay Damages

We are not aware of any reported Utah opinion specifically allowing delay damages as part of a payment bond claim. However, if the cost of labor or materials provided by the claimant increased as a result of delay, the claim allowed under the payment bond may include delay-related cost increases.

g. Profits

We are not aware of any reported Utah opinion allowing someone the recovery of lost profit as part of a payment bond claim. Lost profits do not appear to be within the scope of the statute, which covers "labor, service, equipment, or material for the performance of the work provided in the contract." Utah Code Ann. § 63G-6a-1103(1)(b) [Lexis].

h. Extracontractual

In *Broadwater v. Old Republic Surety*, a plaintiff shareholder alleged conversion of stock against a corporation and a bad faith claim against the corporation's surety that issued a "lost instruments" bond. 854 P.2d 527, 535–36 (Utah 1993) [Lexis]. The surety argued that the bad faith claim could not be maintained without showing privity of contract. The Court agreed, reasoning that "the duty of an insurer to deal fairly is derived from the insurance contract" and that "[i]n the absence of a contractual relationship or statutory duty, a majority of the courts that have addressed this issue have been reluctant to allow an injured third party to sue another's insurer for failure to bargain in good faith." *Id.* The Court noted that Plaintiff did not allege any facts that would support a finding of a contractual relationship between her and the surety. The Court further observed that "[w]hile it is conceivable that something other than a contractual relationship may impose a duty on an insurer to deal fairly with a third party, plaintiff has failed to allege any facts that might impose such a duty." *Id.* at 536.

In *Stokes v. TLCAS, LLC*, plaintiff car purchasers sued a used car dealership for fraud in selling them a car with an inaccurate odometer reading. 348 P.3d 739, 742 (Utah Ct. App. 2015) [Lexis]. The plaintiff also sought payment from the dealer's surety. The surety settled with the plaintiffs and filed a cross-claim against the dealership for indemnification. The dealership argued that the surety's settlement with the plaintiffs was in bad faith. *Id.* at 745. The court noted that the dealership "erroneously relies on case law about a liability insurance company's duty to defend its insured." *Id.* The court explained that the surety did not *insure* the dealership, but instead issued a surety bond on its behalf, in consideration for the dealership's agreement to indemnify it for any costs incurred relating to the bond. *Id.* The court affirmed the trial court's ruling that the dealership was liable to the surety under the indemnity agreement. *Id.*

In *Zurich American Insurance Co. v. Ascent Construction, Inc.*, the United States District Court for the District of Utah found, in the context of claims asserted by the construction company against the surety, that the surety did not owe the insured fiduciary duties, as nothing in the "bargained-for relationship between businesses [created] a duty for [the surety] to act primarily in [the construction company's] interest." No. 1:20-cv-00089-DBB, 2022 WL 36878, at *2, 2022 U.S. Dist. LEXIS 1321 (D. Utah Jan. 3, 2022) [Lexis]. The court noted, however, that its holding should not be taken to mean "that a surety can never be found to be a fiduciary." *Id.* at *3.

E. Contracts Excluded

Payment bonds are required on all construction contracts with the state in an amount equal to 100% of the price specified in the contract and executed by an authorized surety company for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided in the contract. Utah Code Ann. § 63G-6a-1103(1)(b) [Lexis]; *see also* § 14-1-18 [Lexis].

F. Time for Suit

Pursuant to Utah Code Ann. § 63G-61-1103(5) [Lexis], an action on the payment bond "is barred if not commenced within one year after the last day on which the claimant performed the labor or service or supplied the equipment or material on which the claim is based."

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

The owner of any private commercial construction project exceeding $50,000 must obtain a payment bond from the contractor. Utah Code Ann. § 14-2-1(2) [Lexis]. Residential projects up to four attached units, including rental housing, are excluded from this private payment bond requirement. Utah Code Ann. § 14-2-1(1)(d) [Lexis].

The private payment bond shall be with a surety/sureties satisfactory to the owner for the protection of all persons supplying labor, services, equipment, or material in the prosecution of the work provided for in the commercial contract *and* in sum equal to the original commercial contract price. Utah Code Ann. §14-2-1(3) [Lexis].

A person shall have a right of action on a private payment bond for any unpaid amount due that person if the person has not been paid in full within 90 days of last furnishing labor, service, equipment, or material. Utah Code Ann. § 14-2-1(4) [Lexis].

Any action shall be brought in a court in the county in which the commercial contract was to be performed. Utah Code Ann. § 14-2-1(5)(a) [Lexis].

An award of reasonable attorneys' fees is available to the prevailing party in any action upon a private payment bond, although the statute is unclear and not yet tested as to whether such "may" or "shall" be awarded. *Compare* Utah Code Ann. § 14-2-1(5)(d) [Lexis] *with* § 14-2-1(7) [Lexis]. In an action against the project owner for failure to obtain a private payment bond, the court *shall* award attorneys' fees. Utah Code Ann. § 14-2-2(3) [Lexis].

An owner who fails to obtain a payment bond is liable to each person who provided labor, service, equipment, or materials under the commercial contract, for the reasonable value of the labor, service, equipment or materials. Utah Code Ann. § 14-2-2(1) [Lexis]. Liability cannot exceed the commercial contract price. *Id.*

Unless the claimant is an individual performing labor for wages, the claimant must provide preliminary notice before making a claim on private project bonds, subject to statutory requirements. *See* Utah Code Ann. §§ 14-2-5 [Lexis], 38-1a-501 [Lexis].

B. Time for Suit

An action is barred if not commenced within one year after the last day of providing labor, services, equipment, or material. Utah Code Ann. §§ 14-2-1(5)(b) [Lexis], 14-2-2(2) [Lexis].

VERMONT

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Payment bonds are statutorily required on contracts awarded by the Agency of Transportation, that relate to the construction, maintenance, or repair of transportation related facilities. No specific amount is required by the statute but is set by the Agency of Transportation. 19 V.S.A. § 10(8) and (9).

For public projects not awarded by the Agency of Transportation, the terms of the bond control. "Where the meaning of such bond is clear and unambiguous, it should be enforced, like other contracts, according to the manifest intention of the parties and to carry out, rather than defeat, the purpose for which they were executed. *City of Montpelier v. Nat'l Sur. Co.*, 97 Vt. 111, 122 A. 484, 488 (1923) [Lexis].

B. Tiers Covered

The surety bond is issued for the benefit of "labor, materialmen and others . . ." The statute does not state how many tiers are covered by the statutory bond. There are no cases that have addressed this issue. For contracts not awarded by the Department of Transportation, the terms of the bond govern. 19 V.S.A. § 10(9).

C. Notice Required

For contracts awarded by the Agency of Transportation, "in order to obtain the benefit of the security the claimant shall file with the Secretary a sworn statement of his or her claim, within ninety (90) days after the final acceptance of the project by the State of Vermont or within ninety (90) days from the time the taxes or contributions to the Vermont Commissioner of Employment and training are due and payable . . ." 19 V.S.A. § 10(9).

D. Coverage

1. Labor, Material, and Equipment

For contracts awarded by the Agency of Transportation, the bond shall cover "material, merchandise, labor, rent, hire of vehicles, power shovels, rollers, concrete mixers, tools, and other appliances, professional services, premiums, and other services used or employed in carrying out the terms of the contract between the contractor and the State of Vermont and further conditioned for the payment of taxes both state and municipal, and contributions to the Vermont commissioner of employment and training, accruing during the term of performance of the contract." 19 V.S.A. § 10(9).

2. Other

a. Attorneys' Fees

Vermont follows the "American Rule," which requires each party to bear its own costs and attorneys' fees. See *Imported Car Ctr., Inc. v. Billings*, 163 Vt. 76, 79, 653 A.2d 765, 768 (1994) [Lexis]; *Gramatan Home Investors Corp v. Starling*, 143 Vt. 527, 535, 470 A.2d 1157, 1162 (1983) [Lexis].

b. Extracontractual

In Vermont, a surety contract is regarded more in the nature of an insurance contract. *Fid. & Deposit Co. of Md. V. Wu*, 150 Vt. 225, 552 A.2d 1196, 1199 (1988) [Lexis]; *see also Ins. Co., of N. Am. v. Tucker*, 128 Vt. 340, 262 A.2d. 489 (1969) [Lexis]. An insurer commits an unfair claim settlement practice when it fails to: (1) acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; or (2) adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. 8 V.S.A. § 4724(9). An insurer must "affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed." 8 V.S.A. § 4724(9). An insurer shall orally or by mail acknowledge receipt of the claim notice directly to the claimant within ten (10) working days. If the acknowledgement is made orally, notation of the acknowledgement must be recorded in the insurer's records or file. 21-020-008 Vt. Code R. § 5(A).

A surety is subject to the Vermont Unfair Claims Practice Act. 8 V.S.A. §§ 4721-4726; 21-02-008 Vt. Code. R. § 3.

F. Time for Suit

For contracts awarded by the Agency of Transportation, a claimant, "within one (1) year after the filing of the claim, shall bring a petition in the Superior Court in the name of the Secretary, with notice and summons to the principal, surety, and the Secretary to enforce the claim or intervene in a petition already filed." When the bond specifies a particular limitation period not less than twelve (12) months from the occurrence of the loss, such a limitation provision will be valid and enforceable. 12 V.S.A. § 511; 8 V.S.A. § 3663; *Gilman v. Me. Mut. Fire Ins. Co.*, 175 Vt. 554, 555, 830 A.2d 71, 75 (2003) [Lexis]; *Hicks v. Liberty Mut. Group, Inc.*, 2010 WL 5646892, 2010 Vt. Super. LEXIS 99 (Vt. Sup. Ct. 2010) [Lexis].

An action before the Superior Court shall be brought in a county where one of the parties resides or, if neither party resides in the state, in any county. 12 V.S.A. § 402(a).

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

As summarized in *City of Montpelier v. National Surety Co.*, 97 Vt. 111, 117, 122 A. 484, 487 (1923) [Lexis]:

> The courts agree with practical unanimity that in the case of a surety company, acting for compensation, the contract will be construed most strongly against the

> surety, and in favor of the indemnity which the obligee has reasonable ground to expect. The contract is regarded more in the nature of an insurance contract, and by analogy the rules governing liability applicable in that class of contracts are applied. But the rule is one of construction only. The bond of a compensated surety is not to be so construed as to extend liability beyond the terms of the contract. The plain intention of the parties cannot be nullified by construction. Where the meaning of such a bond is clear and unambiguous, it should be enforced, like other contracts, according to the manifest intention of the parties. The effect of the rule is to give such contracts of indemnity a reasonable construction, so as to give effect to the intention of the parties and to carry out, rather than defeat, the purpose for which they were executed.

See also *DeBartolo v. Underwriters at Lloyd's of London*, 181 Vt. 609, 925 A.2d 1018, 1022 (2007) [Lexis]; *McAlister v. Vt. Prop. & Cas. Ins. Agency*, 180 Vt. 203, 908 A.2d 455, 461 (2006) [Lexis]; *Fireman's Fund Ins. Co. v. CNA Ins. Co.*, 177 Vt. 215, 862 A.2d 251, 256 (2004) [Lexis].

B. Time for Suit

For private bonds, the statute of limitations for contract actions will apply if the bond is silent as to the limitations period. In Vermont, "[a] civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six (6) years after the cause of action accrues and not thereafter." 12 V.S.A. § 511. Many payment bonds are issued under seal. Contracts under seal are governed by an eight (8) year statute of limitations, rather than the six (6) year statute applicable to contract actions. Vt. Stat. Ann. Tit. 12, § 507.

When the bond specifies a particular limitation period not less than twelve (12) months from the occurrence of the loss, such a limitation provision will be valid and enforceable. 8 V.S.A. § 3663; *Gilman v. Me. Mut. Fire Ins. Co.*, 175 Vt. 554, 555, 830 A.2d 71, 75 (2003) [Lexis]; *Hicks v Liberty Mut. Group, Inc.*, 2010 WL 5646892, 2010 Vt. Super. LEXIS 99 (Vt. Sup. Ct. 2010) [Lexis]. *Statutory References:* 12 V.S.A. § 511; 8 V.S.A. § 3663. However, it is important to note that 8 V.S.A § 3663 prohibits any bond from imposing a limitation period of less than twelve (12) months. The statute states, in part, that a "surety or fidelity contract or bond issued or delivered in this state by an insurance company doing business herein shall not contain a condition or clause limiting the time of commencement of an action on such policy or contract to a period less than twelve (12) months from the occurrence of the loss, death, accident, or default... Any such conditions or clauses shall be null and void." *John A. Russell Corp. v. Fine Line Drywall, Inc.*, No. 2:05-cv-321, 2007 WL 2821651, 2007 U.S. Dist. LEXIS 72362 (D. Vt. 2007) [Lexis] (discussing when a default occurs under a payment bond to determine if it violated the statute.)

VIRGINIA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Va. Code Ann. § 2.2-4337 establishes the public payment bond requirements for public construction projects in Virginia. This statute requires contractors to furnish bonds for non-transportation-related projects exceeding $500,000, and transportation projects exceeding $350,000 (pursuant to Va. Code Ann. § 33.2-208) that are partially or wholly funded by the Commonwealth. Virginia's "Little Miller" Act is codified in Va. Code Ann. § 2.2-4341. The Little Miller Act extends to apply to projects that are on Virginia property owned by a public body. *Redman Corp. v. John C. Grimberg Co.*, 46 Va. Cir. 93 (Va. Cir. Ct. 1998) [Lexis].

The statute requires that the prime contractor furnish a payment bond in the sum of the contract amount. Va. Code Ann. § 2.2-4337(2). The payment bond is intended for the protection of claimants who provide labor or materials to the prime contractor or to subcontractors who are providing work for the prime contract. *Id.*

B. Tiers Covered

The payment bond covers claims asserted by both first and second tier claimants—claimants who provide labor or materials to the prime contractor or to subcontractors who are providing work for the prime contract. Va. Code Ann. § 2.2-4337.

C. Notice Required

Any claimant with a direct contractual relationship with a subcontractor but no direct or implied contract with the prime contractor must give written notice to the contractor within 90 days from either the date of performance of the last labor or the last date supplies were furnished. Va. Code Ann. § 2.2-4341(B).

The notice must state with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. *Id.* Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. *Id.* Claims for sums withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in Va. Code Ann. § 2.2-4341(B). Notice is considered "given" at the time the contractor receives it from the claimant, and not upon the sending or mailing. *R.T. Atkison Bldg. Corp. v. Archer W. Constr., LLC*, 90 Va. Cir. 240 (Va. Cir. Ct. 2015) [Lexis].

D. Coverage

As in other states, the statutes governing public payment bonds are "remedial in character" and were "enacted to afford protection to materialmen and subcontractors." *Com. Constr. Specialties, Inc. v. ACM Constr. Mgmt. Corp.*, 242 Va. 102, 105, 405 S.E.2d 852, 854 (Va. 1991) [Lexis]. Courts have held that the statute must be liberally construed in favor of materialmen and subcontractors. *Id.*

1. Labor

a. Professional Services

In the absence of published authority concerning Little Miller Act payment bond claims for professional services, it bears noting that Virginia courts generally look to federal Miller Act cases for guidance. *See Solite Masonry Units Corp. v. Piland Constr. Co.*, 217 Va. 727, 232 S.E.2d 759 (Va. 1977) [Lexis].

b. Union Benefits

See § 1.0(D)(1)(a), *supra*.

2. Material

Unlike in other states, Virginia court have held that the supplied material does not have to be used in the project to be afforded statutory protection. Instead, its use and delivery must merely be contemplated as part of the project, and it must be delivered in good faith. *Solite Masonry Units Corp. v. Piland Constr. Co.*, 217 Va. 727, 732, 232 S.E.2d 759, 762 (Va. 1977) [Lexis]. In *Solite*, the supplier was able to recover under the bond without having to show that the masonry units delivered were actually used in the construction of the building itself. *Id.*

3. Equipment

a. Repairs

There is no authority of note concerning public payment bond claims for equipment repair.

b. Rentals

Rental charges and rented equipment do constitute "supplied material" within the meaning of the statute, and suppliers of rented materials and equipment can recover under the bond. *R.C. Stanhope, Inc. v. Roanake Constr. Co.*, 539 F.2d 992, 994 (4th Cir. 1976) [Lexis].

4. Attorneys' Fees

In the absence of express authority on point, claimants may recover attorneys' fees and interest if provided for in the underlying contract. *See, e.g.*, *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332 (4th Cir. 1996) [Lexis].

E. Contracts Excluded

Payment bonds are not required for public projects that do not exceed the monetary thresholds discussed in § 1(A), *supr*a.

F. Time for Suit

A claimant with a direct contractual relationship with the contractor may bring an action on the payment bond no sooner than ninety (90) days but no later than one (1) year after the conclusion of the work. Va. Code Ann. § 2.2-4341(A), (C). A claimant with a direct contractual relationship with a subcontractor but no contractual relationship with the contractor may bring an action on the contractor's payment bond if the claimant has given notice within ninety (90) days of conclusion of the work. Va. Code Ann. § 2.2-4341(B). The action must, however, be brought within one (1) year of the last performed labor or furnished materials. Va. Code Ann. § 2.2-4341(C).

G. Remarks

Effective January 1, 2023, Virginia law prohibits "pay-if-paid" clauses in both public and private construction contracts. Such clauses do not represent valid defenses for principals or payment bond sureties in Virginia. *See* Va. Code Ann. § 2.2.-4354.

Similarly, no-damages-for-delay clauses are statutorily prohibited in Virginia (*see* Va. Code Ann. § 2.2-4335); this suggests delay damages may be recoverable from a payment bond surety in appropriate instances.

H. Case Annotations

Arbitration

In *Blumenthal–Kahn Electric Ltd. Partnership v. American Home Assurance Co.*, the United States District Court for the Eastern District of Virginia granted the payment bond surety's motion to compel arbitration on the grounds that the Miller Act and Little Miller Act claims asserted fell within the scope of the arbitration provisions in the subcontract and lower-tier subcontracts. 236 F. Supp. 2d 575 (E.D. Va. 2002) [Lexis]. *Compare with* *Colonial Mech. Corp. v. Seaboard Sur. Co.*, 14 Va. Cir. 178 (Va. Cir. Ct. 1988) [Lexis] (surety is not entitled to compel arbitration where bond does not incorporate the subcontract containing the binding arbitration clause).

Other links to helpful sources include:

- Virginia Code Ann. § 2.2-4377 – Performance and Payment Bonds
  - https://law.lis.virginia.gov/vacodeupdates/title2.2/section2.2-4337/

- Virginia Code Ann. § 2.2-4377 West's Notes of Decision
  - https://1.next.westlaw.com/Link/RelatedInformation/NotesofDecisions?docGuid=N4E8DC770CB4111ECAAAA8A6741513E04&originationContext=document&transitionType=NotesOfDecision&ppcid=cb194809275f4621817d558cd25c5590&contextData=(sc.Default)

- Virginia Code Ann. § 2.2-4341 – Actions on payment bonds; waiver of right to sue
  - https://law.lis.virginia.gov/vacode/title2.2/chapter43/section2.2-4341/

- Virginia Code Ann. §2.2-4341 West's Notes of Decision
  - https://1.next.westlaw.com/Link/RelatedInformation/NotesofDecisions?docGuid=N99A71DF0601911E0A886CACCB8F552CF&originationContext=document&transitionType=NotesOfDecision&ppcid=1076458c0b1e48d380acbe6f5fc6395b&contextData=(sc.Document)

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

Common-law bonds are construed according to ordinary contract principles, and the relevant contract and bond interpreted in tandem. Contemporary authority continues to recognize a dubious distinction between compensated and uncompensated sureties. *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000) [Lexis] (applying Virginia law and reasoning that "sureties for hire….must abide by their contracts and pay everything which by fair intendment can be charged against them.") (quoting *Bd. of Supervisors v. S. Cross Coal Corp.*, 238 Va. 91, 380 S.E.2d 636, 638 (1989) [Lexis]).

The liability of the surety cannot exceed the penal sum of the bond. *Noland Co. v. W. End Realty Corp.*, 147 S.E.2d 105, 109 (Va. 1966) [Lexis].

B. Time for Suit

Unless there is a limitation period specified in the bond, Virginia courts will apply the statute of limitations for contracts to apply to private payment bonds. Va. Code Ann. § 8.01-246.

WASHINGTON

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Washington has codified the payment bond requirements of public works projects under RCW 39.08.010–39.08.100 [Lexis], Washington's Little Miller Act; however, cities, towns, and water districts may create their own statutes and regulations relating to payment bonds on public projects, including the amount of any such bond.

RCW 39.08.010 [Lexis] provides that: "Whenever any board, council, commission, trustees, or body acting for the state or any county or municipality or any public body must contract with any person or corporation to do any work for the state, county, or municipality or other public body, city, town, or district, such board, council, commission, trustees or body *must require the person or persons with whom such contract is made to make, execute, and deliver* to such board, council, commission, trustees, or body *a good and sufficient bond, with a surety company as surety,*…." RCW 39.08.010(1)(a) [Lexis] (emphasis added). The bond is required to be in the full amount of the contract price, with some limited exceptions. *See id.* The statute applies to any contract over $150,000; however, for projects of $150,000 or less, the public entity may agree to "retain ten percent of the contract amount for a period of thirty days after date of final acceptance or until receipt of all necessary releases from the department of revenue, the employment security department, and the department of labor and industries…." RCW 39.08.010(3) [Lexis].

Notably, Washington law imposes liability on the board of county commissioners or mayor for failing to take a bond to those protected under RCW 39.08.010 for full amount of any contracted for debts. RCW 39.08.015 [Lexis].

B. Tiers Covered

Washington's public works payment bond covers claims asserted by "laborers, mechanics, subcontractors and material suppliers" to the contractor, as well as those who supply the first tier with provisions and supplies for their work. RCW 39.08.010(1)(a)(ii) [Lexis]. The payment bond is also required to "pay the taxes, increases, and penalties incurred on the project…." *Id.*

C. Notice Required

Washington requires two types of notice: (1) a pre-claim notice; and (2) notice of claim. The pre-claim notice requirement applies only to suppliers to subcontractors and sub-subcontractors, whereas the notice of claim requirement applies to all payment bond claimants. In other words, persons in direct privity with the prime contractor need not give a pre-claim notice. With regard to the pre-claim notice, "[e]very person, firm, or corporation furnishing materials, supplies, or provisions to be used in the construction, performance, carrying on, prosecution, or doing of any work for the state or any county city, town, district, municipality, or other public

body, *shall, not later than ten days after the date of the first delivery of such materials, supplies, or provisions to any subcontractor or agent of any person, firm, or corporation* having a subcontract for the construction, performance…*deliver or mail to the contractor a notice in writing stating in substance and effect that such person, firm, or corporation has commenced to deliver such materials, supplies, or provisions for use thereon*…." RCW 39.08.065 [Lexis] (emphasis added). The notice must state the name of the subcontractor or agent who ordered the material or to whom the labor or material is furnished and must state that the bond will be held for payment. *Id.* The statute further provides that failure to follow the notice requirements in RCW 39.08.065 will bar a later lawsuit for recovery. *Id.*

With regard to the notice of claim, Washington law dictates that the failure to present and file a claim with the applicable public body within thirty (30) days "from and after the completion of the contract with an acceptance of the work by affirmative action of the board, council,…" will bar a right to bring a later lawsuit. RCW 39.08.030(1)(a) [Lexis]. The statute also dictates the substance of the claim to be presented as follows:

> To (here insert the name of the state, county or municipality or other public body, city, town or district):
>
> Notice is hereby given that the undersigned (here insert the name of the laborer, mechanic, or subcontractor, or material supplier, or person claiming to have furnished labor, materials or provisions for or upon such contractor or work) has a claim in the sum of …… dollars (here insert the amount) against the bond taken from ……. (here insert the name of the principal and surety or sureties upon such bond) for the work of …… (here insert a brief mention or description of the work concerning which said bond was taken).
>
> (here to be signed)…….

Id.

D. Coverage

Washington courts have held that lien statutes, including RCW 39.08.010, "are in derogation of the common law and, thus, must be strictly construed." *Better Fin. Sols., Inc. v. Transtech Elec., Inc.*, 112 Wn. App. 697, 703, 51 P.3d 108 (2002) [Lexis] (quoting *Airefco, Inc. v. Yelm Community Schools*, 57 Wn. App. 230, 233, 758 P.2d 996 (1988)). Once, however, it is established that a party is a proper claimant, then "the statute is liberally construed to provide security for all parties intended to be protected by it." *Id.* (quoting *TPST Soil Recyclers of Washington, Inc., v. W.F. Anderson Constr., Inc.*, 91 Wn. App. 297, 300 n. 2, 957 P.2d 265 (1998)). In addition to state-owed taxes, the statute protects "laborers, mechanics and subcontractors and material suppliers, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work…." RCW 39.08.010(1)(a)(ii) [Lexis].

1. Labor

a. Professional Services

There is no Washington court directly addressing whether professional services are covered under the public works statute. However, the direct language of the statute seems to presume that professional services are not covered. Professional services are not laborers, mechanics, or

subcontractors and materials suppliers, nor do they typically provide the provisions or supplies to carry on the performance of the work.

b. Union Benefits

Union benefits are covered under the public works payment bond. The Washington Supreme Court has held that ERISA does not preempt claims made under Washington's public works statute or under Washington's Mechanic's and Materialmen's Lien statute. *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 18 Wn.2d 54, 322 P.3d 1207 (2014) [Lexis]. In doing so, the *W.G. Clark Const.* Court concluded that the two statutes "are in place to ensure that workers on public projects are paid for their work. They apply generally to all workers on public projects, regardless of the type of work they perform or how they are paid." *Id.* at 64. Moreover, it should be noted that Washington's Mechanic's and Materialmen's Lien statute defines "[f]urnishing labor, professional services, materials, or equipment" as "the performance of any labor or professional services, the contribution owed to any employee benefit plan on account of any labor, the provision of any supplies or materials, and the renting, leasing, or otherwise supplying of equipment for the improvement of real property." RCW 60.04.011(4) [Lexis].

2. Material

Washington courts have long held that there are certain limitations as to what constitutes "materials" under the public works payment bond statute. *See, e.g.*, *Holly-Mason Hardware Co. v. Nat'l Sur. Co.*, 107 Wash. 74, 77, 180 P. 901 (1919) [Lexis] (noting that the materials must have been actually used in the construction of the building or delivered to the project site). Washington law continues to define materials as "including such articles which either actually have been incorporated into and become part of the building or have been delivered on the site for incorporation into the furnished structure." *Campbell Crane & Rigging Servs., Inc. v. Dynamic Intern. AK, Inc.*, 145 Wn. App. 718, 725, 186 P.3d 1198 (2008) [Lexis] (citing *Nat'l Concrete Cutting, Inc. v. NW. GM Contractors*, 107 Wn. App. 657, 661, 27 P.3d 1239 (2001)).

3. Equipment

a. Repairs

Washington law generally holds that equipment repairs are not a proper claim under the payment bond. In *Standard Boiler Works v. National Surety Co.*, the Court held that equipment repairs were not covered by the payment bond because "a contractor is presumed to be prepared with machinery and appliance necessary to do his work, that such items are furnished upon his credit and not upon the implied credit of the public and that repairs, if made, will be paid out of the profits of the undertaking." 71 Wash. 28, 30–31, 127 P. 573 (1912) [Lexis].

b. Rentals

RCW 39.08.010 [Lexis] provides protection for laborers, mechanics, subcontractors, and material suppliers, as well as *all persons who supply* such person or persons, or subcontractors, *with provisions and supplies for the carrying on of such work*…." (emphasis added). Washington

courts have held that providing rental equipment is providing the "provisions and supplies" as noted under RCW 39.08.010. *See Willett v. Davis*, 30 Wn. 2d 622, 636, 193 P.2d 321 (1948) [Lexis].

4. Other

a. Attorneys' Fees

RCW 39.08.030(1)(b) [Lexis] provides that, "in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items specified in this section, *the claimant is entitled to recover in addition to all other costs, attorney's fees in such sum as the court adjudges reasonable*." (emphasis added). A claimant must follow the notice requirements and the terms of the statute in order to recover their reasonable attorneys' fees, and the claimant cannot recover attorneys' fees if the claimant commences a lawsuit before 30 days have elapsed since providing the requisite notice. Further, Washington courts have held that attorneys' fees are recoverable in an action "where the surety contests a right to recover, denies the allegations in a complaint, and seeks dismissal of an action." *Campbell Crane & Rigging Servs., Inc.*, 145 Wn. App. at 727 [Lexis] (citing *Diamaco, Inc. v. Mettler*, 135 Wn. App. 572, 578, 145 P.3d 399 (2006)). Moreover, Washington courts have also allowed for recovery of attorneys' fees where a surety forces a claimant to litigation to recover under a bond and where the claimant is the prevailing party in any such litigation. *See King Cnty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper JV*, 188 Wn. 2d 618, 398 P.3d 1093 (2017) [Lexis]. Thus, claimants have several avenues whereby they may recover attorneys' fees.

b. Interest

A Washington court has held that a payment bond claimant is entitled to recover interest from the surety. In *U.S. Filter Distribution Grp., Inc. v. Katspan, Inc.*, the Court allowed the supplier to recover interest from the surety at the lower statutory rate of 12 percent. 117 Wn. App. 744, 754, 72 P.3d 1103 (2003) [Lexis]. In doing so, the Court rejected the claimant's argument that it was entitled to the 18 percent interest rate as set forth in its supply contract with the principal. *Id.* at 754. The Court noted that the "supplier's right of action against a defaulting contractor's surety arises from the provisions of RCW 39.08.030, not from the terms of its agreement with the contractor." *Id.* (citing to *Keller Supply Co. v. Lydig Constr. Co.*, 57 Wn. App. 594, 789 P.2d 788 (1990)). Because the supplier had no contract with the surety, but was relying on the statute to assert a cause of action, the interest rate in the statute controlled over any agreements between the supplier and the contractor.

c. Financing Charges

There is no published decision addressing the recovery of financing charges in Washington State. In order to be recoverable, the Court would need to conclude that financing charges were part of the "materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements". *See* RCW 39.08.030(1)(a) [Lexis].

d. Insurance Premiums

Insurance premiums are not recoverable under the public works payment bond statute. In *Maryland Casualty Co. v. City of Seattle*, the Court held that insurance premiums were not recoverable against the surety because the premiums did not constitute a supply as "supplies" was used in the statute and the bond. 11 Wn.2d 69, 72–75, 118 P.2d 416 (1941) [Lexis]. The Court also rejected the argument that the insurance premiums should be recoverable, even though the bond was incorporated by reference into the bond, as the Court concluded that the obligations to pay insurance premiums was between the contractor and the insurer and was not part of the construction contract the performance of which the bond secured. *Id.* at 72–73.

e. Loans

Claimants cannot recover money loaned to a contractor from the surety, even when the money is used in performing the work. *Maryland Cas. Co.*, 11 Wn.2d at 73 [Lexis] (citing *Am. Savings Bank & Trust Co. v. Nat'l Surety Co.*, 104 Wash. 663, 177 P. 646 (1919)).

f. Delay Damages

Generally speaking, "a subcontractor performing services or furnishing material cannot recover in excess of the reasonable value of the services performed or material furnished." *Maryland Cas. Co. v. City of Tacoma*, 199 Wash. 72, 87, 90 P.2d 226, 233 [Lexis], *opinion modified on reh'g*, 199 Wash. 72, 94 P.2d 217 (1939), *and opinion modified on reh'g*, 199 Wash. 72, 94 P.2d 749 (1939). This general rule seems to suggest that delay damages are not recoverable and that recovery under the payment bond is limited to the reasonable value of services furnished on the bonded project.

g. Profits

There is no published decision on whether lost profits are recoverable under Washington's public works payment bond. Again, in order to be recoverable, a court would need to conclude that profits were part of the "materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements" to be recoverable. *See*, RCW 39.08.030(1)(a) [Lexis]. Because claims under the payment bond are limited to the reasonable value of services furnished on the project, lost profits are likely not recoverable. *Maryland Cas.*, 199 Wash. at 87 [Lexis].

h. Extracontractual

This area is not entirely settled by the Washington courts, as there has been no decision addressing whether a bond claimant can sue a surety for extracontractual damages, particularly under a theory of bad faith. However, at least one court, the United States District Court for the Western District of Washington, held that a payment bond claimant did not have standing to bring bad faith claims for extracontractual damages because the Court predicted that the Washington Supreme Court would not allow for a subcontractor payment bond claimant to bring causes of action for tortious bad faith and alleged violations of Washington's Consumer Protection Act to

recover extracontractual damages. *Kenco Constr., Inc. v. Hartford Fire Ins. Co.*, No. 2:19-cv-01000-RAJ, 2020 WL 1433738, 2020 U.S. Dist. LEXIS 51087 (W.D. Wash. March 24, 2020) [Lexis]. While the court recognized that the claimant could pursue a claim under the bond, that did not create the fiduciary relationship necessary to justify a bad faith cause of action. *Id.* at *3. Further, the Court noted that, to hold otherwise, could create a conflict of interest for a surety who owes dual obligations to its principal and the claimant. *Id*. at *3–4.

However, in a separate decision addressing a payment bond claimant under the federal Miller Act, the United States District Court for the Western District of Washington held that the claimant had standing as a "first-party" claimant to bring a statutory bad faith claim under Washington's Insurance Fair Conduct Act and a Consumer Protection Action claim seeking extracontractual damages against the surety. *U.S. ex rel. Ballard Marine Constr., LLC v. Nova Group, Inc.*, No. C20-5954BHS-DWC, 2021 WL 3174799, 2021 U.S. Dist. LEXIS 140016 (W.D. Wash. Jul. 27, 2021) [Lexis].

While there is no Washington State authority on extracontractual damages relating to payment bond sureties under the public works statute, a Washington court did recently address this issue as to a statutory bond required under Washington's Contractor Registration Act, RCW 18.27.040 [Lexis]. *See Caskey v. Old Republic Sur. Co.*, 21 Wn. App. 2d 295, 506 P.3d 650 (2022) [Lexis]. In *Caskey*, the Court held that, absent an express statutory carve-out which imposed Consumer Protection Act liability on sureties, third-party claimants, or those who are not a signatory to the bond, do not have a right to bring a Consumer Protection Act claim against a surety. The Court also held that, absent an express statutory imposition of a duty of good faith on sureties, third-party claimants also do not have a right to bring claims alleging a breach of the duty of good faith. Finally, the Court also held that a party who is not a signatory to the bond is not a "first-party claimant" under Washington's Insurance Fair Conduct Act and, thus, such third-party claimants lack standing to assert a claim against a surety under that Act. This decision arguably closes the door on any third-party claimant's ability to bring a claim against a surety to seek extracontractual damages wherein the third-party claimant alleges a violation of the Consumer Protection Act, the Insurance Fair Conduct Act, or makes general allegations of bad faith.

E. Contracts Excluded

Washington's public works statute excludes from it contracts of $150,000 or less. RCW 39.08.010(3) [Lexis]. There, "at the option of the contractor or the general contractor/construction manager…the respective public entity may, in lieu of the bond, retain ten percent of the contract amount for a period of thirty days after date of final acceptance or until receipt of all necessary releases from the department of revenue, the employment security department, and the department of labor and industries, and settlement of any liens filed under chapter 60.28 RCW, whichever is later." *Id.*

F. Time for Suit

As set forth above, a claimant must provide the requisite notice set forth in RCW 39.08.030 [Lexis]. If a claimant brings a lawsuit before thirty days have provided since providing the requisite notice, then the claimant is not entitled to recover attorneys' fees. RCW 39.08.030 (1)(b). Further, if a claimant who is "furnishing materials, supplies, or provisions to be used in the construction, performance, carrying on, prosecution, or doing of any work for the state, or any county, city,

town, district, municipality, or other public body" does not provide notice in writing within 10 days from the date of the first delivery with the requisite information, then any such claimant cannot bring a lawsuit against the contractor or the bond. RCW 39.08.065 [Lexis].

G. Remarks

Washington has a provision encouraging early settlement between the parties where the project involved a public entity. The Statute applies Washington's prevailing party attorney fee statute to "an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works is a party…." RCW 39.04.240 [Lexis]. While Washington's prevailing party statute usually applies to disputes of $10,000 or less (*see* RCW 4.84.250 [Lexis]) the public works statute holds that maximum dollar limitation does not apply. RCW 39.04.240(1) [Lexis]. In order to take advantage of the statute, a settlement offer must be served on the adverse party "not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint." *Id*. As previously noted, there are other avenues by which a claimant can recover attorneys' fees against a surety and RCW 39.04.240 is not an exclusive remedy. *See, e.g.*, *King Cnty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper JV*, 188 Wn. 2d 618, 398 P.3d 1093 (2017) [Lexis]. However, the statute does not require that a party seeking attorneys' fees be a party to the underlying construction contract. *See State Constr., Inc. v. City of Sammamish*, 11 Wn. App. 2d 892, 920–21, 457 P.3d 1194 (2020) [Lexis] (citing to various cases). In *State Construction*, the appellate court affirmed the trial court's award of attorneys' fees to the surety where the surety was a prevailing party based on the timely offer of settlement issued to the claimant. *Id.* at 921. Thus, this statute provides an avenue for a surety to recover its attorneys' fees.

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

A bond is interpreted under general principles of contract. *See Joint Admin. Bd. of Plumbing and Pipefitting Indus. v. Fallon*, 89 Wn. 2d 90, 94, 569 P.2d 1144 (1977) [Lexis]. The surety's liability will be determined by the plain terms of the bond.

B. Time for Suit

Washington law holds that parties can agree to a shorter limitations period than those provided for under statute. *Yakima Asphalt Paving Co. v. Washington State Dep't of Transp.*, 45 Wn. App. 663, 665, 726 P.2d 1021 (1986) [Lexis]. "A contract limitation period prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable." *Id.* Under Washington law, the statute of limitations applicable to the breach of a written contract is six years. RCW 4.16.040 [Lexis]. Washington courts have upheld suit limitations periods in payment bonds of one year. Washington law prohibits a suit limitation period of less than one year in any insurance contract (*see* RCW 48.18.200(c) [Lexis]) and this provision has been held to be applicable to surety bonds as well. It should be noted, however, that the Washington Supreme Court has recently held that a one-year limitation period to bring a construction defect lawsuit against a contractor by residential homeowners was unconscionable

and, therefore, void and unenforceable. *Tadych v. Noble Ridge Constr., Inc.*, 519 P.3d 199 (2022) [Lexis]. While this decision is not against a surety and does not involve a payment bond, it is important to be aware of it, especially when evaluating and affirmative defenses by the principal.

C. Case Annotations

Defenses of the Principal

A surety's liability is secondary and conditional to that of its principal. *See AAA Cabinets & Millwork, Inc. v. Accredited Sur. & Cas. Co., Inc.*, 132 Wn. App. 202, 207, 130 P.3d 887 (2006) [Lexis]. The surety may assert any and all of the principal's defenses on its own behalf. *Id.*

Statutory License Bonds

In order to obtain a license with the State of Washington, contractors must obtain a Continuous Contractor's Surety Bond pursuant to which the State is an obligee in the penal sum of $12,000.00, for a general contractor, or $6,000.00 for a specialty contractor. RCW 18.27.040(1) [Lexis]. Under RCW 18.27.040, "[t]he bond shall be conditioned that the applicant will pay all persons performing labor, including employee benefits, for the contractor and will pay all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business. *Id.* The statute provides a suit limitation period whereby residential homeowners must bring a lawsuit against the bond "within two years from the date the claimed work was substantially completed or abandoned, whichever occurred first." All other authorized claimants have one year—"from the date labor was performed and benefits accrued, taxes and contributions owing the state of Washington became due, materials and equipment were furnished, or the claimed contract work was substantially completed or abandoned"—to commence a lawsuit. *Id.* at (3). Service upon the bond is only accomplished by sending three copies of the summons, complaint, and the applicable fee, via registered or certified mail, upon the Department of Labor & Industries for the State of Washington. *Id.* While residential homeowners may access the entire penal sum of the applicable bond, all other claimants are limited to one-half of the penal sum, or, in the case of a specialty contractor, one-half of the bond amount or $4,000.00, whichever is greater. *Id.* at (5). The statute also provides that a prevailing party in an action under this statute is entitled to recover its costs, interest, and reasonable attorneys' fees, however, the surety will not be liable in an aggregate amount for any amounts in excess of the penal so of the bond. *Id.* at (6).

WEST VIRGINIA

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

West Virginia requires the provision of payment and performance bonds for public construction projects. See W. Va. Code § 5-22-1; W. Va. Code § 5-6-7; W. Va. Code § 18-5-12; W. Va. Code § 17-4-20. W. Va. Code § 38-2-39 sets forth the payment bond form generally required for public projects in West Virginia. According to that statute, in all contracts "for the erection, construction, improvement, alteration or repair of any public building or other structure" other than school buildings, the prime contractor must provide a bond "in a penal sum equal at the least to the reasonable cost of the materials, machinery, equipment and labor required for the completion" of the contract. In lieu of a bond issued by a corporate bonding or surety company, the contracting public body may accept "a sum in cash or bonds and securities of the United States of America or of the State of West Virginia …" *Id*.

Persons contracting to build or repair school property must execute a bond, with approved security, in the amount of the contract price where the contract amount exceeds $25,000. See W. Va. Code § 18-5-12.

With respect to contracts relating to the construction and reconstruction of state roads and bridges, W. Va. Code § 17-4-20 directs that the successful bidder on any such project must provide "sufficient surety or collateral bond" in such penal sum as the State Road Commissioner shall require, "but not to exceed 110 percent of the contract price …"

W. Va. Code § 4-7-7 and W. Va. Code § 5-6-7 mandate that every contract for the construction of state legislative buildings and/or with the state building commission must be secured by a bond which meets the requirements of W. Va. Code § 38-2-39 .

The bond requirement set forth in W. Va. Code § 38-2-39 is also a necessary prerequisite for the award of a construction contract subject to the West Virginia Fairness in Competitive Bidding Act, W. Va. Code § 5-22-1. The Act directs that the state and its political subdivisions (municipalities, county boards of education and administrative entities) shall solicit competitive bids for every construction project exceeding $25,000 in total cost. Following the solicitation of bids, "the construction contract shall be awarded to the lowest qualified responsible bidder who shall furnish a sufficient performance and payment bond." W. Va. Code § 5-22-1(e).

The purpose of the bond is to protect certain laborers, subcontractors, and material suppliers against nonpayment. Liens against public buildings, improvements, or the land upon which a public project occurs are not permitted; rather, the bond is the sole remedy on public projects. See W. Va. Code § 38-2-39.

B. Tiers Covered

The bond required of a contractor on a public construction project covers all "materials, machinery, equipment and labor delivered to [the contractor] for use in the erection, construction,

improvement, alteration or repair of" any public building or other structure used or to be used for public purposes. W. Va. Code § 38-2-39. Under this statute, parties who furnish necessary labor or materials under a contract with the general contractor or subcontractors are protected by the bond. Materials supplied to, or labor performed for, a furnisher of material on a public construction project are not protected by the bond. See Syl. pt. 1, *Marsh v. Rothey*, 117 W. Va. 94, 183 S.E. 914 (1936) [Westlaw]; *Preussag Int'l Steel Corp. v. March-Westin Co.*, 221 W. Va. 472, 655 S.E.2d 494 (2007) [Westlaw].

A subcontractor is ordinarily one to whom the principal contractor sublets a portion or all of the contract itself. A materialman is generally one from whom the principal contractor or a subcontractor secures material of a general type for use on the structure. *Preussag*, 221 W. Va. at 477 [Westlaw] (internal citation omitted).

C. Notice Required

There is no statutory notice requirement for a bond claim under W. Va. Code § 38-2-39. The bond itself, however, may have specific notice requirements to be met.

D. Coverage

Like other states' Little Miller Acts, W. Va. Code § 38-2-39 is to be liberally construed to "extend the protection afforded by the statutory bond as far as reason and logic will permit." *Preussag*, 221 W. Va. at 477 [Westlaw] (citing *Cecil I. Walker Mach. Co. v. Stauben, Inc.*, 159 W. Va. 563, 230 S.E.2d 818 (1976) [Westlaw]). This liberal construction should not, however, disregard limitations imposed by the provisions of the statute. The Supreme Court of Appeals of West Virginia has deemed cases interpreting the federal Miller Act instructive when construing the coverage provided by W. Va. Code § 38-2-39. *See, e.g.*, *Preussag*, 221 W. Va. at 478 [Westlaw].

"To make the determination in a public construction bond case whether a party that furnishes labor or materials for the project should be classified as a subcontractor or as a materialman, a multi-factorial analysis should be used, with no single factor being determinative. The core inquiry is whether the party in question takes from the prime contractor a specific and substantial part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." *Id.* at 486 (citing W. Va. Code § 38-2-39).

1. Labor

a. Professional Services

Although West Virginia's mechanics' lien statutes allow architects, surveyors, engineers and landscape architects to record a mechanics lien, see W. Va. Code § 38-2-6a, no similar right exists for these types of professional services under West Virginia's public works payment bond, W. Va. Code § 38-2-39.

W. Va. Code § 38-2-39 directs that the bond required for public projects cover "materials, machinery, equipment and labor delivered to" the contractor "for use in the erection, construction, improvement, alteration or repair of" a public building or other structure to be used for public purposes. Professional services have not been classified a labor or materials under this statute.

Where, however, an architect or engineer, for example, is able to demonstrate that s/he contracted with the prime contractor to perform part of the labor requirements of the original contract, such services may arguably be considered subcontractor labor for which the payment bond could be applicable. *See, e.g.*, *U.S. ex rel. Naberhaus-Burke, Inc. v. Butt & Head, Inc.*, 535 F. Supp. 1155 (S.D. Ohio 1982) [Westlaw] (discussing the definition of "labor" under the federal Miller Act, 40 U.S.C. § 270b(a), and recognizing that, while the word "has been construed to include physical toil, but not work by a professional, such as an architect or engineer … the term does include an architect or another professional who actually superintends the work as it is done on the job site … [and] a consulting engineer responsible for inspecting a job while in progress").

b. Union Benefits

The question of whether union benefits, contracted for as part of payment for labor provided on a public construction project, may be covered by a public works payment bond provided pursuant to the requirements of W. Va. Code § 38-2-39 has not been specifically addressed by the Supreme Court of Appeals of West Virginia.

2. Material

Pursuant to W. Va. Code § 38-2-39, necessary material furnished for a public construction project under contract with a general contractor or subcontractor is protected by the statutory bond. Conversely, material furnished to a provider of materials on a public construction project is not covered by the bond. *See e.g.*, *Marsh v. Rothey*, 117 W. Va. 94, 183 S.E. 914 (1936) [Westlaw]; *Preussag Int'l Steel Corp. v. March-Westin Co.*, 221 W. Va. 472, 655 S.E.2d 494 (2007) [Westlaw].

Despite the language in W. Va. Code § 38-2-39 which states that the bond shall cover materials "delivered … for use" on a public project, this statute has been interpreted to allow coverage under the surety bond for only "those materials that are actually used in public building and construction projects." *Preussag Int'l Steel Corp. v. March-Westin Co.*, No. 1:04-CV-233, 2009 U.S. Dist. LEXIS 144744, 2009 WL 10675158 (N.D. W. Va. Aug. 31, 2009) [Westlaw] (citing Syl. pt. 7, *McConnell v. Hewes*, 50 W. Va. 33, 40 S.E. 436 (1901)). In *Preussag*, for example, the Court held that the materialman could "only recover under the bond for materials it provided that were actually used in the Project." *Id*. at *12.

3. Equipment

A bond provided on a public construction project pursuant to W. Va. Code § 38-2-39 generally does not cover the purchase price, rental or repair of equipment, which is or should be part of the contractor's regular equipment. *See, e.g.*, *Morton Motor Co. v. Fid. & Cas. Co.*, 109 W. Va. 67, 152 S.E. 860 (1930) [Westlaw]; *Nat'l Equip. Corp. v. Pinnell*, 114 W. Va. 558, 172 S.E. 790 (1934) [Westlaw]; *Rhodes v. Riley*, 113 W. Va. 679, 169 S.E. 525 (1933) [Westlaw]; *Cecil I. Walker Mach. Co. v. Stauben, Inc.*, 159 W. Va. 563, 230 S.E.2d 818 (1976) [Westlaw]. Thus, while a statutory bond is to be liberally construed to provide protection, it will not be construed to expose the bonding company to liability for: (a) repairs of a major nature which add substantially to the value of equipment; (b) repairs or replacements which are not substantially consumed on the contract involved; or (c) repairs or replacements which cannot be reasonably expected to be used

on or consumed in the performance of the job covered by the contract. *See Stauben*, 159 W. Va. at 569–70 [Westlaw].

a. Repairs

An exception to the general principal was recognized in *Hicks v. Randich*, 106 W. Va. 109, 144 S.E. 887 (1928) [Westlaw], to cover the cost of work performed to repair a highway contractor's trucks while they were being used to haul material for the road base on a road construction project. In *American Liability & Surety Co. v. Bluefield Supply Co.*, 70 F.2d 187 (4th Cir. 1934) [Westlaw] (applying West Virginia law), the court also found that the surety on the bond was chargeable with the of cost of small tools, appliances, and supplies nearly or completely used during work on the subject project, as well as incidental repairs made on the contractor's equipment while performing work on that project.

b. Rentals

In *Julian v. Cavin*, 111 W. Va. 395, 162 S.E. 318 (1932) [Westlaw], the court extended the protection of the bond to cover the rental cost of machinery necessarily used in the construction of a public road and which was limited to construction of the road at issue.

4. Other

a. Attorneys' Fees

W. Va. Code § 38-2-39 does not include a fee-shifting provision to authorize the award of attorneys' fees incurred in making a claim against a public payment bond. The bond/indemnity contract itself may, however, include such a provision. *See, e.g.*, *Fair Am. Ins. & Reinsurance Co. v. Capitol Valley Contracting, Inc.*, No. 2:21-CV-00212, 2021 U.S. Dist. LEXIS 232993, 2021 WL 5774154 (S.D. W. Va. Dec. 6, 2021) [Westlaw] (discussing a fee-shifting provision in a public performance bond indemnity contract). An exception may also be available to a successful plaintiff able to prove that a defendant acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See, e.g.*, Syl. pt. 3, *Sally-Mike Props. v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986) [Westlaw].

b. Interest

West Virginia law provides that a jury, in any action founded on contract, may allow interest on the principal due or any part thereof. See W. Va. Code § 56-6-27; *Am. Liab. & Sur. Co. v. Bluefield Supply Co.*, 70 F.2d 187 (4th Cir. 1934) [Westlaw]; Syl. Pt. 3, *Ringer v. John*, 230 W. Va. 687, 742 S.E.2d 103 (2013) [Westlaw] (citing Syl. Pt. 4, *Thompson v. Stuckey*, 171 W. Va. 483, 300 S.E.2d 295 (1983) [Westlaw]); *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 814 S.E.2d 205 (2018) [Westlaw].

West Virginia also has prompt pay statutes which provide protection for those contracting to provide services or goods directly with a state agency (W. Va. Code § 14-3-1), a county or county agency (W. Va. Code § 7-5-7), or a municipality or municipality agency (W. Va. Code § 8-13-22d). These statutes provide for the payment of interest for late payment after particular deadlines.

c. Financing Charges

Unless deemed part of the cost of materials, machinery, equipment, or labor delivered to the contractor for use in the erection, construction, improvement, alteration, or repair of any public building used or to be used for public purposes, finance charges are not specifically authorized under a statutory payment bond. See W. Va. Code § 38-2-39.

d. Insurance Premiums

Unless deemed part of the cost of materials, machinery, equipment, or labor delivered to the contractor for use in the erection, construction, improvement, alteration, or repair of any public building used or to be used for public purposes, insurance premiums are not specifically authorized under a statutory payment bond. See W. Va. Code § 38-2-39.

e. Loans

Unless deemed part of the cost of materials, machinery, equipment, or labor delivered to the contractor for use in the erection, construction, improvement, alteration, or repair of any public building used or to be used for public purposes, loans to a contractor or material provider are not specifically authorized under a statutory payment bond. See W. Va. Code § 38-2-39.

f. Delay Damages

"As a general rule, the liability of the surety is coextensive with that of the principal." Syl. pt. 6, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005) [Westlaw] (citation omitted). Thus, the surety is generally liable for the "debt, default, or miscarriage of his principal." *VanKirk v. Green Constr. Co.*, 195 W. Va. 714, 466 S.E.2d 782 (1995) [Westlaw]. In West Virginia, if a subcontractor is able to prove a claim for delay damages, it is "entitled to the reasonable costs of performing work as changed by the unanticipated circumstances." *Smith & Loveless, Inc. v. Breckenridge Corp.*, 1:18CV145, 2021 U.S. Dist. LEXIS 75403, 2021 WL 1554331 (N.D. W. Va. Apr. 20, 2021) [Westlaw] (citations omitted). If, therefore, a subcontractor is able to establish that claimed delay damages constitute increased costs for materials, machinery, equipment or labor delivered for use on the public project, the claim allowed under the payment bond may include the delay-related cost increases. *See id.*; *and see Gen. Contracting Corp. v. United States*, 70 F.2d 83 (4th Cir. 1934) [Westlaw] (allowing the contractor a right to set off against subcontractor's suit against the contractor/principal and surety for subcontractor's delay in deliveries of sand and gravel).

Note that the Supreme Court of Appeals of West Virginia has not addressed whether a "no damages for delay" clause in contract involving a public project is enforceable. In *United States ex rel. Kogok Corp. v. Travelers Casualty & Surety Co. of America*, 55 F. Supp. 3d 852 (N.D. W. Va. 2014) [Westlaw], however, the federal court predicted that such a clause in a construction subcontract would likely be upheld by the state's highest court.

g. Profits

A payment bond claim may include compensation for the value of the materials, machinery, equipment, or labor delivered for use on the public project, which may include a reasonable profit earned. *See, e.g.*, *Farley v. Zapata Coal Corp.*, 167 W. Va. 630, 281 S.E.2d 238 (1981) [Westlaw] (discussing mechanic's lien claims); *Preussag Int'l Steel Corp. v. March-Westin Co.*, 221 W. Va. 472, 655 S.E.2d 494 (2007) [Westlaw] (recognizing that the purpose of West Virginia's public bond statute is to "give a security to materialmen, laborers, and the like . . . equal to that provided by a mechanics' lien against private structures," therefore the rules and application of the state's mechanic's lien statutes are applicable to determining the security afforded by a bond available in a public construction project); *accord. Preussag Int'l Steel Corp. v. March-Westin Co.*, No. 1:04-CV-233, 2009 U.S. Dist. LEXIS 144744, 2009 WL 10675158 (N.D. W. Va. Aug. 31, 2009) [Westlaw].

h. Extracontractual

Under West Virginia law, a subcontractor or materialman supplying labor or materials to a public construction project is precluded from bringing claims against the bond surety for unfair claim settlement practices or common-law bad faith. See *S. W. Va. Paving, Inc. v. Elmo Greer & Sons, LLC*, 691 F. Supp. 2d 677 (S.D. W. Va. 2009) [Westlaw].

E. Contracts Excluded

W. Va. Code § 38-2-39 requires the posting of a payment bond regardless of the value of the contract at issue. Notably, however, W. Va. Code § 18-5-12, applicable to County Boards of Education, directs that Boards shall require "all persons contracting for the building or repairing of school property, where the contract exceeds $25,000 to execute a bond, with approved security, in the amount of the contract price."

F. Time for Suit

There is no statutory requirement for filing a bond claim under W. Va. Code § 38-2-39. The bond itself, however, may have specific notice or filing requirements to be met. Notably, the time within which to bring an action to recover "upon an indemnifying bond taken under any statute" is ten years "after the right to bring the same shall have accrued." W. Va. Code § 55-2-6. Further, the time within which to file a lawsuit to enforce a lien otherwise authorized by Article 2, Chapter 38 of the West Virginia Code, is six months after the filing of a notice of claim of lien in the clerk's office; and liens authorized by this Article are to be filed within 100 days of the last provision of labor or material on a non-public project. See W. Va. Code § 38-2-34 and W. Va. Code § 38-2-7.

G. Case Annotations

Pay-if-Paid Clauses

A pay-if-paid condition precedent clause in a public construction contract does not violate public policy and is enforceable. Accordingly, "a pay-if-paid clause which prevents a subcontractor from proceeding against a contractor in the absence of the owner's payment to the contractor also prevents the subcontractor from proceeding against the contractor's surety under a payment bond acquired by the contractor." *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005) [Westlaw].

Distinguishing Subcontractors from Materialmen: A Multi-Factorial Analysis

In *Preussag International Steel Corp. v. March-Westin Co.*, 221 W. Va. 472, 655 S.E.2d 494 (2007) [Westlaw], the Court, answering certified questions from the U.S. District Court, held that for purposes of the public construction bond statute, W. Va. Code §38-2-39, "a party need not necessarily perform work at the construction job site itself in order to be considered a subcontractor." *Id*. at Syl. pt. 3. There, the Court applied a multi-factorial analysis to determine whether the steel fabricator in that case was a subcontractor or materialman. If deemed a subcontractor rather than a materialman, its supplier of non-fabricated steel would be entitled to payment under the bond. The Court rejected the surety's argument that the fabricator's status as a materialman or subcontractor was contractually defined; instead, recognizing that, the use of a particular term in connection with a business relationship is not considered to be a dispositive factor when making the subcontractor/materialman distinction. Finding that the fabricator in that case was a subcontractor rather than a materialman, the Court relied upon the following: (a) the fabricator had specially fabricated structural steel components that were created to the contract's unique design specifications and were central to the project's progress; (b) the fabricator's shop drawings had to be approved by the architect for the general contractor; (c) the steel components were project-specific rather than fungible products available to use in other projects; and (d) a substantial percentage of the contracted-for project was undertaken by the fabricator. See *id*. at 486, 655 S.E. 2d at 508.

§ 2.0 PRIVATE PAYMENT BONDS

W. Va. Code § 38-2-22 provides that an owner may limit potential liability on a private construction project to the contract price for the same "by recording, in the county where the building or structure is situate, the contract and a bond of the general contractor in a penalty equal to the contract price, for the protection of any laborer, materialman or other person 'having perfected his lien as allowed by this article.'" *Atlas Powder Co. v. Nelson & Chase & Gilbert Co.*, 124 W. Va. 298, 299, 20 S.E.2d 890, 891 (1942) [Westlaw]. If the bond is property recorded, the owner "shall be exempt from the payment of more than such contract price, and his property shall likewise be exempt therefrom, and all … liens … as are not fully satisfied and discharged … shall be paid by [the] contractor and his surety on such bond." W. Va. Code § 38-2-22.

A. Rules of Construction

A contractual payment bond is subject to the rules of contract interpretation and construction. The bond's coverage, notice requirements, and other conditions for payment are provided by the language of the bond and it will be interpreted as any other contract. *L. Schreiber & Sons Co. v. Miller Supply Co.*, 77 W. Va. 236, 87 S.E. 353 (1915) [Westlaw]; *Mid-State Sur. Corp. v. Thrasher Eng'g, Inc.*, 575 F. Supp. 2d 731 (S.D. W. Va. 2008) [Westlaw].

Under West Virginia law, "when the surety is a corporation and supplies bonds for a consideration, the courts will construe the obligations of the bond most strongly against the surety." *Elkins Manor Assocs. v. Eleanor Concrete Works*, 183 W. Va. 501, 396 S.E.2d 463 (1990) [Westlaw] (quoting *Cecil I. Walker Mach. Co. v. Stauben, Inc.*, 159 W. Va. 563, 230 S.E.2d 818 (1976) [Westlaw]). In addition, the surety's liability under a bond is generally "coextensive with that of the principal … [T]he obligation of a surety being accessory to that of his principal, the surety's liability is generally measured by the liability of the principal and cannot exceed it." *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005) [Westlaw].

W. Va. Code § 45-1-3 also provides that a surety shall be allowed to make any defense in any action instituted against it as could have been made by the principal in an action in which a judgment or recovery was had against the principal.

B. Time for Suit

A private payment bond may contain a provision limiting the time for suit to commence against the bond. *See, e.g.*, W. Va. Code § 38-2-22. Otherwise, W. Va. Code § 55-2-6 establishes a ten-year limitations period for actions founded on written contracts and/or "an indemnifying bond taken under any statute."

C. Case Annotations

Effect of Owner's Failure to Record Contract and Bond

The limitation of liability afforded by the provision of a bond under W. Va. Code § 38-2-22 is unavailable if the owner fails to record the contract with the general contractor or the bond as required by the terms of the statute. *See, e.g.*, W. Va. Code § 38-2-23; *Augir v. Warder*, 68 W. Va. 752, 70 S.E. 719 (1911) [Westlaw]; *Williams & Davisson Co. v. Bailey*, 68 W. Va. 681, 70 S.E. 696 (1911) [Westlaw].

A Valid Mechanic's Lien Is Required to Proceed against the Bond

W. Va. Code § 38-2-22 and W. Va. Code § 38-2-23 are only triggered if the requirements for filing a lien pursuant to W. Va. Code § 38-2-1 and W. Va. Code § 38-2-2 have been met. *See, e.g.*, *Hanover Res., LLC v. LML Props., LLC*, 241 W. Va. 767, 828 S.E.2d 829 (2019) [Westlaw]; *Atlas Powder Co. v. Nelson & Chase & Gilbert Co.*, 124 W. Va. 298, 20 S.E.2d 890 (1942) [Westlaw].

A Lienholder Must Bring Suit against the General Contractor and Its Surety

When an owner has opted to limit its liability to the contract price pursuant to W. Va. Code § 38-2-22, W. Va. Code § 38-2-26 requires the mechanic's lienholder to name as parties to an execution action the general contractor and its surety. See *Waco Equip. Co. v. B.C. Hale Constr. Co.*, 182 W. Va. 381, 387 S.E.2d 848 (1989) [Westlaw].

Interpretation of Bonds Given to Comply with Statute

A bond executed pursuant to statute shall be construed and applied in conformity and compliance with the statute. Thus, bonds which are given with the plain purpose of complying "with a statutory requirement prescribing the condition of the bonds [are] to be read as if given in literal compliance with the statute" whether the statutory language is or is not expressly and precisely stated in the bond. *Atlas Powder Co. v. Nelson & Chase & Gilbert Co.*, 124 W. Va. 298, 20 S.E.2d 890 (1942) [Westlaw]; *State Rd. Comm'n v. Curry*, 155 W. Va. 819, 187 S.E.2d 632 (1972) [Westlaw].

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Whether a payment bond is required for a public improvement or public work depends on the amount of the contract and whether the contract is with the state or a local government entity.

The terms "public improvement" or "public work" mean any improvement or work undertaken by a unit of government or a public agency or board. *See* *Blaser & Kammer v. Don Ganser & Assoc. Inc.*, 19 Wis. 2d 403, 120 N.W.2d 629 (Wis. 1963) [Lexis] (holding under a prior version of payment bond statute that a building corporation is a private corporation is not an agency of the state and did not constitute a public board or body).

State Contracts

- A payment bond is not required from the prime contractor for contracts between $16,000 and $148,000, but the underlying contract shall include criteria for determining whether the contract requires payment assurances, and, if so, what assurances are required. Wis. Stat. § 779.14(1m)(c)1.b.
- For contracts between $148,000 and $369,000, the contract shall require the prime contractor to provide a payment bond, unless the department of administration allows substitution of a different type of payment assurance. Wis. Stat. § 779.14(1m)(c)2.b.
- For contracts that exceed $369,000, the contract shall require the prime contractor to provide a payment bond. Wis. Stat. § 779.14(1m)(c)3.

Local Government Contracts

- For contracts between $16,000 and $74,000 the contract shall include criteria for determining whether the contract requires payment assurances, and, if so, what assurances are required. Wis. Stat. § 779.14(1m)(d)1.b.
- For contracts between $74,000 and $148,000 the contract shall require the prime contractor to provide a payment bond, unless the public body allows substitution of a different type of payment assurance. Wis. Stat. § 779.14(1m)(d)2.b.
- For contracts in excess of $148,000, the prime contractor is required to provide a payment bond. Wis. Stat. § 779.14(1m)(d)3.

Failure by the government to require the prime contractor to obtain the payment opens the government up to liability from unprotected subcontractors, suppliers, and service providers. *Holmen Concrete Prods. Co. v. Hardy Constr. Co., Inc.*, 2004 WI App 165, 276 Wis. 2d 126, 686 N.W.2d 705, *review denied* (Wis. Dec. 15, 2004) [Lexis]; *see also* *Davis v. Miron Constr. Co., Inc.*, 222 Wis. 2d 623, 587 N.W.2d 456, 1998 WL 731168 (Wis. App. 1998) (unpublished) [Lexis].

The amount of the prime contractor's bond must be for the same amount as its own contact with the owner/obligee. *Golden Valley Supply Co. v. Am. Ins. Co.*, 195 Wis. 2d 866, 537 N.W.2d 58 (Wis. Ct. App. 1995) [Lexis], *review denied* (Wis. Nov. 14, 1995).

B. Tiers Covered

Except for highway projects, subcontractors, suppliers, and service providers that have a direct contractual relationship with the prime contractor, or with any subcontractor of the prime contractor, to perform, furnish, or procure labor, services, materials, plans, or specifications for public improvement projects can maintain a cause of action against a payment bond. Wis. Stat. § 779.14(1)(a); *see also Nagle Hart, Inc. v. United Pac. Ins. Co.*, 141 Wis. 2d 858, 417 N.W.2d 36 (Wis. Ct. App. 1987) [Lexis] (holding that, unless the bond provides for expanded coverage, a supplier to a subcontractor of a prime contractor is not covered by the payment bond under Wis. Stat. § 779.14). For highway improvement projects, a payment bond claimant has to have a direct contractual relationship with the prime contractor. Wis. Stat. § 779.14(1)(b); *see also Gilson Bros. Co. v. Worden-Allen Co.*, 220 Wis. 347, 265 N.W. 217 (Wis. 1936) [Lexis].

C. Notice Required

Except as provided below, a subcontractor, supplier, or service provider can maintain a cause of action on a payment bond only if it has served a written notice on the prime contractor for whom it has performed, furnished, or procured, or will perform, furnish, or procure labor, services, materials, plans or specifications for the public work or improvement. Wis. Stat. § 779.14(2)(am)1. The notice must be served no later than 60 days after the date on which the claimant first performed its work. *Id.*

Notice to the surety to maintain an action on a payment bond is not required in any of the following three instances:

- The contract under which payment is sought does not exceed $5,000. Wis. Stat. § 779.14(2)(am)2.a.
- The action is brought by an employee of the prime contractor, subcontractor, supplier, or service provider. Wis. Stat. § 779.14(2)(am)2.b.
- The subcontractor, supplier, or service provider is identified on a list as required by Wis. Stat. § 779.14(1e)(b), or in a written contract or document attached to the written contract between the subcontractor, supplier, or service provider and the prime contractor. Wis. Stat. § 779.14(2)(am)2.c.

D. Coverage

Generally, beneficiaries of the payment bond are identified in the applicable bonding statute. *Kniess v. Am. Sur. Co. of N.Y.*, 239 Wis. 261, 300 N.W. 913 (Wis. 1941) [Lexis]; *see also Milwaukee Metro. Sewerage Dist. v. Fid. & Deposit Co. of Md.*, 56 F.3d 821 (7th Cir. 1995) [Lexis] (holding that the plaintiff, as a beneficiary of the applicable bond under the applicable statute, was subject to the statute of limitations set forth in that statute).

1. Labor

a. Professional Services

The plain language of the payment bond statutes covers professional services work performed by architects and engineers. Wis. Stat. § 779.14(1m)(e)2.b.

b. Union Benefits

An action against a prime contractor and its surety for a subcontractor's failure to pay prevailing wages may be brought by an employee of the offending subcontractor. *Strong v. C.I.R., Inc.*, 184 Wis. 2d 619, 516 N.W.2d.719 (Wis. 1994) [Lexis]. However, neither the prime contractor nor its surety are liable for any penal aspects of prevailing wage law, as those penalties are reserved for the offending employer, which in that case, was a subcontractor to the prime contractor. *Id*.

2. Material

Wisconsin statutes provide broad payment bond coverage for materials that are "furnished, or procured for the purpose of making the public improvement or performing the public work." Wis. Stat. § 779.14(1m)(e)2.b; *see also Amoco Oil Co. v. Capitol Indem. Corp.*, 95 Wis. 2d 530, 291 N.W.2d 883 (Wis. Ct. App. 1980) [Lexis] (holding that, under prior payment bond statute, a supplier did not need to establish that the materials provided were actually used on the bonded project before recovering from the surety).

3. Equipment

a. Repair

There is no case law that specifically addresses payment bond coverage for the cost of repairs to equipment.

b. Rentals

A supplier is entitled to recover rental value of equipment leased to a price contractor on a bonded project, and the surety's defense. *In re Liquidation of Wis. Sur. Corp.*, 111 Wis. 2d 194, 330 N.W.2d 768 (Wis. 1983) [Lexis] (remanding to the trial court to determine loss sustained by supplier for lost and damaged equipment); *see also Theodore J. Molzahn & Sons, Inc. v. K.W. Constr. Co.*, 214 Wis. 603, 254 N.W. 101 (Wis. 1934) [Lexis] (holding, under the terms of the bond and its subcontract with the prime contractor, the subcontractor agreement to pay for all rentals of equipment).

4. Other

a. Attorneys' Fees

"[A]ttorneys' fees are recoverable only when expressly allowed by contract or statute". *Sanfelippo Env't Constr., LLC v. Mews Co., Inc.*, 2000 WI App 143, ¶ 11, 237 Wis. 2d 694, 616 N.W.2d 922 (Wis. Ct. App. 2000) [Lexis] (quotation omitted) (unpublished). Sanfelippo commenced a suit against the bond principal and its surety for, amongst other things, breach of the performance and payment bond, and the Wisconsin Court of Appeals focused on the fact that the claimant was entitled to attorney's fees based on the language in the subcontract, which contained a provision that the prevailing party in a dispute would be entitled to attorney's fees. *Id*.

b. Interest

A supplier's right to post-judgment interest accrued under the statutory rate, and not under the rate set out in the underlying bonded contract. *Waukesha Concrete Prods. Co., Inc., v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 379 N.W.2d 333 (Wis. Ct. App. 1985) [Lexis]; *see also Amoco Oil Co. v. Capitol Indem. Corp.*, 95 Wis. 2d 530, 291 N.W.2d 883 (Wis. Ct. App. 1980) [Lexis] (holding that breach of contract damages which are liquid or measurable with reasonable certainty bear interest from the time of demand and surety never denied the supplier was owed).

c. Financing Charges

A surety can be liable for payment of interest based on the language of the underlying bonded contract. *Waukesha Concrete Prods Co., Inc., v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 379 N.W.2d 333 (Wis. Ct. App. 1985) [Lexis]. In *Waukesha*, the supplier commenced suit against the prime contractor and its surety for materials supplied to a bonded project, and the surety argued that it was not liable because (i) it was not a party to the underlying contract, which contained a 1.5% monthly finance charge (or 18% per year), and therefore there was no intent that its bond would cover the same, and (ii) the statute does not state coverage for such charges. *Id*. at 339. In holding that the surety was liable for the finance charge, the court noted that the surety's liability is measured by the liability of its bond principal, and that Wisconsin has long recognized that this charge is a commercially acceptable measure of the time value of money. *Id.* at 340; *see also Suamico Sanitary Dist. No. 1 v. Midwest Contractors, Inc.*, 2002 WI App 221, 257 Wis. 2d 623, 650 N.W.2d 561 (Wis. Ct. App. 2002) [Lexis] (unpublished).

d. Insurance Premiums

The plain language of the bond which provided that it would "satisfy all claims and demands incurred" was found broad enough to cover unpaid liability insurance premiums which the bond principal contracted to maintain during the performance of its bonded contract. *Bldg. Contractors' Ltd. Mut. Liab. Ins. Co. v. S. Sur. Co.*, 185 Wis. 83, 200 N.W. 770 (Wis. 1924) [Lexis].

e. Loans

There is no case law that specifically addresses payment bond coverage for repayment of loans.

f. Delay Damages

There is no case law that specifically addresses payment bond coverage for delay damages.

g. Profits

There is no case law that specifically addresses payment bond coverage for lost profits.

h. Extracontractual

While the bond at issue was a statutory *performance* bond, the Wisconsin Supreme Court held that a bond conditioned upon the faithful performance of the contract and payment for all claims of labor performed and materials furnished did not run to the benefit of tort claimants whose property was damaged during the performance of the underlying contract. *Kniess v. Am. Sur. Co. of N.Y.*, 239 Wis. 261, 300 N.W. 913 (Wis. 1941) [Lexis].

E. Contracts Excluded

Under certain statutory requirements, a contract with a local professional football stadium district is not required to include a provision whereby the prime contractor has to provide a payment bond or other payment assurances. Wis. Stat. § 779.14(4). (Go Pack Go!?)

F. Time for Suit

A claimant on a payment bond must bring suit against the prime contractor and its surety no later than one (1) year after completion of work under the contract. Wis. Stat. § 779.14(2)(a); *see also* *Milwaukee Metro. Sewerage Dist. v. Fid. & Deposit Co. of Md.*, 56 F.3d 821 (7th Cir. 1995) [Lexis] (holding that under Wis. Stat. § 779.14 the one (1) year statue of limitations applied to the action of the claimant on the *performance* bond, rather than the general six (6) year statute for contract actions). While the bond at issue in *Milwaukee Metro.* was a performance bond, the limitations statue addresses both performance and payment bonds, and so it is likely a court would interpret the statute in the same manner as to payment bonds.

In determining *when* the one (1) year limitations period began to run, the Wisconsin Court of Appeals held that the statute of limitations begins to run when a contractor completes its work on a project under the terms of its contract. *Arbor Vitae-Woodruff Joint Sch. Dist. No. 1. v. Gulf Ins. Co.*, 2002 WI App 24, 250 Wis. 2d 637, 639 N.W.2d 788 [Lexis].

G. Remarks

The Wisconsin payment statutes generally provide broad coverage for first and second tier subcontractors, suppliers, and service providers so long as what is performed, provided, procured, or used, pertains to the public improvement or public work which the bond secures. Wis. Stat. § 779.14(1e)(a). As is usually the case in other jurisdictions, if the terms of the payment bond are broader than the statute, then the Wisconsin courts will apply the broader enforcement. *H.H. Robertson Co. v. Lumberman's Mut. Cas. Co.*, 94 F.R.D. 578 (W.D. Pa. 1982) [Lexis] (holding that under Wisconsin law, in order to determine the scope of a surety bond, the bond and contract are construed together), *aff'd* 696 F.2d 982 (3d Cir. 1982).

H. Case Annotations

The payment bond statute, and its predecessor versions were enacted to "extend to contractors, laborer, and materialmen on a public work protection comparable to that given by the Mechanic's Lien Law on private construction." *Knuth v. Fid. & Cas. Co. of N.Y.*, 275 Wis. 603, 608, 83 N.W.2d 126, 129 (Wis. 1957) [Lexis].

Effect of Conditional Payment Clause

Wisconsin statutes do not specifically prohibit "pay-when-paid" clauses in underlying construction contract between the owner and the prime contractor whereby the prime contractor can delay payment to a subcontractor, supplier, or service provider. Wis. Stat. § 779.135(3). But there is little case law where a court considers whether the surety may rely on such a defense of its bond principal to a claim from an unpaid claimant. *See Trenhaile v. J.H. Findorff & Son, Inc.*, 213 Wis. 2d 483, 570 N.W.2d 910, 1997 WL 570374 (Wis. Ct. App. 1997) [Lexis] (involving a subcontract with a "pay when paid" clause, and the matter was remanded to trial court to determine what amount damages surety should pay) (unpublished). However, like other jurisdictions, Wisconsin courts do recognize that a surety can raise and rely on the defenses of the bond principal, unless they are personal defenses such as infancy or insanity. So, it is likely the surety can rely on a "pay-when-paid" clause in the contract of its bond principal as a defense to payment. *Riley Constr. Co., Inc. v. Schillmoeller & Krofl Co.*, 70 Wis. 2d 900, 236 N.W.2d 195 (Wis. 1975) [Lexis]; *see also BMD Contractors, Inc. v. Fid. & Deposit Co. of Md.*, 679 F.3d 643 (7th Cir. 2012) [Lexis] (holding surety could rely on pay-if-paid clause as a defense to liability in litigation).

Equitable Subrogation

While there is no case specifically addressing a surety's paid loss under its payment bond and its rights to contract funds based on the theory of equitable subrogation, the legal principle is acknowledged in Wisconsin. The purpose of the doctrine of subrogation is to avoid unjust enrichment; and equitable subrogation "rests on the principles that someone other than a volunteer who pays for the wrong of another should be permitted to look to the wrongdoer to the extent that he has paid a debt or demand which should have been paid by the wrongdoer." *Berna-Mork v. Jones*, 174 Wis. 2d 645, 652–653, 498 N.W.2d 221, 224 (Wis. 1993) [Lexis].

§ 2.0 PRIVATE PAYMENT BONDS

A. Rules of Construction

While Wisconsin law does not require payment bonds for private project, Wisconsin courts use the same method of interpretation or construction applied to other contracts to analyze private payment bonds. *Waukesha Concrete Prods. Co., Inc. v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 339, 379 N.W.2d 333, 336 (Wis. Ct. App. 1985) [Lexis]; *see also All Cities Privacy Class v. Harford Fire Ins. Co.*, 2011 WI App 71, ¶ 6, 333 Wis. 2d 483, 798 N.W.2d 909 [Lexis]. When interpreting the payment bond, the Wisconsin courts will not construe the language strictly in favor of the surety unless a gratuitous surety. *Wiegel v. Sentry Indem. Co.*, 94 Wis. 2d 172, 180, 287 N.W.2d 796, 800 (Wis. 1980) [Lexis]; *see also Plumber's Loc. 458 Holiday Vacation Fund v. Howard Immel, Inc.*, 151 Wis. 2d 233, 246, 445 N.W.2d 43, 44–45 (Wis. Ct. App. 1989) [Lexis] ("Wisconsin's construction lien law is remedial in nature and should be liberally construed to give effect to the legislative intent of protecting the claims of tradesmen, laborers and materialmen for work and materials supplied." (quotation omitted)).

For construction of improvements for private parties, the owner and the prime contractor may eliminate statutory lien rights except for those of the prime contractor by obtaining a private surety bond. Wis. Stat. § 779.035(1). It is not necessary that private parties obtain a bond for improvements. *See id.* Some payment bonds are required as part of statutory requirements. *See* Wis. Stat. § 224.74(4)(am) (mortgage broker or mortgage broker license).

B. Time for Suit

A party may not bring an action against the prime contractor and surety on a private payment bond no later than one (1) year after completion of the contract for the construction of the improvement. Wis. Stat. § 779.035(2)(a); *Blaser & Kammer v. Don Ganser & Assoc., Inc.*, 19 Wis. 2d 403, 410–11, 120 N.W.2d 629, 633–34 (Wis. 1963) [Lexis]; *see also Barrett Wrecking, Inc. v. Aetna Cas. & Sur. Co.*, 140 Wis. 2d 859, 409 N.W.2d 670, 1987 WL 267244, at *3 (Wis. Ct. App. 1987) [Lexis] (concluding the statute is "plain and unambiguous in its requirement that a cause of action must be maintained within one year of the completion of the work under the contract" (footnote omitted)) (unpublished), *review denied* (Wis. Oct. 13, 1987).

To bring a private bond claim, the subcontractor, supplier, or service provider must notify the prime contractor in writing no later than 60 days after the date that the provider performed, furnished, or procedure the labor, services, materials, plans, or specifications. Wis. Stat. § 779.035(2)(b)1. Notice to the prime contractor is not required in three circumstances:

(1) "The contract for performing, furnishing, or procuring the labor, services, materials, plans, or specifications does not exceed $5,000," Wis. Stat. § 779.035(2)(b)2.a.;
(2) "The action is brought by an employee of the prime contractor, the subcontractor or the supplier," Wis. Stat. § 779.035(2)(b)2.b.; or
(3) "The subcontractor, supplier, or service provider is listed in a written contract, or in a document appended to a written contract, between a subcontractor, supplier, or service provider and the prime contractor," Wis. Stat. § 779.035(2)(b)2.c.

A private payment bond includes impose additional notice requirements that are enforceable. *See R.C. Mahon Co. v. Hedrich Constr. Co.*, 69 Wis. 2d 456, 230 N.W.2d 621 (Wis. 1975) [Lexis] (upholding 90-day-notice-of-nonpayment provision as valid).

C. Case Annotations

Liability Delimited by Bond Terms

Wisconsin courts also read the scope of the private payment bonds considering the contract between the prime contractor and owner. *Iowa Sheet Metal Contractors, Inc. v. Knab Co.*, 17 Wis.2d 493, 498, 117 N.W.2d 682, 684–85 (Wis. 1962) [Lexis]; *Golden Valley Supply Co. v. Am. Ins. Co.*, 195 Wis. 2d 866, 875–76, 537 N.W.2d 58, 61 (Wis. Ct. App. 1995) [Lexis], *review denied* (Wis. Nov. 14, 1995).

Defenses of Principal

A surety is not liable to the claimant if the principal is not liable. *See, e.g.*, *Riley Constr. Co. v. Schillmoeller & Krofl Co.*, 70 Wis. 2d 900, 905, 236 N.W.2d 195, 198 (Wis. 1975) [Lexis]; *Continental Bank & Tr. Co. v. Akwa*, 58 Wis. 2d 376, 390, 206 N.W.2d 174, 182 (Wis. 1973) [Lexis]; *Waukesha Concrete Prods. Co.*, 127 Wis. 2d at 339, 379 N.W.2d at 336 [Lexis].

Party in Interest

In *R.C. Mahon Co. v. Hedrich Construction Co.*, the Wisconsin Supreme Court determined that supplies of subcontractors constitute a party in interest to a private payment bond. 69 Wis. 2d 456, 463–64, 230 N.W.2d 621, 624 (Wis. 1975) [Lexis].

Third-Party Beneficiaries to Arbitration

In *Badger State, Inc. v. Keller Construction Co.*, the Wisconsin Court of Appeals concluded subcontractors were third-party beneficiaries of the prime contract and entitled to their respective portion of an arbitration award. 2012 WI App 97, 344 Wis. 2d 123, 820 N.W.2d 155 (Wis. Ct. App. 2012) [Lexis] (unpublished).

Interest

In *Suamico Sanitary District No. 1 v. Midwest Contractors, Inc.*, the Wisconsin Court of Appeals held that a subcontractor is entitled to prejudgment interest against a surety on the unpaid balance owed. 2002 WI App 221, 257 Wis. 2d 623, 650 N.W.2d 561 (Wis. Ct. App. 2002) [Lexis] (unpublished).

WYOMING

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§ 1.0 PUBLIC PAYMENT BONDS

A. Requirements for Bond

Wyoming requires public payment bonds in an amount equal to or greater than the contract price for public projects where the contract price exceeds $150,000. Wyo. Stat. Ann. § 16-6-112(a) [Lexis]. The contractor must furnish the payment bond for the public project to the governmental entity before beginning work on the project. *Id.* The bond must have conditions that allow for the payment of all taxes, excises, licenses, assessments, contributions, penalties and interest lawfully due the state or any political subdivision. Wyo. Stat. Ann. § 16-6-112(a)(i) [Lexis].

B. Tiers Covered

Wyoming's public payment bond statutes cover any person performing any work or labor or furnishing any material or goods of any kind which were used in the execution of the public contract. Wyo. Stat. Ann. § 16-6-112(a)(ii) [Lexis]. Wyoming's public payment bond statute also extends to second tier materialmen and/or suppliers. *D & L. Bldg., Inc. v. State ex rel. Maltby Tank & Barge, Inc.*, 747 P.2d 517, 519 (Wyo. 1987) [Lexis]; *DeLozier Bros. v. Fremont Cnty. Sch. Dist. No. 14*, 747 P.2d 515, 517 (Wyo. 1987) [Lexis].

C. Notice Required

Public payment bond claimants must provide notice of the bond claim to the governmental entity no later than sixty days after the date on which the services or materials were first furnished. Wyo. Stat. Ann. § 16-6-121(b) [Lexis]. The notice must be sent to the general contractor by certified mail, electronic means (including e-mail), or delivered to and received by the general contractor or his agent. Wyo. Stat. Ann. § 16-6-121(c) [Lexis]. The notice must be in writing, signed by the claimant, and must state that it is a notice of a right to protection under the bond. Wyo. Stat. Ann. § 16-6-121(d) [Lexis]. The notice must include: 1) the claimant's name, address, phone number, and the name of a contact person; 2) the name and address of the claimant's vendor; and 3) the type or description of the materials or services provided. Wyo. Stat. Ann. § 16-6-121(d)(i)-(iii) [Lexis]. The general contractor must post on the construction site a prominent sign citing Wyo. Stat. Ann. § 16-6-121 and stating that any claimant shall give notice to the general contractor of a right to protection under the bond and that failure to provide the notice shall waive the claimant's protection under the bond. Wyo. Stat. Ann. § 16-6-121(f) [Lexis].

D. Coverage

1. Labor

Labor that contributed directly or indirectly to completion of the work and was contemplated by the parties at the time the payment bond was executed for the public project is covered by the public payment bond. *Franzen v. S. Sur. Co.*, 246 P. 30, 38 (Wyo. 1926) [Lexis]; *Vaughn Excavating & Constr., Inc. v. P.S. Cook Co.*, 981 P.2d 485, 488 (Wyo. 1999) [Lexis].

a. Professional Services

Professional services have not been classified as labor under Wyoming's public payment bond laws.

b. Union Benefits

Union benefits have not been classified as labor under Wyoming's public payment bond laws.

2. Material

Materials that contributed directly or indirectly to completion of the work and were contemplated by the parties at the time the payment bond was executed for the public project are covered by the public payment bond. *Franzen v. S. Sur. Co.*, 246 P. 30, 38 (Wyo. 1926) [Lexis]. Whether materials contributed to the completion of the public project is a question of fact. *Colo. Builders' Supply Co. v. Nat'l Fire Ins. Co.*, 423 P.2d 79, 81 (Wyo. 1967) [Lexis].

3. Equipment

A public payment bond does not generally cover the purchase price of machinery or other equipment that constitutes part of a contractor's plant or outfit. *Colo. Builders' Supply Co. v. Nat'l Fire Ins. Co.*, 423 P.2d 79, 81 (Wyo. 1967) [Lexis].

a. Repairs

A public payment bond may cover repairs to equipment and/or machinery where the repairs are made strictly to complete the public project where the equipment/machinery is located at the project. *Colo. Builders' Supply Co. v. Nat'l Fire Ins. Co.*, 423 P.2d 79, 82 (Wyo. 1967) [Lexis].

b. Rentals

Rentals have not been considered under Wyoming's public payment bond laws.

4. Other

a. Attorneys' Fees

Attorneys' fees are not generally recoverable under a public payment bond unless provided for in the contract that governs the public project. *Vaughn Excavating & Constr., Inc. v. P.S. Cook Co.*, 981 P.2d 485, 488 (Wyo. 1999) [Lexis].

b. Interest

Interest is not generally recoverable under a public payment bond unless provided for in the contract that governs the public project. *Vaughn Excavating & Constr., Inc. v. P.S. Cook Co.*, 981 P.2d 485, 488 (Wyo. 1999) [Lexis].

c. Financing Charges

Finance charges have not been considered in relation to a Wyoming public payment bond.

d. Insurance Premiums

Insurance premiums have not been considered in relation to a Wyoming public payment bond.

e. Loans

Loans have not been considered in relation to a Wyoming public payment bond.

f. Delay Damages

Delay damages have not been considered in relation to a Wyoming public payment bond.

g. Profits

Profits have not been considered in relation to a Wyoming public payment bond.

h. Extracontractual

In Wyoming, beneficiaries of a payment bond may sue a surety for breach of the covenant of good faith and fair dealing. *Westchester Fire Ins. Co. v. Interior Partitions, Inc.*, No. 18-CV-34-SWS, 2018 WL 9854670 (D. Wyo. Sept. 27, 2018) [Lexis].

E. Contracts Excluded

A public payment bond is not required for public projects where the contract price is equal to or less than $150,000. Wyo. Stat. Ann. § 16-6-112(a) [Lexis].

F. Time for Suit

Claimants must sue on the public payment bond within one year after the date of final completion of the public work. Wyo. Stat. Ann. § 16-6-115 [Lexis]; *Colo. Builders' Supply Co. v. Nat'l Fire Ins. Co.*, 423 P.2d 79, 80 (Wyo. 1967) [Lexis].

G. Remarks

Wyoming House Bill 0052 (the "Bill") went into effect on July 1, 2020, amending certain requirements for public works projects. The Bill clarified the definitions of public entity, public work, and substantial completion. "Public entity" means the state of Wyoming, any state office, board, council, commission, separate operating agency, department, institution or other instrumentality or operating unit of the state, including the University of Wyoming, any political subdivision of the state, any county, city, town, school district, community college district or any public corporation of the state. Wyo. Stat. Ann. § 16-6-101(a)(viii) [Lexis]. "Public work" includes alteration, construction, demolition, enlargement, improvement, major maintenance, reconstruction, renovation and repair of any highway, public building, public facility, public monument, public structure or public system. Wyo. Stat. Ann. § 16-6-101(a)(ix) [Lexis].

"Substantial completion" or "substantially complete" means the public entity has determined that the construction of the public work or designated portion thereof is sufficiently complete in accordance with the contract and associated documents so that the work may be occupied or utilized for its intended purposes. Wyo. Stat. Ann. § 16-6-101(a)(xi) [Lexis].

The Bill specifically allows a claimant to submit notice of the claim by e-mail, which is deemed delivered on the date the e-mail is sent. Wyo. Stat. Ann. § 16-6-121(c) [Lexis].

The Bill capped retainage at 5% of each progress payment. Wyo. Stat. Ann. § 16-6-702(b) [Lexis]. If the public project is making satisfactory progress, the contractor may request payment from the withheld retainage in any phase of the contract, pending approval by the governmental entity. *Id.*

The Bill addressed certificates of substantial completion and certificates of final completion. Once the public project has reached substantial completion, the governmental entity is required to issue a certificate of substantial completion, which must be published once a week in a newspaper of general circulation for two consecutive weeks. Wyo. Stat. Ann. § 16-6-116(a)(i)-iii) [Lexis]. The certificate of substantial completion must also be posted on the Wyoming State Construction Procurement Website or the governmental entity's official website. *Id.*

The certificate of final completion must be issued when all portions of the work are deemed acceptable under the contract and any other associated documents. Wyo. Stat. Ann. § 16-6-116(a)(iv) [Lexis]. The governmental entity must post the final completion date on the Wyoming State Construction Procurement Website or the governmental entity's official website. *Id.*

The Bill also revised the language pertaining to the statute of limitations for public payment bond claims. Before the Bill became effective, the deadline to file a lawsuit was one year from the first publication of notice of final payment of the contract. Under the new rule, the limitations period is still one year, but the claim begins to accrue on the date of final completion as shown on the Wyoming State Construction Procurement Website or the governmental entity's official website. Wyo. Stat. Ann. § 16-6-115 [Lexis].

H. Case Annotations

See above.

§ 2.0 PRIVATE PAYMENT BONDS

Wyoming does not require contractors to furnish payment bonds on private projects.

A. Rules of Construction

A common-law payment bond furnished for use on a private project would likely be construed according to its express terms and in light of ordinary rules of contract interpretation. *See Snow v. Duxstad*, 147 P. 174, 184 (Wyo. 1915) (stating that in construing a contract of suretyship the same rules apply that control in the construction of other contracts; that is to say, the true intent and meaning of the contract is to be ascertained or determined according to the rules applicable to contracts generally).

B. Time for Suit

No Wyoming reported decision suggests that a payment bond provision limiting the time for suit or detailing the time in which claims must be presented would be unenforceable. *See Nuhome Invs., LLC v. Weller*, 81 P.3d 940, 945 (Wyo. 2003) (addressing a contractual period of limitation clause and stating that the Supreme Court of Wyoming has often showed its commitment to uphold the right of competent parties to freely contract for various provisions as long as the provisions are not contrary to Wyoming law, public policy, or the general interests of Wyoming's citizens). Absent a contractual limitations period, the ten-year statute of limitations applicable to actions for breach of written contract is likely to apply. Wyo. Stat. Ann. § 1-3-105 [Lexis].

C. Case Annotations

Private payment bonds have not been addressed in published Wyoming case law.