

CHAPTER 20

50 STATE SUMMARY PAYMENT BOND LAW ON PUBLIC PROJECTS

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A bond is a contract or a guarantee agreement, which contains the promise of a third party, a bonding company or surety, to pay a fixed sum if certain acts are not performed. This typically relates to non-performance or non-payment. A surety bond is not an insurance policy. Rather, a surety bond is a guarantee that the contractor, called the *principal* in the bond, will perform the *obligation* stated in the bond. For example, the obligation stated in a bid bond is that the principal will honor its bid; the obligation in a performance bond is that the principal will complete the project; and the obligation in a payment bond is that the principal will pay subcontractors and suppliers.

If the principal fails to perform the obligation stated in the bond, both the principal and the surety are liable on the bond. That is, either the principal or surety or both may be sued on the bond, and the entire liability may be collected from either the principal or the surety. The amount in which a bond is issued is the *penal sum*—the highest limit of liability of the bond.

The person or firm to whom the principal and surety owe their obligation is called the *obligee*. On bid bonds, performance bonds and payment bonds, the obligee is usually the owner. Where a subcontractor furnishes a bond, however, the obligee may be the owner or the prime contractor or both. The people or companies that are entitled to sue on a bond, sometimes called *beneficiaries*, are usually but not necessarily named in the bond. In a payment bond, many of the beneficiaries are not yet contracted-with at the time the bond is issued. Fortunately, those yet-to-be-determined beneficiaries are usually defined in the language of the bond by position on the ladder of supply or in state and federal statutes that require bonds on public projects.

HISTORY OF CONSTRUCTION BONDS ON PUBLIC WORKS PROJECTS

In 1935, Congress passed the Miller Act, which completely eliminated the right of a subcontractor or supplier to impose any form of mechanic's lien or other encumbrance against federal public works projects. The primary purpose of the Miller Act, however, was to protect subcontractors who supplied material and labor to federal public works projects by providing an alternative and usually superior remedy to the assertion of mechanic's liens. Under the Miller Act, a payment bond must be provided by the principal or general contractor on every federal contract to protect the right of payment for those supplying materials or services to the federal project. With few exceptions, all federal public construction projects are subject to the provisions of the Miller Act.

Following the success of the Miller Act for federal projects, the states then began enacting what came to be known as "Little Miller Acts." These Little Miller Acts are modeled after the federal Miller Act and state courts have generally held that the Little Miller Acts are to be interpreted in conformity with the federal statute.

TYPES OF CONSTRUCTION BONDS

Private Bonds

Although surety bonds are required by law on most public projects, the use of bonds on privately owned projects is up to each owner. Many private owners require surety bonds from their contractors to protect their company, lenders and shareholders from the cost of contractor failure. To bond a project, the owner specifies the bonding requirements in the contract documents. Obtaining bonds and delivering them to the owner is usually the responsibility of the prime contractor, who will consult with a surety bond producer. Subcontractors may also be required to obtain surety bonds to help the prime contractor manage risk, especially when the subcontractor performs a significant part of the job.

Performance Bonds

Many states have statutes requiring performance bonds. A performance bond guarantees the owner that the principal will complete the contract according to its terms, including price and time. The owner is the obligee of a performance bond and may sue the principal and the surety on the bond. If the principal defaults or is terminated for default by the owner, the owner may call upon the surety to complete the contract. Many performance bonds give the surety three choices: completing the contract itself through a completion contractor; selecting a new contractor to contract directly with the owner; or allowing the owner to complete the work with the surety paying the costs. The penal sum of the performance bond usually is the amount of the prime construction contract, and often is increased when change orders are issued.

Payment Bonds

When payment bonds have been made available for a particular project, the owner is able to substitute the right to assert a mechanic's lien with the right to make a claim against the bond. It is always valuable to know, as a credit grantor, whether there are bonds on a construction project. The terms of the bond can materially affect (positively or negatively) the supplier's rights with respect to payment.

Payment bonds may have provisions limiting the time in which a claim may be asserted. They may also have additional restrictive periods during which litigation may be filed and prosecuted. Again, it is important that if a credit grantor intends to rely on a payment bond, a copy of the bond should be obtained and reviewed. Careful attention should be paid to the requirements for giving notice, the type of notice, the documentation to be presented and other time limitations, including the limitation period by which litigation must be commenced. Suppliers and subcontractors should also attempt to secure a copy of the payment bond during the process of negotiating the underlying contract or as soon as possible thereafter.

The Department of the Treasury maintains a list of corporate sureties approved to issue bonds for federal projects. Copies of the list, the Treasury Department Circular 570, may be obtained on the Treasury's website (www.treasury.gov). Whenever a new corporate surety is added to the approved list, a notice is published in the Federal Register. Contracting officers can only accept surety bonds issued by corporate sureties listed in Treasury Department Circular 570. The circular lists the name and address of each approved surety and all states where each surety is licensed. Most surety companies are subsidiaries or divisions of large insurance companies and are regulated by state insurance departments.

THE MILLER ACT

The Miller Act (40 U.S.C. §§3131-3134) sets out the terms and conditions governing bonds and claims on bonds for federal projects. The following sections discuss specific provisions of the Miller Act along with some of the case law interpreting the Act.

Obtaining Copies of Payment Bonds

Under the Miller Act, a subcontractor or supplier has the legal right to obtain a copy of the bond, which secures a federal construction project. The department or agency is required to provide a certified copy of the bond upon payment of a fee and receipt of an affidavit that the claimant has supplied labor or materials for such work and payment has not been made. The agency is only required to give a copy of the bond after there has been default; however, suppliers and subcontractors should attempt to secure a copy of the bond during the process of negotiating the underlying contract or as soon as possible thereafter.

What Materials and Labor Can Be Reimbursed

A subcontractor or supplier may recover the value of the labor and material furnished for the construction, alteration or repair of any public building or public work of the United States. Labor includes on-site supervisory work of a project manager if he or she did or might have been called upon to do some on-site work in the regular course of the job.

The general test for whether a particular part or item of equipment is covered by the bond is whether the item was or will be consumed by performance of the work at the job site. The cost of renting equipment for a job has been held to constitute the supplying of goods, and transportation costs relating to moving materials to a job site have also been held to be reimbursable.

MAKING A CLAIM UNDER THE MILLER ACT

Remote Suppliers and Subcontractors Do Not Have the Right to Recover

The Miller Act limits the right to make a claim and file a lawsuit to those suppliers and subcontractors who deal directly with the prime contractor and to those suppliers who, lacking any contractual relationship with the general contractor, have a direct contractual relationship with a subcontractor. A supplier to another supplier who then sells goods to the general contractor has no claim, nor does anyone whose relationship to the general contractor is more remote than a second tier subcontractor.

90-Day Notice of Intent to Seek Recovery

Any supplier having a contractual relationship with a subcontractor, but not a contractual relationship with the principal or general contractor, can only recover if a notice is given to the contractor within 90 days from the date on which the last material supplied to the job or the last labor furnished on which a claim is being made. A supplier or subcontractor having a direct contractual relationship with the general contractor does not need to give the 90-day notice.

To Whom/Which Entity Notice Should Be Given

Claimants must give the 90-day notice only to the principal or general contractor; notice does not have to be given to the surety (the bonding company). However, the surety is the only necessary party in a lawsuit raising a Miller Act claim, so it is a good practice to give the 90-day notice to the surety as well. Notice to any subcontractor with whom the claimant has dealt and to the government or agency may speed resolution of the claim (even where there is no right to sue on the bond).

Condition Precedent to the Right to Sue

Providing proper notice is a condition precedent to the right to sue. If the proper notice is not provided, claimants do not have the right to sue. The 90-day limitation is strict and applies to goods supplied and services performed under the terms of the original contract or any approved modifications.

Start of the 90-Day Period

The 90-day period begins to run on the date materials or labor are last supplied. It is important that a supplier not allow the 90-day period to pass, while discussing payment or payment terms without the 90-day notice being sent. Even where the contractor promises (or even delivers) payments, once the 90th day passes, the claimant loses all rights, absent some form of fraud (which is difficult to prove).

Notice Must Be Received

The majority of courts have ruled that notice must be received within the 90-day period and the date that the notice was sent by putting it in the mail does not constitute giving notice under the Miller Act.

Content of the 90-Day Notice

The notice must state with specificity the amount due. It must also identify the subcontractor in default that received materials or labor. The notice must inform the general contractor that payment is being sought from the general contractor—in other words, that the supplier is looking to the general contractor for payment. Some of the case law suggests a formal demand is required; other cases suggest the demand can be express or implied. Merely sending open invoices to the general contractor will not be sufficient to comply with the notice requirement of the Miller Act. Even where the principal contractor admits knowledge of the claim, the failure to give the statutory notice legally bars the claim.

Service of the 90-Day Notice

The notice must be served by registered mail, return receipt requested.

Jurisdictional Requirements

Where the initial construction contract is private and the government or its agent is not actually a contracting party, courts have generally declined to find jurisdiction even when the construction project itself has been carried out for a public purpose or been funded by public revenues.

Filing a Lawsuit on the Bond

A subcontractor may sue on the payment bond for the balance unpaid at the time of institution of the suit. The suit must be brought in the name of the United States for the claimant's use. Generally, the only necessary defendant to the suit is the surety, as the issuer of the payment bond. The claimant need not join the general contractor (or subcontractor), which was actually furnished with the labor or material, to recover. However, most sureties have an agreement by the general contractor to indemnify the surety for losses on the bond, so the general contractor will almost always have financial interest in the case (and should be included if they can be properly brought into that court).

Deadline for Filing Lawsuit on the Bond

The statute of limitations contained in the Miller Act provides that a suit must be brought within one year after the last day on which materials were supplied or labor was performed. The provisions requiring a suit to be brought within one year are not waived or modified merely because there is an arbitration clause in any of the agreements involving the project.

Where to File the Lawsuit

The lawsuit must be brought in U.S. District Court in the district in which the contract was to be performed.

CONSTRUCTION BONDS ON STATE AND LOCAL PUBLIC PROJECTS

As with the Miller Act, those suppliers seeking to secure payment based upon a payment bond for a state or local project must strictly comply with the statute, which creates the bonding requirement. In many instances, these state statutes parallel and may even be identical to the Miller Act. However, significant differences may exist, which require a review of the state law prior to delivery of goods or services in reliance on the bond as the ultimate form of payment.

While the state statutes in many instances deal with state, county, municipal or political subdivision's repair, construction or development of any public building, public work, highway, bridge, sewer project, water project or the like, careful attention must be paid to determine if a particular job is covered by a state's bond law. Do not hesitate to contact the state contracting officer to determine in advance if the project is covered by the law, or subject to some other provision which will require some type of payment bond to ensure payment to subcontractors and suppliers.

STATE-BY-STATE REVIEW OF PUBLIC PROJECT BOND LAWS

Note: State legislatures will on occasion modify an area of law without clear delineation as to its content and context. As a result, even the changes which have been enacted, prior to placement in the state's code, may be difficult to locate. As a result, the editors urge all users of this Manual to use it only as a guide and to consult the latest codified version of the state's law, and applicable case law, for all recent changes.

ALABAMA

Amount of Bond: Not less than 50 percent of the contract price.

Labor and Material Covered: All labor, supplies and materials used in connection with the public works contract.

Notice Required: Written notice to the surety of the amount claimed to be due and the nature of the claim shall be sent by registered or certified mail 45 days prior to filing suit.

Time for Suit: Claimant may institute an action upon the additional bond any time after 45 days after the written notice to the surety but such suit must be commenced not later than one year from the date of final settlement of the contract.

Contracts Excluded: Less than \$50,000.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Code of Alabama, Title 39, Chapter 1, Division 8, §§39-1-1.

ALASKA

Types of Projects: Public contracts for one-half of the contract price where the total amount payable by the terms of the contract is not more than \$1,000,000; 40 percent of the contract price whenever the total amount payable by the terms of the contract is more than \$1,000,000 but not more than \$5,000,000; whenever the total amount payable by the terms of the contract is more than \$5,000,000 the payment bond is in the sum of \$2,500,000. §36.25.010.

Labor and Material Covered: Labor and material furnished for the construction, alteration, or repair of any public building or public work of the state. §36.25.010.

Notice Required: No notice is required by a person having a contractual relationship, express or implied with the principal contractor. Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the principal contractor must give written notice to the contractor within 90 days from the date on which such person performed the last of the labor or furnished or supplied the last of the material for which the claim is 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, *see* sample below. Such notice shall be served by mailing it by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where an office is maintained or business is conducted or the residence of the contractor. Alternatively it may be served in any manner in which a peace officer is authorized to serve a summons. §36.25.020.

NOTICE TO CONTRACTOR

TO: (prime contractor)

You are hereby notified that the undersigned claimant has furnished (labor, materials, supplies or equipment) for use in the prosecution of the work of (public agency, contract number) at the request of (name of subcontractor). The last day of furnishing (labor, materials, supplies or equipment) was _____. The undersigned makes claim against you and your surety for payment of \$_____ which sum is due and owing to the undersigned.

DATED this ____ day of _____, 20 ____.

Name of Claimant:

Address:

Phone Number:

Signature:

Title:

Contractor Registration Number:

Time for Suit: Suit may be brought any time after the expiration of 90 days after the day on which the last of the labor was performed or material was furnished for which the claim is made, but such action must be commenced within one year after the date of final settlement of the contract. §36.25.020.

Contracts Excluded: Under \$100,000. §36.25.010.

Penalty for Failure to Take Bond: The State may not approve final payments to the contractor until the contractor files a written certification that all persons who supplied labor or material in the prosecution of the work provided for in the contract have been paid. §36.25.010.

Statutory Citation: Alaska Statutes, Title 36, Chapter 36.25, §§36.25.010 to 36.25.020.

ARIZONA

ARIZONA LITTLE MILLER ACT (PAYMENT BOND RIGHTS)

PAYMENT BONDS FOR ARIZONA PUBLIC PROJECTS

Arizona’s “Little Miller Act” is set forth in Arizona Revised Statutes § 34-221 (“Surety bond required; suit on bond; limitations”), through A.R.S. § 34-227. It applies to most Arizona public projects at the city, county or state level. Both a performance bond and a payment bond must equal the full contract amount. A.R.S. § 34-222.A.1 and 2. A performance bond is obtained by a subcontractor or general contractor for the protection of the public body awarding the contract A.R.S. § 34-222.A.1, in order to ensure the completion of the contract. By comparison, a payment bond is obtained by the prime contractor for the benefit of subcontractors and suppliers furnishing materials or labor to the project, who may then make a claim against the payment body if they are not paid, as long as they properly served a preliminary notice and bond claim letter. A.R.S. § 34-222.A.2.

Required Amount of Bond: One hundred percent of the contract price solely for the protection of claimants supplying labor or material to the contractor or his subcontractors in the prosecution of the work provided for in contracts for the construction, alteration, or repair of the public work. A.R.S. § 34-222.A.1.

Labor and Material Covered: Labor or material furnished in the prosecution of the work provided for in such contract, for which the contractor or supplier has not been paid in full. A.R.S. § 34-223.A.

Notice Required: Preliminary Twenty (20) Day Notice or a “Ninety (90) Day Bond Claim Letter: None for a subcontractor or a materials supplier having a direct contract with the prime contractor, i.e., the highest tier contractor that is in direct contract with the public entity. A.R.S. § 34-223.A. Otherwise, in order to make a claim on the payment bond, a subcontractor or materials supplier must have served a written preliminary 20-day notice in compliance with A.R.S. § 33.992.01(C), (E), (F) and (H); *see* A.R.S. §34-223(A)(1). Further, the subcontractor or materials supplier, in addition to serving a preliminary notice, must actually serve the prime contractor with written notice of a bond claim, with confirmed receipt, not later than ninety (90) days following the last date that labor was performed or materials were supplied. A.R.S. § 34-223.A(2). That 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 supplied. A.R.S. § 34-223.A(2). The notice can be served 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. *Id.*

The claimant may then file suit on the payment bond against (i) the bond surety, (ii) the prime contractor as the principal on the bond, and (iii) the party with whom the claimant directly contracted, only in the county in which the labor was performed or materials supplied, within one year of the last date of supplying contractually conforming labor or materials. A.R.S. § 34-223.B.

By amending A.R.S. § 34-223, the Arizona Legislature overruled the Arizona Court of Appeals in the decision of *Cemex Construction Materials South, LLC v. Falcone Brothers & Associates, Inc.*, 237 Ariz. 236 (App. 2015). The Court of Appeals ruled in that decision that, under the Arizona Little Miller Act, a prime contractor must receive its preliminary notice by **certified mail** in order for a ninety (90) day Little Miller Act bond claim notice to be effective, and before the bond claimant may possess a right to foreclose that bond claim. *Id.* The Court of Appeals had also ruled that *if the prime contractor* actually receives *the preliminary notice* within twenty (20) days of the supply date of the amount a subcontractor or supplier claims on its bond claim, those bond claim rights are not rendered invalid by the *claimant’s*

failure to send the preliminary notice by certified mail. *Id.* Accordingly, if a bond claimant could prove that the general contractor **actually received** the preliminary notice, the bond claim rights would still be valid. The recently amended version of A.R.S. § 34-223 overrules the appellate opinion and clarifies the confusion that the opinion created, permitting service of the preliminary notice on an Arizona Miller Act project by the same preliminary notice service manner required of lien claimants: first-class mail with a certificate of mailing, registered mail, or certified mail. A.R.S. § 34-223.A(1). Further, the amendment eliminates the requirement for the Miller Act bond claim letter to be served by certified mail, and allows it to be served by any verified form of service. A.R.S. § 34-223.A(2).

Practice tip 1: If up against the ninety-day service deadline, transmit the bond claim letter by all available means, including email with a receipt notice requested, by facsimile without a transmittal cover page so as to allow the fax confirmation to appear on the first page of the notice, by hand delivery, and by overnight delivery initiated not later than the second to last day of the ninety-day period where the ninetieth day falls on a business day, i.e., the eighty-ninth (89th) day, if the 90th day falls on a business-open Friday.

Practice tip 2: There is no certainty that there is forgiveness for the ninetieth day falling on a weekend or judicial holiday. Accordingly, the last business day within the ninety-day period should be considered the last day for the prime contractor to receive the bond claim letter.

Practice tip 3: While only the prime contractor must receive the copy of the bond claim letter, the strategy of also copying the owner (the government office in charge of issuing contracts on the project), any management company making payment, and the customer if the claimant is a materials supplier, is more likely to generate payment than serving only the prime contractor.

Time for Suit: No Arizona Miller Act bond claim suit can be commenced within the first ninety (90) days following the date on which the last of the bond claimant's labor was performed or materials were furnished; under the statute, such suit rights do not even commence for 90 days. A.R.S. § 34-223(A). However, suit must be actually filed within one year of the date on which the last of the claimant's labor was performed or the claimant's materials were furnished for which the claim is being made. A.R.S. § 34-223.B.

Penalty for Contractor's Failure to Obtain the Required Miller Act Payment Bond: No statutory provision.

Statutory Citation: Arizona Revised Statutes, Title 34, Chapter 2, Article 2, §§ 34-222-223.

ARKANSAS

Note: In Arkansas, special bond statutes are passed because contractors cannot create a lien against a public property when working for a public entity. Arkansas has passed two statutes concerning bonds. The first act was passed in 1911, and is codified under the Mechanic's and Materialmen's Liens section of the Arkansas Code. The second act was passed in 1929 and is in the Public Property/Public Works section of the Arkansas Code. These two statutes do not require two separate bonds, and have been interpreted to be one whole statute by the Arkansas courts (*Berry Asphalt Co. v. W. Sur. Co.*, 223 Ark. 344, 266 S.W.2d 835 (1954)).

Amount of Bond: A sum equal to the amount of the contract on all public works exceeding \$20,000 (§18-44-503).

Labor and Material Covered: All labor and material furnished in the prosecution of the contract to execute and deliver the contract, except Arkansas Department of Transportation contracts (§18-44-502). The statute covers all surety bonds required by the state and provides that these bonds shall be liable on all claims for labor and materials entering into the construction, or necessary to or used in the course of construction of the public improvements (§18-44-506).

Notice Required: No special statutory provision. However, if a bond is not provided by the contractor on construction projects for churches, religious organizations and charitable institutions as required by Ark. Code Ann. §18-44-504, lien claimants must adhere to the notice and timing requirements set out in the lien statutes (*St. Matthews Church v. White*, 172 Ark. 1152, 291 S.W. 977 (1927); *S. Cent. Dist. of the Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980)), cf. *Leonards v. E.A. Martin Mach. Co.*, 321 Ark. 239, 245, 900 S.W.2d 546, 550 (1995).

Time for Suit: No action shall be brought on the bond after six months from the final payment on the job, unless it is a project on which the Arkansas Building Authority approves final payment on the state contract, in which case the suit must be filed within 12 months from the date that Arkansas Building Authority approves final payment. Additionally, no action shall be brought outside the State of Arkansas (§18-44-503; §18-44-508). To avoid controversy, bond claimants should follow the six-month statute of limitations. No action shall be brought on a bond furnished by a public works contractor after one year from the date final payment is made on the contract (§22-9-403).

Statutory Bonds Versus Common Law Bonds: The Arkansas courts distinguish statutory bonds and common law bonds in determining the applicable statute of limitations. Bonds covering claims for labor and materials contributed on a public project as required under Arkansas law are considered to be statutory bonds. (*Berry Asphalt Co. v. W. Sur. Co.*, 223 Ark. 344 (1954)). Claims on statutory bonds for payment of materials or labor furnished on a public project are limited by the one-year limitations period contained in the statutes. (§22-9-403; §18-44-503). Common law bonds are not only for the purpose of securing payment for materials and labor, but rather, they also assure the owner

that the contractor will perform and complete the project in a proficient workmanlike manner. (*Berry Asphalt Co. v. W. Sur. Co.*, 223 Ark. 344 (1954)). Claims on performance bonds are subject to the common law limitations period. (*Berry Asphalt Co. v. W. Sur. Co.*, 223 Ark. 344 (1954)). If a bond provides greater coverage than that set out in Ark. Code Ann. §22-9-401, then the bond is a common law bond not covered by statute, and a bond claimant is not bound by the one-year limitation. (*U.S. Fid. and Guar. Co. v. Little Rock Quarry Co.*, 309 Ark. 269, 830 S.W.2d 362 (1992)).

Contracts Excluded: Under \$20,000. However, for charitable institutions, only contracts under \$1,000 are excluded (§18-44-503; §18-44-504).

Penalty for Failure to Take Bond: No special statutory provision.

Surety Company: The bonds must be made by surety companies authorized to do business in Arkansas (§18-44-506).

Bond from a Particular Source: It is a Class A misdemeanor for any person to require a bidder or contractor to purchase a surety bond from a particular insurance company or surety company, agent, or broker (§22-9-405).

Statutory Citation: Arkansas Code Annotated, Title 18, Subtitle 4, Chapter 44, Subchapter 5, §§18-44-501 to 18-44-508; Title 22, Chapter 9, Subchapter 4, §§22-9-401 to 22-9-405.

CALIFORNIA

PAYMENT BONDS

Public Private Partnerships (P3) Projects

Effective January 1, 2014, any local government who enters into an agreement with private entities for the study, planning, design, financing, construction, maintenance, rebuilding, improvement, repair, or operation by private entities of specific types of fee-producing infrastructure must include provisions to ensure the issuance of performance and payment bonds.

Public Works

Amount of Bond: A sum equal to the amount of the contract on all public works, and executed by an admitted surety insurer. (Civil Code, §9354).

Contracts Excluded: Contracts less than \$25,000 are excluded from bond requirements, as are contracts with any state entity defined in California Public Contract Code. (Civil Code, §9550).

Labor and Material Covered: Any materials, provisions, provender or other supplies, power or teams, furnished to, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor thereon of any kind, or for amounts due under the Unemployment Insurance Code with respect to work or labor performed under the contract, or for any amounts required to be deducted, withheld and paid over to the Employment Development Board from the wages of employees of the contractor and his subcontractors.

Notice Required: A claimant must give the preliminary notice as required for stop payment notices for public works. (Civil Code, §§9530, 9560). Suit against the surety or sureties on the payment bond may be brought by any claimant, or his assigns, at any time, after the claimant has furnished the last of the labor or materials, or both, but must be commenced before the expiration of six months after the period in which stop payment notices may be filed. Said preliminary notice must be served by registered or certified mail, by personal delivery, express mail, overnight delivery by an express service carrier, or in the manner for serving summons and complaint.

In the event, claimant fails to serve preliminary notice as required, claimant may serve written notice to the surety and principal on the bond within 15 days of Notice of Completion or within 75 days of completion if no Notice of Completion. The notice to surety will not be effective to cause payment under the payment bond if the direct contractor has paid all progress payments to subcontractor to whom the claimant provided labor and materials; except those disputed in good faith. (Civil Code, §9560). Service shall be in the same manner as required for service of stop payment notice.

Time for Suit: Claimant must file suit not later than six months after the period in which stop notice payments must be served.

Private Works

There is no requirement that payment be issued for projects on private works except for security for large projects. (Civil Code, §§8700-8730). By causing direct contract, and payment bond in sum not less than 50 percent of the contract price to be recorded, the owner can limit his liability for lien claims to the amount due from the owner to the contractor.

Notice Required: A claimant must give the preliminary notice as required for mechanics liens and stop payment notices. (Civil Code, §8612). If preliminary notice was not given as required, claimant may serve written notice to the surety and principal on the bond within 15 days after recordation of a notice of completion or, if no notice of completion, 75 days after completion of the work of improvement. The notice to surety will not be effective to cause payment under the payment bond if the direct contractor has paid all progress payments to subcontractor to whom the claimant provided labor and materials; except those disputed in good faith. (Civil Code, §8612). Service shall be in the same manner as required for service of stop payment notice. (Civil Code, §8614).

Time for Suit: If payment bond is recorded before completion of work of improvement, an action to enforce the liability on the bond may not be commenced later than six months after completion of work of improvement.

If payment bond is not recorded before completion of the work or improvement, an action to enforce the liability on the bond will be determined as stated in the bond, except under no circumstances shall it limit the time to a shorter period than six months from the completion of the work of improvement. If the bond does not state the time for bringing suit, the time period is four years.

Statutory Citation: California Civil Code, Division 4, Part 6, Title 2, Chapter 6, §§8600 to 8614; Title 3, Chapter 3, §§9300 to 9306; Chapter 5, §§9550 to 9566.

COLORADO

Types of Projects: Any railroad, reservoir, or irrigating canal company contracting for the construction of its railroad, reservoir, or irrigating canal, or any part thereof. Any contract for more than \$50,000 with any county, municipality, or school district for the construction of any public building or the prosecution or completion of any public works or for repairs upon any public building or public works. Any contract for more than \$100,000 for the construction of any public work for the State of Colorado. (§§38-26-102, 38-26-105, 38-26-106, C.R.S.).

Labor and Material Covered: *Railroad, reservoir, or irrigating canal company.* All laborers, mechanics, materialmen, ranchmen, farmers, merchants and other persons who supply such contractor, or any of his or her subcontractors, with labor, work, laborers, materials, ranch or farm products, provisions, goods, or supplies of any kind all just debts incurred therefor in carrying on such work. (§38-26-102, C.R.S.).

Public works. All labor, laborers, materials, rental machinery, tools or equipment used or performed in the prosecution of the work. Second tier material suppliers (material suppliers to a material supplier) do not have protection under the Colorado Contractor's Bonds and Lien on Funds Article 26. And all labor, materials, team hire, sustenance, provisions, provender or other supplies used or consumed by contractor or his subcontractor in or about the performance of the public work. (§§38-26-105, 38-26-106, C.R.S.).

Verified Claim and Withholding of Payments: If a claimant has not been paid, the claimant can deliver a notice called a "verified statement of the amount due and unpaid on account of the claim" to the railroad, reservoir, or irrigation canal or their agents or to the any county, municipality, or school district or the state. The party served must then withhold payments from the contractor in a sufficient amount to assure payment of the claimant. (§38-26-103, 38-26-107, C.R.S.).

Notice Required for Public Projects: Persons furnishing labor or material to a contractor or subcontractor, at any time up to and including the time of final settlement for the work contracted to be done, which final settlement shall be duly advertised at least 10 days prior thereto in the county or counties where the work was contracted for and wherein such work was performed, may file, with the official awarding the contract, a verified statement of the amount due and unpaid, whereupon such official shall withhold payments from contractor sufficient to ensure the payment of such claim, until the same has been paid or the claim has been properly withdrawn. However, such funds shall not be withheld longer than 90 days following the date fixed for final settlement, unless an action is commenced within that time to enforce such unpaid claim and notice thereof is filed with the public body that awarded the contract. (§38-26-107, C.R.S.).

Contractor's Bond: A penal bond in a sum of "not less than one-half of the total amount payable under the terms of the contract" with a "good and sufficient surety" must be provided stating that "such contractor shall at all times promptly make payments of all amounts lawfully due to all persons supplying or furnishing such person or such person's subcontractors with labor, laborers, materials, rental machinery, tools, or equipment used or performed in the prosecution of the work." Claimants on the bond who are unpaid have a direct right of action on the bond if they timely file suit on the bond. (§§38-26-105, 38-26-106, C.R.S.).

Time for Suit on Verified Statement of Claim and Bond: Suit must be commenced on the verified statement of claim and on the bond within 90 days of the date set for final settlement. (§38-26-107, C.R.S.).

Time for Suit on Bond: Within six months after the completion of the public work, or the time limitation set forth in the bond if greater than six months after completion of the project. (§38-26-106, C.R.S.).

Penalty for Failure to Take Bond: Unless such bond is executed, delivered and filed, no claim in favor of the contractor arising under such contract shall be audited, allowed or paid.

Contracts Excluded: Under \$50,000.

Special Provisions: Notwithstanding the monetary qualification, the governing body of any county, city, town or school district determining it to be in the best interest of the county, city, town or school district may require the execution of a penal bond for any contract of \$50,000 or less.

Trust Funds: All funds disbursed to any contractor or subcontractor shall be held in trust for payment of any person that has furnished labor, materials, sustenance, or other supplies used or consumed by the contractor in or about the performance of the work contracted to be done or that supplies laborers, rental machinery, tools, or equipment. Any person who violates the provisions of the trust fund statute commits theft. (§§38-26-109; §18-4-401, C.R.S.).

Violation of the trust fund statute may result in a treble damages award against the party violating the statute under §18-4-405, C.R.S.

Under Colorado case law, the principals of a company who have violated the trust fund statute may be found to be personally liable for the violation, including treble damages. (*Alexander Company v. Packard*, 754 P.2d 780 (Colo. App. 1988)).

Excessive Amounts Claimed: Any person who files a verified statement of claim or asserts a claim against a principal or surety that has furnished a bond for an amount greater than the amount due without a reasonable possibility that the amount claimed is due and with the knowledge that the amount claimed is greater than the amount due, and that fact is demonstrated in a proceeding under the statute, shall forfeit all rights to the amount claimed and shall be liable for all costs and attorneys' fees reasonably incurred by the one contesting the claim. (§38-26-110, C.R.S.).

Statutory Citation: Colorado Revised Statutes, Title 38, Article 26, §§38-26-101 to 38-26-110; Title 18, Article 4, Part 4, §§18-4-401, 18-4-405.

CONNECTICUT

Amount of Bond: A bond in the amount of the contract is required.

Labor and Material Covered: Labor and materials in the prosecution of the work provided for in contract for the construction, alteration or repair of any public building or public work of the state or any subdivision thereof. The word "material" includes the rental of equipment used in the prosecution of such work.

Notice Required: Every person who has furnished labor or material in the prosecution of the work provided for in a contract for which a statutory payment bond is required is entitled to payment within 30 days after the party with whom that person has contracted, whether the general contractor or a subcontractor, receives payment for that person's work. Any person who performed work or supplied materials for which a requisition was submitted to the awarding authority and who does not receive full payment for such work or materials within 60 days of the applicable payment date set forth above, or any person who supplied materials or performed subcontracting work not included on a requisition who has not received payment within 60 days after the day on which the last of the labor was done or performed, may enforce the right to payment under the bond by serving a written notice of claim within 180 days from the date when such person performed the last of the labor or furnished the last of the material for which claim is made, on the surety that issued the bond and a copy of the notice on the principal contractor. The notice shall state with substantial accuracy the amount claimed, name of the party for whom labor was performed or to whom materials were furnished and a detailed description of the bonded public project involved. Within 90 days after service of the notice of claim, the surety must pay the claim or such amount which is not disputed in good faith and must notify the claimant as to any unpaid portion for which liability is denied. Notices shall be served by registered mail or certified mail, postage prepaid, in envelopes addressed to any office at which the surety, principal or claimant conducts his business, or in any manner in which civil process may be served.

Time for Suit: No suit may 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 claimant.

Contracts Excluded: Under \$100,000.

Municipal Liability for Failure to Obtain Bond: In the event that any political subdivision of the state fails to obtain delivery of the payment bond required by statute, any person who has not been paid by the contractor shall have the same right of action against such political subdivision of the state as such person would have had against a surety.

Statutory Citation: Connecticut General Statutes, Title 49, Chapter 847, §§49-41 to 49-42.

DELAWARE

BONDS ON PUBLIC WORKS PROJECTS

Amount of Bond: 100 percent of the contract price.

Labor and Material Covered: Every firm furnishing material or performing labor under the contract of a successful bidder on a public works project for which the successful bidder is liable may maintain an action thereon for the recovery of such sum as may be due from the contractor. "Material" is defined to mean materials, equipment, tools, supplies or any other personal property but does not include electric, gas, water, telephone or similar utilities.

Notice Required: No special statutory provision, review bond for timeframes.

Time for Suit: If the bond so provides, no suit on the bond shall be commenced after the expiration of one year following the date which the successful bidder ceased work on the contract. Otherwise, suits may be commenced at any time within three years following the date the last work was performed on the contract.

Contracts Excluded: A special state body, the Contracting and Purchasing Advisory Council, sets the threshold amount for "large public works" where bonds are required.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Delaware Code Annotated, Title 29, Chapter 69, §6962.

DISTRICT OF COLUMBIA

Amount of Bond: 100% of the prime contract amount if over \$100,000, but can be reduced by the Contract Procurement Officer to one-half of the total amount payable by the terms of the prime contract. The Contract Procurement Officer can substitute a letter of credit for a contractor that is a non-profit corporation, licensed and doing business as a general contractor for at least five years and has a net worth of at least one million dollars.

Labor and Material Covered: Labor or material furnished to the prime contractor or a subcontractor in performance of work in the prime contract, including lessors of equipment.

Notice Required: No notice is required by a person having a contract with the prime contractor. Any person having a contract with a subcontractor must give written notice to the prime contractor within 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, 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. Such notice shall be served by mailing the same by

certified or registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence.

Time for Suit: Suit must be instituted more than 90 days after the last day of labor or material for which claim is made, but within one year from the date final labor was performed or the material was supplied.

Contracts Excluded: Procurement regulations may waive bonds for contracts of \$100,000 or less.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: District of Columbia Code, Division I, Title 2, Chapter 3A, Subchapter VII, §§2-357.01 to 2-357.06.

FLORIDA

Amount of Bond: In an amount equal to the original contract price.

Labor and Material Covered: Labor, material and supplies used directly or indirectly in the prosecution of the work by contractors, subcontractors, sub-subcontractors, laborers, materialmen and professional lienors.

Notice Required: A claimant, except a laborer, who is not in privity with the contractor shall, within 45 days after beginning to furnish labor, material or supplies for the prosecution of such work, furnish the contractor with a notice that he intends to look to the bond for protection; if the claim includes sums for retainage, the notice must specify the portion of the amount claimed for retainage. A claimant who is or is not in privity with the contractor and who has not received payment for his labor, material or supplies, shall within 90 days after performance of the labor or after complete delivery of all the materials and supplies, deliver to the contractor and the surety written notice of the performance of the labor or delivery of the material and supplies, of the nonpayment and amount of nonpayment and that the claimant is looking to the bond for payment.

Time for Suit: No action or suit shall be instituted or prosecuted against the contractor or against the surety on the bond required by the statute after one year from the performance of the labor or completion of delivery of the materials or supplies. The time for suit may be shortened by a contractor who files a Notice of Contest of Claim Against Payment Bond; a claimant upon whom such notice is served must institute suit to enforce the claim within 60 days of service of the notice.

Contracts Excluded: The threshold for exemption from the bond requirement is \$100,000 on public works. Contracts under \$200,000 may be exempted on public works.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Florida Statutes, Title XVIII, Chapter 255, §255.05.

GEORGIA

Amount of Bond: Not less than the contract price.

Labor and Material Covered: All persons supplying labor or material used in the prosecution of the work.

Notice Required: No notice required if there is a direct contractual relationship with the general contractor. Those not under direct contract with the general contractor must give written notice of claim within 90 days after the date on which the last of the labor was performed or the last of the materials furnished.

If the owner, agent of the owner, or general contractor files a Notice of Commencement within 15 days of beginning the project, a lien claimant who does not have a direct contractual relationship with the general contractor is barred unless the claimant serves a Notice to Contractor within 30 days of the claimant beginning work on the project.

Time for Suit: All suits must be brought within one year after the completion of the project and acceptance by the public authority.

Contracts Excluded: Less than \$100,000. However, public authority may require bond when the contract price is less than \$100,000. Less than \$50,000 for DOT projects.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Official Code of Georgia, Title 13, Chapter 10, §§13-10-60 to 13-10-65.

HAWAII

Types of Projects: All public construction projects which exceed \$25,000, require a bond equal to 100 percent of the contract price of construction. §103D-324

Labor and Material Covered: All labor and materials furnished to the contractor and used in the prosecution of the work provided for in such contract. §103D-324

Notice Required: Written notice shall be served by registered or certified mail to contractor and surety within 90 days from the date on which the person did or performed the last labor or furnished or supplied the last of the material for which 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. The notice shall be served to the contractor and surety at any place they maintain an office or conduct their business or in any manner authorized by law to serve summons. §103D-324

Time for Suit: Every suit instituted on a payment bond shall be brought within one year after the last labor was performed or material supplied for the work provided in the contract. §103D-324

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Hawaii Revised Statutes, Division 1, Title 9, Chapter 103D, §324.

IDAHO

Who May Claim: Before any contract equal to or greater than fifty thousand dollars for the construction, alteration, or repair of any public building or public work or improvement in the State of Idaho, a person shall furnish to the State of Idaho, or to such county, city, town, municipal corporation, township, school district, public educational institution, or other political subdivision, public authority, or public instrumentality, or to such officer, board, commission, institution, or agency thereof, a payment bond which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor." (Idaho Code § 54-1926.)

Every claimant who has furnished labor or material or rented, leased, or otherwise supplied equipment used in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material or equipment was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond. (Idaho Code § 54-1927.)

However, it shall be unlawful for any person to engage in the business or act in the capacity of a public works contractor within this state without first obtaining and having a license issued pursuant to the provisions of this chapter by the administrator of the division of building safety, unless that person is specifically exempted. (Idaho Code § 54-1902.)

Idaho Contractor Registration Act: All contractors must register with the Idaho Contractors Board. The term “contractor” is broadly defined and includes anyone engaged in construction and anyone who hires those engaged in construction, though it does not include suppliers. (Idaho Code § 54-5203.) It is unlawful for a person to engage in business as a contractor in Idaho without holding a current registration. Also, if not exempt, an unregistered contractor is precluded from bringing or maintaining any action for the collection of compensation. (Idaho Code § 54-5217(2); *ParkWest Homes, LLC v. Barnson* (“*ParkWest I*”), 149 Idaho 603, 608 (Idaho 2010); *reaffirmed ParkWest Homes, LLC v. Barnson* (“*ParkWest II*”), 154 Idaho 678 (2013).) A contract for work subject to the Act is illegal and cannot be enforced if the contractor is unregistered when the contract is executed. (*AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 167-68 (Idaho 2013).)

Amount of Bond: In an amount to be fixed by the contracting body, but in no event less than eighty-five percent of the contract amount. (Idaho Code § 54-1926.)

Labor and Material Covered: Construction, alteration, or repair of any public building or public work or improvement in the State of Idaho or any political subdivision, public authority, or public instrumentality thereof, including the renting or leasing of equipment. (Idaho Code § 54-1926.)

Notice Required: No notice is required by a person having a contractual relationship, express or implied, with the principal contractor. Any person having a direct contractual relationship with a subcontractor, but no contractual relationship, express or implied, with the principal contractor, must give written notice to the contractor within 90 days from the date on which such claimant performed the last of the labor or furnished or supplied the last of the material or equipment for which such claim is made, stating with substantial accuracy the amount claimed and the name of the person to whom the material was furnished or supplied or for whom the labor was done or performed. Each notice shall be served by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence. (Idaho Code § 54-1927.)

Limit on Contract Retainage: Public bodies requiring a performance bond or payment bond in excess of fifty percent of the total contract amount shall not be authorized to withhold from the contractor or subcontractor any amount exceeding five percent of the total amount payable as retainage. Further, the public body shall release to the contractor any retainage for those portions of the project accepted by the contracting public body and the contractors as complete within thirty days after such acceptance. Contractors who utilize subcontractors to perform a portion of the contract work with a public body, shall not be authorized to withhold from the subcontractor any amount exceeding five percent of the total amount payable to the subcontractor as retainage. The contractor shall remit the retainage to the subcontractor within thirty days after completion of the subcontract. (Idaho Code § 54-1926 (3).)

Time for Suit: No such suit shall be commenced after the expiration of one year from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material or equipment for which such suit is brought, except that if the claimant is a subcontractor of the contractor, no such suit shall be commenced after the expiration of one year from the date on which final payment under the subcontract became due. Every suit instituted on the such payment bond shall be brought in an appropriate court in any county in which the contract was to be performed. (Idaho Code § 54-1927.) In any action brought upon either the payment or construction bonds, or against the public body failing to obtain the delivery of the payment bond, the prevailing party, upon each separate cause of action, shall recover a reasonable attorney’s fee to be taxed as costs. (Idaho Code § 54-1929.)

Contracts Excluded: No statutory provision excluding certain contracts.

Penalty for Failure to Take Bond: Any public body who fails or neglects to obtain the required payment bond shall, upon demand, itself make prompt payment to all persons who have supplied materials or performed labor in the prosecution of the work under the contract, and any such creditor has a direct right of action upon his account against such public body in any court having jurisdiction in any county in which the contract was to be performed and executed, which action must be commenced within one year after the furnishing of materials or labor. (Idaho Code § 54-1928.)

Statutory Citation: Idaho Statutes, Title 54, §§ 54-5203, 54-5217, 54-1902, 54-1925 to 1929.

ILLINOIS

Amount of Bond: Shall be fixed by such officials, boards, commissions, commissioners or agents awarding the contract in an amount sufficient to complete the contract including the payment for all labor and material whether by subcontractor or otherwise.

Labor and Material Covered: Material used in such work and for all labor performed in such work, whether by subcontractor or otherwise. In addition the Public-Private Partnerships for Transportation Act grants the Illinois Department of Transportation (IDOT) and the Illinois State Highway Tollway Authority the necessary powers for the development, financing, and operation of transportation projects through public-private agreements with one or more private entities. Bid, performance and payment bonds or other security determined suitable by IDOT, including letters of credit, are required.

Notice Required: Every person furnishing material or performing labor, either as an individual or as a subcontractor for any contractor with the state or any political subdivision thereof, has a right to sue on the bond provided, however, that any person having a claim for labor or material as aforesaid shall have no such right of action unless he shall have filed verified notice of 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 and files a copy of the notice with the contractor within 10 days after filing the notice with the agency officer or political body clerk or secretary awarding the contract.

The claim shall be verified and shall contain: (1) the name and address of the claimant; the business address of the claimant within the State of Illinois, and if the claimant be a foreign corporation having no place of business within the State of Illinois, the notice shall state the principal place of business of said corporation, and in the case of a partnership the notice shall state the name and residence of each of the partners; (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 or it furnished materials; (4) a brief description of public improvement sufficient for identification; and (5) a description of the claimant's contract as it pertains to the public improvement, describing the work done by claimant and stating the total amount due and unpaid as of the date of the verified notice.

Time for Suit: No action shall be brought on the bond later than one year after the date of the furnishing of the last item of work or materials by the claimant.

Public Improvement Lien: Illinois provides a lien on unexpended funds due the contractor. To preserve the lien, written notice of the potential claim must be sent to the public authority and contractor prior to the payment of the unexpended funds. Notice must be provided to the clerk or secretary, as the case may be, of the local government unit.

A prime contractor can force a subcontractor to file its claim for lien by giving notice to subcontractor and if the subcontractor fails to file its lien claim within 30 days of notice, the lien is forfeited, otherwise suit must be filed within 90 days after filing the notice of claim. The suit must make the prime contractor and any intermediate subcontractors defendants. Notice of the suit must be received by the public authority within 10 days of filing. On state jobs, the suit must be filed not less than 15 days before the date on which the appropriation will lapse.

Contract Bond Excluded: Under \$50,000 for work performed for the State, and for all other political subdivisions under \$5,000. A political subdivision may allow an irrevocable bank letter of credit in lieu of a bond on contracts under \$100,000 if motor fuel tax funds, federal-aid funds or funds from the state are not used.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Illinois Compiled Statutes, 30 ILCS 550/0.01 to 550/3.

INDIANA

Types of Projects: In Indiana, there are four different public works statutes: Title 4 for certain projects owned by the State of Indiana, such as state prisons; Title 5 for other state projects, such as state supported universities; Title 8 for state highways, bridges and rest stops; and Title 36 for local government projects, including public schools.

Amount of Bond: Each of the four statutes requires a bond for the total price of the general contract if the project is required to be bonded.

Labor and Material Covered: Any labor or services performed or materials furnished in the construction, erection, alteration or repair of any public improvement; work or improvement of any nature or character on the public works project. However, on Title 36 projects, lessors of equipment to a subcontractor are not covered. Also, under Title 8, a claimant who is not in privity of contract with the contractor or a subcontractor (any subcontractor or material supplier who is not a first or second tier claimant) is not entitled to the coverage of a performance bond.

Notice Required: *Title 4.* To impound contract proceeds, a written Verified Claim stating the amount due and owing to the claimant must be filed with the Public Works Division of the Indiana Department of Administration within 60 days after the last labor performed, last materials furnished or last services rendered by that claimant. To make a claim under the bond, a Verified Claim must be given to the surety and the Public Works Division must be notified that the surety has been given the Verified Claim. A copy of the claim filed with the public body must also be provided to the general contractor on the project.

Title 5. To make a claim against retainage, a Verified Statement of Claim setting forth the amount due and owing, the name of the subcontractor and when the work was performed or materials furnished must be filed in duplicate with the public agency administering the contract within 60 days after the last work or services were performed or last item of materials were furnished to the project by that claimant. To make a claim against the bond, a Duplicate Verified Statement must be filed with the appropriate governing body within 60 days after that claimant last worked on the project setting forth the same information required in the Verified Statement of Claim. A copy of the claim filed with the public body must also be provided to the general contractor on the project. However, a contractor is not required to execute a bond in the case of a contract with a state educational institution, if the contract amount is less than \$500,000 and the institution waives the requirement.

Title 8. To claim against the contract proceeds, a Triplicate Verified Itemized Statement must be filed with the Department of Transportation. This must be in writing, verified, contain an itemized statement of the amount due, identify the claimant by name and post office address, identify the contractor for whom the work was performed, set forth the dates, including the last date, on which the work was performed, describe the work and the costs thereof, and attach itemized statements or invoices. This should be filed in triplicate within 60 days of the last labor performed or materials furnished and, in all instances, within 30 days after final acceptance of the project. To claim against the bond, the claimant must file a statement of the amount due and owing with the surety on the bond. The statement of the amount due and owing must be furnished to the surety within one year after acceptance of the labor, materials or services by the DOT. The surety must be given 60 days to respond, after which time suit may commence on the bond.

Title 36. To claim against retainage, a Verified Claim must be filed with the public agency administering the contract setting forth the project by name and address, the amount due and owing, the contractual relationship between the claimant and the subcontractor or general contractor, and the date upon which the last work was performed or materials furnished. To claim against the bond, a Signed Duplicate Statement must be filed with the governing body setting forth the same information as the Verified Claim within 60 days after the last labor or materials were furnished to the project by that claimant. A copy of the claim filed with the public body must also be provided to the general contractor on the project.

Time for Suit: *Title 4.* A claimant may not file suit against the contractor's surety on the payment bond until 30 days after filing the Verified Claim with the Public Works Division. Unless the bond provides a greater period of time, all suits must be brought against the surety on the payment bond within one year after final settlement with the contractor.

Title 5 and Title 36. If a Verified Statement is filed, suit cannot be brought against the surety on the payment bond until the expiration of 30 days after the filing of the Verified Duplicate Statement with the governing body. Suit must be commenced within 60 days after final completion and acceptance of the public works project by the public agency, which by case law interpretation is generally the "substantial completion date."

Title 8. If the triplicate notice is filed with the DOT as against retainage, then the DOT is required upon receipt to withhold from the retainage a sum equal to the amount of the claim. The prime contractor is given 20 days within which to give written notice to the DOT that it is allowing or rejecting the claim. If the claim is rejected in whole or in part, the DOT is to give immediate notice of the contractor's action by registered mail to the claimant. Within 90 days after receiving notice of a rejection from the DOT, the claimant must take two procedural steps to perfect its claim. First, it must commence an action against the contractor or surety in a court of competent jurisdiction. Second, once the lawsuit has been filed, the claimant must obtain a certificate from the clerk stating that the action has been filed, the date it was filed and the identity of the parties to the action. The claimant must file this certificate with the DOT within a 90-day period. If a claim is made as against the bond only, and not retainage, then after the surety is given 60 days to respond suit must be filed 18 months from the date of final acceptance of the project.

Contracts Excluded: Title 4, Title 5, Title 8 and Title 36 require bonds for state and local projects in excess of \$200,000.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Indiana Code, Title 4, Article 13.6, Chapter 7, §§4-13.6-7-5 to 4-13.6-7-11; Title 5, Article 16, Chapter 5, §§5-16-5-1 to 5-16-5-2; Title 8, Article 23, Chapter 9, §§8-23-9-8 to 8-23-9-33; Title 36, Article 1, Chapter 12, §§36-1-12-12 to 36-1-12-13.1.

IOWA

Amount of Bond: Not less than 75 percent of the contract price, excepting that, in contracts where no part of the contract price is paid until after the completion of the public improvement, the amount of the bond may be fixed at not less than 25 percent of the contract price.

Labor and Material Covered: Labor performed or material, services, or transportation furnished in the construction of a public improvement under a contract with the principal contractor or with subcontractors, except those furnishing materials to a subcontractor.

Notice Required:* *To principal contractor.* A person, firm, or corporation that has performed labor for or furnished materials, service, or transportation to a subcontractor shall not be entitled to a claim against the retainage or bond. However, an exception exists where the principal contractor is notified in writing with a one-time notice containing the name, mailing address and telephone number of the performing or furnishing party and the name of the subcontractor. Such notice must be received by the principal contractor within thirty days of first performing or furnishing. This notice covers additional labor performed or materials, service, or transportation furnished by the same party to the same subcontractor for use in the same construction project. The claim must be also supported with a certified statement that the principal contractor received the notice. Note that this exception does not apply to highway, bridge, or culvert projects.

**Counsel should also note: The construction bidding procedures are now incorporated into Chapter 26 in the Code of Iowa which allows for various devices based upon the amount of the project.*

Time of Filing Claims: Claims must be filed no later than 30 days after the completion and final acceptance of the improvement, or at any time if no action is pending and the full contract price has not been paid.

Public Improvements and Highway, Bridge, or Culvert Projects: Payments made by a governmental entity or the department for the construction of public improvements and highway, bridge, or culvert projects are discussed in Section 573.28. A contractor may request the release of all or part of the retained funds owed at any time after all or any part of the work is substantially completed. The request must be accompanied by a sworn statement from the contractor that, 10 calendar days prior to filing the request, notice was given to all known relevant parties. Once the funds are released by the governmental agency or the department, the contractor must in turn release owed funds to other relevant parties.

In case of highway improvements by the county, claims shall be filed with the county auditor of the county letting the contract. In case of contracts for improvements on the farm-to-market highway system paid from farm-to-market funds, claims shall be filed with the auditor of the state department of transportation.

Interest: Interest is available on unpaid funds; however, the rate of interest is determined by the period of time during which interest accrues, and shall be the same as the rate of interest that is in effect under Section 12C.6, as of the day interest begins to accrue.

Time for Suit: Any time after the expiration of 30 days, and not later than 60 days, following the completion and final acceptance of the public improvement.

Contracts Excluded: Public improvement contracts under \$25,000.

Penalty for Failure to Take Bond: Bond mandatory.

Statutory Citation: Iowa Code, Title XIV, Subtitle 3, Chapter 573.

KANSAS

Types of Projects: Can be on private or public projects. The bond must be filed with the Clerk of the District Court of the county where the improvement is to be made.

Private. Optional, but if obtained, must be sufficient to pay all claims which might be a basis for a lien, for at least the amount of the contract price.

Public. Required if the contract exceeds \$100,000, and must be for at least the amount of the contract price.

Labor and Material Covered: All supplies, materials or labor furnished, used or consumed in connection with or in or about the construction of said public improvements or in making such public improvements.

Notice Required: No special statutory provision, so review bond to determine deadlines, except in connection with the improvement of highways.

Time for Suit: On bonds other than state highway bonds, no action shall be brought on the bond after six months from the completion of the public improvement. On bonds given in connection with the construction, improvement, reconstruction and maintenance of the state highway system, no action may be brought after one year from the completion of the contract.

Contracts Excluded: Any contract for less than \$100,000 does not require a bond. For state highway contracts of more than \$1,000 made by the state secretary of transportation, the bond must be filed with the secretary.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Kansas Statutes, Chapter 60, Article 11, §§60-1110 to 60-1111.

KENTUCKY

Amount of Bond: A payment bond in the amount of 100 percent of the contract price.

Labor and Material Covered: All persons supplying labor and material to the contractor or his subcontractors for the performance of the work provided for in the contract.

Notice Required: Within 60 days of the last day of the month in which materials were provided, the claimant must file a statement in writing verified by affidavit, 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. 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.

Time for Suit: This also is not specified in the statute. 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. However, the Kentucky courts have allowed the surety to a shorter period in the bond.

Contracts Excluded: Under \$25,000.

Penalty for Failure to Take Bond: No special provisions.

Statutory Citation: Kentucky Revised Statutes, Title XXXI, Chapter 376.100.

LOUISIANA

Amount of Bond: *Private Works.* The owner may relieve himself of the claims and privileges afforded by the Private Works Act if he requires the contractor to give a bond with good and sufficient surety. The amount of the bond must be the amount of the contract, if the contract does not exceed \$10,000; between \$10,000 and \$100,000 the amount of the bond must be 50 percent of the contract, but in no event less than \$10,000. For contracts over \$100,000, but not in excess of \$1,000,000, the bond must be 33½ percent of the contract, but in no event less than \$50,000, and for contracts exceeding \$1,000,000 the bond must be 25 percent of the amount of the contract but not less than \$333,333. The bond must be attached to and recorded with the contract (or notice of contract).

Public Works. Louisiana law requires that whenever the state or any state entity, agency or political subdivision enters into a contract in excess of \$25,000 for the construction, alteration or repair of any public work, the contract must be in writing and a bond furnished in an amount not less than 50 percent of the contract price. The bond is given to ensure the faithful performance of the contract and for the payment of certain claims arising out of the work. Under a 1985 amendment to the Public Works Act, lessors of equipment used in the construction project are now protected by the Act. Although the statute only requires a bond in an amount equal to 50 percent of the contract price, nearly all public contract bonds are for the full amount of the contract.

On public contracts of \$200,000 or less, 50 percent of the performance bond required by the bid is waived for any contractor who: (1) qualifies as a small business; (2) is a "responsible bidder;" (3) has been certified by the director of the Department of Economic Development to be in compliance with the criteria set forth by the Department of Economic Development; (4) has been operating under the same name for over three years; and (5) has been denied a guaranteed bond by the Small Business Administration or an established surety firm, for any

reason other than a previous performance default. Under Louisiana law, a public works bond is considered a statutory bond. This means that regardless of the contents and provisions of the bond document itself, the bond is deemed to provide coverage under such terms as are specified in the Public Works Act. This entails that any provisions of the Act which were omitted from the bond would be read into the bond, and extra-statutory language in the bond would be read out of the bond. This is known as the “read-in, read-out” rule.

Labor and Material Covered: Any person to whom money is due pursuant to a contract with a contractor or 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 such materials or supplies to the site of the job by a for-hire carrier, or for furnishing oil, gas, electricity or other materials or works, including persons to whom money is due for the lease or rental of movable property used at the site and including any architect or consulting engineer engaged by the contractor or subcontractor in connection with the building of any public work. *See* Chapter 1.

Notice Required: *See* Chapter 1. However, it must be noted that suits on “conventional” bonds—that is, on bonds not supplied in accordance with or pursuant to statutory requirements—are not subject to claim restrictions based on the Private and Public Works Acts and the filing and notice requirements therein contained. Instead, claims against conventional bonds are governed by the terms of the bond and the prescriptive statutes (statutes of limitation) governing conventional obligations.

Time for Suit (for statutory bonds and related “lien” type claims only): On private works, one year following the date upon which the lien was filed. On public works, one year following the date upon which the notice of termination was filed.

Attorneys’ Fees Recoverable by Claimant: In the public works context, 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, whether by *concursum* proceeding or separate suit, shall be allowed 10 percent attorneys’ fees which shall be taxed in the judgment on the amount recovered.

Penalty for Failure to Take Bond: In the private context, there is no penalty in the strict sense, other than the loss of protections for the owner from personal liability and from the *in rem* liability related to the property that is the subject of the work. On public jobs, when an awarding authority makes final payment to the contractor without deducting the total amount of all outstanding claims properly served on it or without obtaining a bond (in this case, a release of lien bond; the existing payment bond will not suffice for the purpose) from the contractor to cover the total amount of all outstanding claims, the awarding authority shall become liable from its ordinary budget for the amount of these claims.

Statutory Citation: Louisiana Revised Statutes, Title 9, §§9:4802C, 9:4811 to 9:4812, 9:4823A(2); Title 38, §§38:2212, 38:2241, 38:2246A, 38:2247.

MAINE

Bonds Required: Bonds are required in Maine regarding any contract exceeding \$125,000 for the construction, alteration or repair of any public building or other public improvement or public work. Both payment and performance bonds in an amount equal to the full contract amount. The performance bond shall be conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions thereof. Such bond is solely for the protection of the state or the contracting body awarding the contract. The payment bond shall be 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.

Labor and Material Covered: Labor or material supplied to the contractor or his subcontractor in the prosecution of the work provided for in the contract for the construction, alteration or repair of any public building or other public improvement or public work including highways awarded to any person by the state or by any political subdivision or quasi municipal corporation or by any public authority. The term “material” includes rental of equipment.

Notice Required: No notice is required by a claimant having a contractual relationship, express or implied, with the principal contractor before bringing a claim on the bond. A claimant having a direct contractual relationship with a subcontractor of the contractor (but no contractual relationship, express or implied, with such contractor) shall not have the right of action upon such payment bond unless he shall have given written notice to the contractor within 90 days from the date on which such claimant 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. Such notice shall be served by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence.

Time for Suit: No suit shall be commenced prior to 90 days from the date on which claimant furnished the last of the labor or material for which such claim is made and no action may be commenced after the expiration of one year from the date on which the last of the labor was performed or material was supplied for the payment of which such action is brought. Every action shall be brought in the county where the construction, alteration or repair of the public building, improvement or work is located.

Prompt Payment Act: (10 M.R.S.A. §§1111-1120). Maine's Prompt Payment Act protects subcontractors by setting forth payment deadlines for project owners and contractors on both residential and commercial construction jobs on real estate. An owner must pay the contractor strictly in accordance with the terms of the construction contract; and except as otherwise agreed, payment must be made within 20 days after the end of the interim billing period or of the final billing on the project. Except as otherwise agreed, late payments incur interest at a statutory rate. Then, a contractor must pay a subcontractor within seven days of receipt of any payments from the owner related to that subcontractor's work and materials or within seven days of receiving the subcontractor's invoice, whichever is later. Late payments are subject to statutory interest rates. Exceptions are made, allowing for withholding of payment, for good faith disputes arising under the contract. If arbitration or litigation is commenced and it is found that an owner, contractor or subcontractor failed to comply with the payment terms of the Act, then the arbitrator or court shall award as a penalty 1 percent per month for all sums wrongfully withheld, which penalty is in addition to what other damages are established. In addition, the substantially prevailing party to any proceeding to recover payment covered by the Act must be awarded reasonable attorney's fees and expenses.

The Act does not apply to contracts entered into by the Department of Transportation.

Contracts Excluded: Under \$125,000.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Maine Revised Statutes, Title 14, Chapter 205, Subchapter 3, §871.

MARYLAND

Amount of Bond: 50 percent of the total amount payable under the prime contract.

Labor and Material Covered: For the protection of all persons supplying labor and material to the contractor, a subcontractor or a sub-subcontractor in the prosecution of the work provided for in the contract.

Notice Required: No notice is required by a person having a contract with the prime contractor. Any claimant having a contract with a subcontractor, or with any sub-subcontractor must give written notice to the prime contractor within 90 days from the date on which the claimant performed the last of the labor or furnished 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 for whom the labor was performed. Such notice shall be served by mailing certified mail to the contractor at the contractor's residence or a place where the contractor has an office or does business.

Time for Suit: Suit must be instituted more than 90 days after the day on which the claimant last supplied labor or materials for which the claim is made, but no more than one year after the public body finally accepts the work performed under the contract.

Contracts Excluded: Before a public body awards a construction contract exceeding \$100,000, the contractor must provide payment security and performance security that meet the requirements of § 17-104 of this subtitle, in an amount that the public body considers adequate for its protection; and for payment security, at least 50 percent of the total amount payable under the contract. A public body, other than the State or a unit of the State government, may require payment security or performance security for a construction contract if the contract exceeds \$50,000 but does not exceed \$100,000; and the amount of the security does not exceed 50 percent of the contract amount.

Penalty for Failure to Take Bond: No special statutory provision, except in the Transportation Code. The Controller shall furnish a certified copy of a payment bond to a person who submits an affidavit that the person has supplied labor or materials for which payment has not been made.

Waiver: An executory contract may not waive payment bond rights. A "pay when paid" provision in an executory contract does not waive payment bond rights.

Statutory Citation: Maryland Code Annotated, Finance and Procurement, Title 17, §§17-101 to 17-111.

MASSACHUSETTS

Amount of Bond: A bond in the amount of not less than one-half of the total contact price shall be obtained.

Labor and Material Covered: All subcontractors and materialmen.

Notice Required: A claimant having a contractual relationship with a subcontractor, but not with the general contractor, must give notice of a claim in writing to the general contractor within 65 days after the day on which the claimant last performed labor or furnished labor, materials, equipment, appliances or transportation, stating with substantial accuracy the amount claimed, the name of the party for whom such labor was performed or such labor, materials, equipment, appliances or transportation was furnished.

To make a claim covering specially fabricated material the claimant must give the contractor principal written notice of the placement of the order and the amount thereof not later than 20 days after receiving the final approval in writing for the use of the material. The notices shall be served by mailing a sworn statement by registered or certified mail postage prepaid in an envelope addressed to the contractor principal at any place at which the contractor principal maintains an office or conducts his business, or at the contractor principal's residence, or in any manner in which civil process may be served.

Time for Suit: Within one year after the day such claimant last performed the labor or furnished the labor, materials, equipment, appliances or transportation included in his claim, and by prosecuting the claim thereunder by trial in the superior court to final adjudication.

Demand for Direct Payment: A written demand for direct payment directly to the awarding authority is a way for a "subcontractor" to be paid by the awarding authority for both progress payments and for final payments on certain kinds of public work. For the purposes of this remedy, a "subcontractor" is defined as being three things: (1) a filed sub-bidder with a written subcontract on public building contracts; (2) for either public buildings or public works, an entity approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor; and (3) for contracts with the Commonwealth (only) and not awarded under the competitive bid statute for buildings, a person contracting with the general contractor to supply materials used in a public works project for a price in excess of \$5,000.

Contracts Excluded: Statute requires that bond must be furnished where the amount of the contract is more than \$5,000 in the case of the Commonwealth and more than \$2,000 in the case of a contract with a county, city, town, district or other political subdivision.

New Reform Legislation: Highlights of Chapter 193 of the Acts of 2004 (An Act Further Regulating Public Construction in the Commonwealth) include: filed sub-bid subcontractors must furnish payment and performance bonds on projects where prequalification is required or utilized by the awarding authority; requires an owner's project manager for projects valued at \$1.5 million or more; requires DCAM certification of subcontractors submitting filed sub-bids after January 1, 2005; subcontractors must furnish payment and performance bonds on CM at Risk projects.

Public Construction/Prevailing Wage: The Massachusetts prevailing wage laws require that employees on public works projects, except those who perform strictly supervisory functions, be paid a minimum hourly rate set by the Department of Labor and Workforce Development, Division of Occupational Safety (DOS) (Mass. General Laws c. 149, s. 26).

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Massachusetts General Laws, Part I, Title XXI, Chapter 149, §§26, 27D, 28, 29, 44A *et al.*

MICHIGAN

BONDS REQUIRED/TWO STATUTES DEPENDING ON TYPE OF PROJECTS

State (Non-Highway) and Municipal Projects: Any contract exceeding \$50,000 for the construction, alteration, or repair of any public building or public work or improvement of the state or a county, city, village, township, school district, public educational institution, other political subdivision, public authority, or public agency shall require that the principal contractor furnish at his or her own cost to the governmental unit a performance bond and a payment bond. If the principal contractor is a common carrier or the designated operator of a state subsidized railroad, the principal contractor may provide an irrevocable letter of credit from a state or national bank or a state or federally chartered savings and loan association instead of the bonds. Each payment and performance bond shall be in an amount fixed by the government unit to be not less than 25 percent of the contract price.

State Highway Projects (Michigan Department of Transportation): State highway jobs under the Michigan Department of Transportation (MDOT) are covered by a separate statute, (MCL §570.101 *et seq.*). General contractors are required to file a payment bond for the protection of subcontractors and suppliers.

Labor and Material Covered: Labor, material, or both used or reasonably required for use in the performance of the contract, including that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the contract. A separate statute (MCL §570.101 *et seq.*) covers state highway projects.

Notice Required (State (Non-Highway) and Municipal Projects): No notice is required by a claimant having a contractual relationship with the principal contractor. A claimant not having a direct contractual relationship with the principal contractor does not have a right of action upon the payment bond unless: (a) claimant has within 30 days after furnishing the first of such material or performing the first of such labor served on the principal contractor a written notice which shall inform the principal of the nature of the materials being furnished or to be furnished or labor being performed or to be performed and identifying the party contracting for such labor or material and the site for the performance of such work or the delivery of such materials; and (b) claimant has given written notice to the contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim was 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. Each notice shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence.

Notice Required (State Highway Projects): Notice of Lien Claim must be filed by subcontractor or material supplier to MDOT as notice of an intent to file a claim against the bond. Even though the claim is against the bond and not real property, the notice is referred to as a Notice of Lien Claim. A form is available on MDOT's website. Subcontractors must provide the required notice within 60 days after furnishing the last material or supplies or performing the last work covered by their subcontract. However, this period has been modified by MDOT endorsement. A copy of the bond and notice requirements should be requested early in the project to ensure compliance. In the notice, the claimant must specify the work provided, that it relies upon the security of the bond given by the general contractor and directs the MDOT to notify the surety on the bond. **Note:** Always review the actual bond as notice requirements can be lessened or waived. Notice requirements cannot, however be increased beyond the statutory requirements.

Relevant Statutes. Michigan's Public Act 524 of 1980 (Retainage Act): Contract retainage funds must be segregated and interest must be paid on the retainage when final payment on project is released. The Retainage Act restricts the public owner's ability to withhold retainage to 10 percent of the first 50 percent of the work in place. Michigan's Differing Site Conditions statute applies to all public works projects over \$75,000. The Act provides for a negotiating process for contractors who encounter unusual or misrepresented conditions while performing public works projects.

Statutory Citation: Michigan Compiled Laws, Chapter 129, §129.201 *et seq.*; Chapter 570, §570.101 *et seq.*

MINNESOTA

Amount of Bond: Performance and payment bonds each to be not less than the contract price. The penalty of each bond 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 be not less than the amount of the increase, and if the additional bonds are not furnished within 10 days after demand, the work on the contract shall cease until the additional bonds are furnished. In contracts made by the Commissioner of Administration or the Department of Transportation of the state, the Commissioner of Administration or the Commissioner of Transportation, respectively, may fix the amount of the bond penalty, but at not less than three-quarters of the contract price.

Labor and Material Covered: Claims of all persons doing work or furnishing skill, tools, machinery or materials, or insurance premiums, equipment or supplies, or sales or wage tax, under or for the purpose of such contract.

Notice Required: In the event of a claim on a payment bond by a person furnishing labor and materials, no action shall be maintained unless, within 120 days after completion, delivery or provision by the person of its last item of work, the person serves a written notice of claim 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 specified in the bond. The notice must specify the nature and amount of the claim and the date the claimant furnished its last item of labor or materials for the public work.

Time for Suit: No action shall be maintained unless begun within one year after the date of the last work by the claimant on the public project as stated in its notice of claim.

Contracts Excluded: Projects under \$100,000, Natural Resource Development projects, and projects of the Department of Transportation costing less than \$100,000, or involving the permanent or semi-permanent installation of heavy machinery, fixtures, or other capital equipment to be used primarily for maintenance or repair.

Penalty for Failure to Take Bond: If the state or other public body fails to get and approve a valid payment bond or securities in place of a payment bond, the public body for which work is done under the contract is liable to all persons furnishing labor and materials under or to perform the contract for any loss resulting to them from the failure.

Cases of Note: In *Safety Signs, LLC v. Niles-Wiese Construction Co.*, 840 N.W.2d 34, the Minnesota Supreme Court decreed that a bond claimant must strictly comply with the statutory notice requirements listed in Section 574.31, subd. 2(a) (the claimant must provide notice to the surety and contractor at the address listed on the bond). In doing so, the court rejected arguments that substantial compliance with the notice requirement is sufficient. The *Safety Signs* opinion confirms that a party seeking to make a bond claim must take care to strictly comply with the mandated service requirements or risk the loss of its claim.

Statutory Citation: Minnesota Statutes, Chapter 574, §§ 574.26 to 574.32.

MISSISSIPPI

Amount of Bond (excepting state highway projects): A performance bond payable to, in favor of, or for the protection of such public body, as owner, for the work to be done in an amount not less than the amount of the contract, conditioned for the full and faithful performance of the contract; a payment bond 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.

Labor and Material Covered: All persons supplying labor or material used in the prosecution of the work. The labor and/or materials must have been approved by the public authority or its architect or engineer, where required. The Little Miller Act provides that the only persons that a payment bond must protect on a state or local public job are: (a) first tier subcontractors and material suppliers below the prime contractor; (b) second tier sub-subcontractors and material suppliers below subcontractors who give notice of their claims within 90 days of their last addition of labor or materials; and (c) laborers with wage claims who have performed work on the project site. The Little Miller Act does not require protection for materialmen of materialmen, and for subs below the sub-sub level, although the bond itself may include such protection.

Notice Required: Persons having a direct contractual relationship with a subcontractor but not the contractor must give written notice to the contractor by hand delivery or certified mail within a 90-day period after the date on which the last of the labor was performed by him or the last of the materials was furnished by him.

Time for Suit: When suit is instituted on a performance bond given in accordance with this chapter, it shall be commenced within one year after the obligee shall have made final payment on the contract; provided, however, if the contract is abandoned by the general contractor as bond principal or is terminated by the bond obligee, suit shall be commenced within one year after the earlier of the abandonment by the bond principal or termination by the bond obligee.

When suit is instituted on a payment bond given in accordance with this chapter, it shall be commenced within one 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.

Any 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.

Attorneys' Fees: Whenever any person supplying labor or material in the prosecution of the work brings an action on such 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 merely for the purpose of delaying payment, then the trial judge may, in his discretion, award the claimant a reasonable amount to be determined by the trial judge as claimant's attorneys' fees in bringing such successful action. Likewise, if the trial judge finds that such action was brought by claimant without just cause or in bad faith, the trial judge may, in his discretion, award the contractor or surety a reasonable amount to be determined by the trial judge as attorneys' fees for defending such action; provided, however, this section shall not affect the right of any person to recover attorneys' fees where provided by contract or bond.

Contracts Excluded: Whenever a contract is less than \$25,000, the owners may elect to make a lump sum payment at the end of the job. In such cases, a performance bond is not required.

General Liability Insurance Coverage: Any person entering into a formal contract with the state which exceeds \$5,000, or with a county, city, or other public authority which exceeds \$25,000, for the construction, alteration, or repair of any public building or public work, before entering into such contract, shall furnish to the public body proof of general liability insurance coverage in an amount not less than \$1,000,000 for bodily injury and property damage. Exempted from the provisions of this subsection are any persons who enter into a contract with the Mississippi Department of Rehabilitation Services for the construction, alteration or repair of the home of a disabled individual who has been determined eligible for services by the Mississippi Department of Rehabilitation Services.

Payment of Interest on Delinquent Accounts: When a contractor receives any payment under a public construction contract, the contractor shall, upon receipt of that payment, pay each subcontractor and material supplier in proportion to the percentage of work completed by each subcontractor and material supplier. If for any reason the contractor receives less than the full payment due under the public construction contract, the contractor shall be obligated to disburse on a *pro rata* basis those funds received, with the contractor, subcontractors and material suppliers each receiving a prorated portion based on the amount due on the payment. If the contractor without reasonable cause fails to make any payment to his subcontractors and material suppliers within 15 days after the receipt of payment under the public construction contract, the contractor shall pay to his subcontractors and material suppliers, in addition to the payment due them, a penalty in the amount of ½ of 1 percent per day of the delinquency, calculated from the expiration of the 15-day period until fully paid. The total penalty shall not exceed 15 percent of the outstanding balance due.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Mississippi's Little Miller Act appears at Mississippi Code Annotated, Title 31, Chapter 5, §§31-5-51 to 31-5-57. (Rev. 1972).

MISSOURI

Public Works Payment Bonds: Like most states, Missouri does not allow mechanic's liens on public property. The alternative to mechanic's lien rights are public works bonds which are required to be posted for jobs where the general contract is in excess of \$50,000.00. Such bonds, among other things, shall be conditioned for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, said work, and for all labor performed in such work whether by subcontractor or otherwise. The statutes affecting public works bonds are sometimes known collectively as The Little Miller Act. The term "public works contract" means a contract of the state, county, city and other political subdivisions of the state, except the Missouri transportation department, for the construction, alteration, repair, or maintenance of any building, structure, highway, bridge, viaduct, pipeline, public works, or any other works dealing with construction, which shall include, but need not be limited to, moving, demolition, or excavation performed in conjunction with such work.

Some of the items protected by a payment bond differ what is lienable in a private project. Material, lubricants, oil, gasoline, grain, hay, feed, coal and coke, repairs to machinery, groceries and foodstuffs, equipment and tools, consumed or used in connection with the construction of the public improvement and all insurance premiums, both compensation and all other kinds of insurance, are covered by the bond.

As with mechanic's liens, a subcontractor or supplier is required to give Notice before filing suit. The terms of the bond control. However, typically bonds have a 90-day Notice requirement. A Notice must be served within 90 days of the last furnishing or labor or material to the jobsite. The Notice must be served upon the surety, the governmental entity and the general contractor. The Notice must identify the claimant, the amount due and from whom. the terms of the bond will typically be enforced.

Oftentimes the bond will provide a one year deadline for the claimant to file suit. One year is shorter than the statute of limitations for contract claims. Some courts have rejected the one year deadline in the bond in favor of the statutory limitations period.

Prompt Payment Act: Missouri has both a public and a private Prompt Payment Act. The Private Prompt Payment Act requires prompt payment for private construction contracts (except owner occupied repair or remodeling jobs). Without the PPPA, an unpaid claimant could interest at 9% simple. An attorney's fee could only be awarded the unpaid creditor if there was a written contract which so provided. The PPPA makes it discretionary with the Judge to award the creditor its attorney's fee and interest at 1½% per month even for verbal contracts.

The Public Prompt Payment Act requires the governmental entity to pay the GC according to terms of the statute unless a contract provides to the contrary. It also addresses retainage. The Public Act requires the GC to pay its subs within 15 days of receipt of payment. Failure to do so within the time required may make the GC vulnerable to pay the claimant's attorney's fee and interest at 1½% per month. The statute addresses retainage and circumstances in which less than payment in full is received. The Public Prompt Payment Act also expressly protects professional engineers, architects, landscape architects and land surveyors.

Statutory Citation: Varied, but includes St. Louis Revised Code, Chapter 6.04, §6.04.100. Missouri Revised Statutes, Title 2, Chapter 8, §8.250; Title 4, Chapter 34, §§34.057, 34.058.1.

MONTANA

Amount of Bond: Full contract price for state contracts. The amount may be fixed by municipal ordinance, but in no event shall the penal sum be less than 25 percent of the contract price. (Mont. Code Ann. §18-2-203).

Labor and Material Covered: Provender, materials, supplies, provisions or goods supplied and performed or labor furnished in the prosecution of the public work. (Mont. Code Ann. §18-2-201).

Notice Required: Not later than 30 days after the date of the first delivery of the provender, material, supplies or provisions to any subcontractor or agent of any person, firm or corporation having a subcontract with respect to the prosecution of said public work, delivered or sent by registered mail to the contractor. This notice must contain the name of the subcontractor or agent ordering or to whom the same was furnished and state that such contractor or his bond will be held for the same. No suit or action shall be maintained in any court against the contractor or his bond to recover for such provender, provisions, material or supplies or any part thereof unless such notice shall have been given. (Mont. Code Ann. §18-2-206).

No right of action shall be had on the bond unless within 90 days from and after the completion of the contract and the acceptance of the work by the public officials the claimant shall present to and file with the public body a notice in writing substantially in the form as required by the statute. (Mont. Code Ann. §18-2-204).

Time for Suit: No special statutory provision. In the case where a settlement procedure is provided by a contracting agency, all actions authorized thereunder must be commenced within one year after a final decision has been rendered pursuant to such settlement procedure; and in the case where no settlement procedure is provided by the contracting agency, the action must be commenced by the contractor within one year after the cause of action has arisen. (Mont. Code Ann. §18-1-402).

Contracts Excluded: A school district may waive their requirements of these bonds for contracts under \$7,500. Other state or governmental authorities may waive their requirements for under \$50,000. (Mont. Code Ann. §18-2-201).

Penalty for Failure to Take Bond: The municipal corporation is liable to the persons intended to be protected by the bond to the full extent and for the full amount of all the debts so contracted by any subcontractor as well as the contractor. (Mont. Code Ann. §18-2-202).

Limit on Retainage for Public Contracts: The maximum retainage applied to construction contracts administered by the State of Montana or any department, agency, or political subdivision of the State of Montana, by any county, municipality, or political subdivision of a county or municipality, or by a school district may not exceed 5 percent if the contractor is performing by the terms of the contract. The retainage percentage withheld by a government entity from a contractor is the maximum retainage percentage that a contractor may withhold from a subcontractor. (Mont. Code Ann. §18-2-316).

Public Contracts: Prevailing Wage Law. Montana's prevailing wage law, often referred to as Montana's Little Davis-Bacon Law, applies to public works contracts entered into for construction services (heavy, highway and building) or nonconstruction services by the state, county, municipality, school district, or political subdivision in which the total cost of the contract is \$25,000 or more involving public funds. It requires that bidders on contracts pay a set rate of compensation, including employee benefits, and that at least 50 percent of the employees of each contractor working on the jobs be *bona fide* Montana residents. (Mont. Code Ann. §§18-2-401, 18-2-403, 18-2-409).

Statutory Citation: Montana Code, Title 18, Chapter 1, §18-1-402; Chapter 2, §§18-2-201 to 18-2-208, 18-2-316, 18-2-401, 18-2-403, 18-2-409.

NEBRASKA

Amount of Bond: The amount of the bond for construction or improvement on a public building shall be not less than the contract price. Mechanic's lien laws do not apply to these projects.

Labor and Material Covered: Labor performed, materials furnished and rental of equipment actually used in the erecting, furnishing or repairing of public building, bridge, highway or other public structures or improvements for the State of Nebraska or any political subdivision thereof.

Notice Required: Any person having direct contractual relationship with a subcontractor, but no contractual relationship, express or implied, with the contractor furnishing said bond, shall have a right of action upon the bond upon giving written notice to the contractor within four months 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. Such notice shall be served by registered or certified mail, postage prepaid, in an envelope directed to the contractor at any place where he maintains an office or conducts his business, or his residence or in any other manner in which a notice may be served.

Time for Suit: No suit shall be commenced after the expiration of one year after the date of final settlement of the principal contract.

Contracts Excluded: The labor and material payment bonds are not required for (a) any project bid or proposed by the State of Nebraska or any department or agency thereof which has a total cost of \$15,000 or less, or (b) 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 \$10,000 or less unless the state, department, agency, board, or officer includes a bond requirement in the specifications for the project.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Nebraska Revised Statutes, Chapter 52, §§52-118 to 52-118.02.

NEVADA

BONDS ON PUBLIC WORKS PROJECTS

Amount of Bond: The payment bond shall be not less than 50 percent of the contract price and will be fixed by the contracting body. (NRS § 339.025(1)(b)).

Labor and Material Covered: Labor performed or materials furnished in the prosecution of the work. (NRS § 339.025(1)(b)).

Notice Required: *To principal contractor.* No notice is required by a claimant having a contractual relationship, expressed or implied, with the principal contractor. (NRS § 339.035(1)). Any claimant who has a direct contractual relationship with any subcontractor of the contractor who gave such payment bond, but no contractual relationship, expressed or implied, with such contractor, may bring an action on the payment bond, only: (a) if he has, within 30 days after furnishing the first of such materials or performing the first of such labor, served on the contractor a written notice which shall inform the latter of the nature of the materials being furnished or to be furnished, or the labor performed or to be performed, and identifying the person contracting for such labor or materials and the site for the performance of such labor or materials; and (b) after giving written notice to such contractor within 90 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment. (NRS § 339.035(2)(a)).

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 mail, postage prepaid, in an envelope addressed to such contractor at any place in which he maintains an office or conducts business, or at his residence. (NRS § 339.035(2)(b)).

Time for Suit: Suit can be filed 90 days after the date on which claimant performed the last of the labor or furnished the last of the material for which he claims payment. (NRS § 339.035(1)). However, no such action may be commenced after the expiration of one year from the date on which the claimant performed the last of the labor or furnished the last of the material for the payment of which such action is brought. (NRS § 339.055(2)).

Contracts Excluded: Contracts less than \$100,000 are excluded from bond requirements. (NRS § 339.025(1)).

Penalty for Failure to Take Bond: No statutory provision.

CONTRACTORS LICENSE BONDS

Type of Bond: Before issuing a contractor's license to a contractor, the State Contractors Board (the Board) requires the that contractor file with the Board a surety bond or cash deposit. (NRS § 624.270).

Amount of Bond: Amount fixed by the Board with reference to the contractor's financial and professional responsibility and operation, but not less than \$1,000 or more than \$500,000. (NRS § 624.270(4)).

Labor and Material Covered: The Bond is issued on form mandated by the Board and benefits the following:

- (a) As owner of the property to be improved, entered into a construction contract with the contractor and is damaged by failure of the contractor to perform the contract or to remove liens filed against the property;
- (b) As an employee of the contractor, performed labor on or about the site of the construction covered by the contract;
- (c) As a supplier or materialman, furnished materials or equipment for the construction covered by the contract; or
- (d) Is injured by any unlawful act or omission of the contractor in the performance of a contract. (NRS § 624.273).

Time for Suit: A lawsuit against the bond must be filed with two years after the commission of the act on which the action is based. (NRS § 624.273(2)).

Statutory Citation: Nevada Revised Statutes, Title 28, Chapter 339, §§ 339.015 to 339.065.

NEW HAMPSHIRE

Amount of Bond: NH public projects, *shall* if said contract involves an expenditure of \$75,000 in behalf of the state or \$125,000 in behalf of a political subdivision, and *may* if it involves an expenditure of less amount, be secured by a bond in 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. *See* N.H. Rev. Stat. §447:16.

Labor and Material Covered: All labor performed or furnished, all equipment hired including trucks, all material used, fuels, lubricants, power, tools, hardware and supplies purchased by the principal contractor and used in carrying out said contract, and for labor and parts furnished upon the order of the contractor for the repair of equipment used in carrying out said contract.

Notice Required: In order to obtain the benefit of such bond any person, firm or corporation having any claim for labor performed, materials, machinery, tools or equipment furnished, shall within 90 days after the completion and acceptance of the project by the contracting party file a statement of claim. The statement of claim must be filed with the following depending on the project: (1) with the Office of the Secretary of State (if the State is a contracting party), or (2) with the Department of Public Works and Highways (if the State is a party to said contract by or through said department), or (3) with the Office of the Clerk of the Superior Court for the county within which the contract shall be principally performed (if any political subdivision of the State is a contracting party). Note: there is a filing fee for filing the Bond Claim notice with the Superior Court. A copy of the statement of claim shall also be sent by mail to the principal and surety. Certified mail, with return receipt requested is recommended.

Time for Suit: Within one year of the claim filing. The Complaint must be filed in the Superior Court for the county within which the contract shall be or was principally performed.

Contracts Excluded: Contracts with the state which are *under* \$75,000, and with a political subdivision which are *under* \$125,000, **may**, but are not required to obtain a bond . (N.H. Rev. Stat. §447:16).

Penalty for Failure to Take Bond: No statutory provision.

Statutory Citation: New Hampshire Revised Statutes, Title XLI, Chapter 447, §§447:15 to 447:18.

NEW JERSEY

Amount of Bond: At least 100 percent of the contract price.

Labor and Material Covered: All labor performed or materials, provisions, provender or other supplies, or teams, fuels, oils, implements or machinery used or consumed in, upon, for, or about the construction, alteration or repair of any public building or other public work or improvement.

Notice Required: Any person who does not have a direct contract with the contractor furnishing the bond shall provide the contractor with written notice via certified mail, prior to furnishing work, that such person is a beneficiary under the bond. Failure to give notice limits the claimant to “the benefits available” from the date on which notice is given and applies to work or materials furnished after the date of receipt of such notice.

Time for Suit: No suit shall be brought against the sureties on said bond until after the expiration of 90 days from the date of receipt of notice of the bond claim, but within one year of the date of last furnishing of materials and labor.

Contracts Excluded: The state may waive the bond requirements on contracts for its public works not in excess of \$200,000. In addition, a public body may waive the bond requirements on contracts for public works at the expense of a county, municipality, or school district, not in excess of \$100,000.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: New Jersey Statutes Annotated, Title 2A, §§2A:44-143 to 44-147.

NEW MEXICO

Amount of Bond: For contracts greater than \$25,000 (NMSA § 13-4-18.A), the prime contractor shall deliver to the state agency or local public body administering the contract for the public works, and with the prime contractor as bond principal, a payment bond for the protection of all persons supplying labor and/or material to the contractor or its subcontractors for performance of the work provided for in the prime contract (NMSA § 13-4-18.A(2)). For contracts of \$25,000 or less, the public body, in its sole discretion, may nevertheless require the prime contractor to supply a payment bond in compliance with NMSA § 13-4-18.E. The size of the construction payment bond must be not less than one hundred percent (100%) of the contract price. NMSA § 13-4-18.A(2). The state purchasing agent or central purchasing office, in their discretion, may reduce this amount to not less than fifty percent (50%) of the contract price, as long as the state agency or local public body self-insures the percentage that is reduced from the contractually required payment amount. NMSA § 13-4-18.B-C.

Labor and Material Covered By the Bond: 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)).

Notice Required: Any person having a direct contractual relationship with a subcontractor but no contractual relationship, either express or implied, with the principal contractor, must serve written notice to the principal contractor within ninety (90) days from the date on which such person performed the last of the labor or furnished or supplied the last of the material for which the claim is made. NMSA § 13-4-19.B. That person 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.* Such “notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the service of summons in civil process is authorized by law.” NMSA § 13-4-19.B.

Time and Contents of Suit: No suit on the construction payment bond may be commenced after the expiration of one year from the date of final “settlement” of the contract as defined by statute. NMSA § 13-4-19.D. Claimant in such suit shall notify the obligee named in the payment bond at the beginning of the action and shall state the amount claimed and that no judgment shall be entered in such action within 30 days after giving such notice. NMSA § 13-4-19.C. “If the amount realized on the bond is insufficient to discharge all claims in full, the amount shall be distributed among the parties entitled thereto *pro rata*.” *Id.* The suit shall be filed in the name of the state of New Mexico for the use of the person asserting the bond claim in court. NMSA § 13-4-19.D.

Penalty for Failure to Take Bond: “If a contractor fails to deliver the required performance and payment bonds, the contractor’s bid shall be rejected, [and] its bid security shall be enforced to the extent of actual damages.” NMSA § 13-4-18.A.

STOP NOTICES

For What Projects: Residential properties of four or less units only. NMSA § 48-2A-2 (“Stop Notice Act”). The statute explains the purpose of the Act:

The legislature finds there are practices within the industry of constructing residential properties containing not more than four dwelling units resulting in certain financial inequities and, therefore, declares that the purpose of the Stop Notice Act is to: provide for timely payment by an original contractor to persons contracted with to furnish labor or materials incorporated or to be incorporated in residential construction; define stop notices and their legal usage; encourage construction lenders to assert reasonable supervision, monitoring and control of funds disbursed to the original contractor for the timely payment of labor or materials; restrain and bar diversion of funds for purposes not directly involved with construction of the residential site improvement; and provide for criminal penalties.

Whom Do You Serve: To exercise stop notice rights, a stop notice claimant must serve a preliminary notice of right to lien upon the owner and construction lender within twenty (20) days after first furnishing materials or labor to the project. NMSA § 48-2A-5(B). Service can be accomplished by personal service (“hand delivery”) or by mail, with a return receipt requested. NMSA § 48-2A-5(B), incorporating § 48-2A-6(1) and (2). Late notice may be served, but the stop-notice claimant will lose rights for materials and labor furnished more than 20 days prior to the service of notice. NMSA § 48-2A-5(C). ***The Stop Notice must be delivered and thereby served no earlier than twenty (20) days or later than thirty (30) days from the date the subcontractor or materialman presented to the original (prime) contractor his “request for payment.” NMSA § 48-2A-5(D).*** The “request for payment” is not defined by NMSA § 48-2A-3 (“Definitions”), but it is distinct from the preliminary notice by virtue of the fact that “request for payment” appears at NMSA § 48-2A-5.A(3), while “preliminary notice” appears at NMSA § 48-2A-5.A(2). Additionally, it is important to note that, even where a materials supply is not in direct contract with the prime contractor, even the materials supplier must serve a “request for payment” upon the prime.

Important practice tip: It is important to note that NMSA § 48-2A-5(D) uses the language “original contractor” (*Note well:* In Subsection D, “contractor” is *singular*) for service of a request for payment. If the project has had a succession of prime contractors, then the best practice is to serve the request for payment upon both the original and the successor prime contractors. Indeed, NMSA § 48-2A-5.A(3) uses the *plural* “original contractors” to suggest exactly that both the original and successor contractors must be served with a request for payment. Indeed, NMSA § defines “original contractor” as “any contractor who has an express contractual relationship with the owner or in the case when the owner is the contractor, the owner.” Consult with a New Mexico-licensed attorney to determine the exact contents, time for filing, parties to be served and form of service requirements for the “request for payment.”

Practice tip: Despite the supportive language on the legislative prologue, the New Mexico Stop Notice Act presents more compliance challenges for a claimant than either Arizona or California and is clearly intended by its onerous requirements and penalties to discourage the use of a Stop Notice. A stop notice claimant must be careful to obtain and serve a copy of a surety bond with the notice, *infra*, and thread the needle on the ten-day window for service following the undefined service upon the prime contractor of a “Request for Payment.” ***Finally, the misdemeanor criminal penalty that attaches to any failure to “deliver” a “claim satisfied” notice to all parties who received the bonded stop notice following satisfaction of the debt, suggests that the legislature is disingenuous in its encouraging prologue for the Stop Notice Act, and that the use of a Stop Notice is not even worth the effort and risks involved.*** The costs and nuisance of obtaining a 125% surety bond, or the cash collateral alternative provided by NMSA § 48-2A-7.B (“Stop notices; bonds”), and the potential criminal penalties have

likely served an obviously intended legislative purpose of discouraging many otherwise viable stop notice claimants from pursuing their statutory rights.

Contents: A stop notice will not be effective unless it is signed under oath by the claimant or the claimant’s agent, accompanied by a bond equal to one hundred and twenty-five (125%) percent of the claim stated in the stop notice (pursuant to NMSA § 48-2A-7.A-B), states the name of the claimant, the date of filing the preliminary notice, the date the claimant served his request for payment on the original contractors, a description of the labor or materials furnished or agreed to be furnished, the name of the party who ordered the labor or accepted the materials, the total costs of the labor or materials furnished to the project to date, the balance of the money due, and a demand on the construction lender, if any, or the owner if there is no construction lender, to withhold a sufficient amount of money from the loan funds to satisfy the stop notice demand amount. NMSA § 48-2A-5.A(1)-(10).

When Must You File Suit on a Stop Notice: A stop notice claimant cannot file suit prior to thirty (30) days, or later than sixty (60) days, from the date of service of the stop notice, and must mail written notice of suit to the recipient within five (5) days of the date of filing suit. NMSA §48-2A-9(A). **IMPORTANT NOTICE OF MISDEMEANOR LIABILITY: The stop notice claimant must also deliver a “claim satisfied” notice to all persons who received a bonded stop notice within ten (10) days from date of satisfaction of the debt forming the basis of the stop notice, or else be guilty of a criminal misdemeanor under New Mexico Statutes Annotated § 31-19-1. (Authority: NMSA § 48-2A-10.D).** Importantly, note that “[a] claim satisfied notice shall not be effective unless it contains at least the same information as required in the stop notice including a statement signed by the claimant stating that the claim has been satisfied and the claimant agrees to discharge the stop notice.” NMSA §48-2A-10(C).

Practice tip: The assessment of criminal penalties under NMSA § 48-2A-10(C) and (D) should arguably be found constitutionally void for vagueness, but in the interim, a petitioner might have to have been found guilty in order to have standing to challenge the statute. The author strongly recommends that a stop notice be attempted only with the most experienced and skilled New Mexico construction law attorney.

Claimant shall not file a lien for payment while the stop notice is being litigated pursuant to a stop notice foreclosure lawsuit in court. NMSA § 48-2A-9.B.

Practice tip: The prohibition against filing a mechanic’s or materialmen’s lien demonstrates the disarray and confusion of New Mexico’s lien and stop notice statutory regime. Stop notices are available only upon residential properties of four or fewer units (NMSA § 48-2A-2), while mechanic’s and materialmen’s liens are available only on properties of more than four units (NMSA §§ 48-2-1.A).

Statutory Citation: New Mexico Statutes Annotated, Chapter 13, Section 4, §§ 13-4-1 to 13-4-24; Chapter 48, Section 2A, §§ 48-2A-1 to 48-2A-12.

NEW YORK

Amount of Bond: No special statutory provision.

Labor and Material Covered: Labor or material furnished to the contractor or his subcontractors in the prosecution of the work provided for in a contract for the prosecution of a public improvement for the State of New York.

Notice Required: No notice is required by a person having a direct contractual relationship with the principal contractor. 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. 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.

Time for Suit: No action on a payment bond shall be commenced after the expiration of one year from the date that the public entity accepted the completion of the project. This limitation does *not* override the timing provisions/limitations contained in the bond itself and is only acceptable if the bond is otherwise silent.

Contracts Excluded: Payment bond may be waived for public works contracts for less than \$50,000 or where the contract is not subject to the multiple contract award requirements of Section 135 of the State Finance Law, waiving the bonds is in the public interest and the aggregate amount of the contract is less than \$200,000.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: New York Finance Law, Article 9, §137.

NORTH CAROLINA

Amount of Bond: 100 percent of the contract price.

Labor and Material Covered: All materials furnished or labor performed in the prosecution of the public work, whether or not the labor or materials enter into or become a component part of the public improvement, including gas, power, light, heat, oil, gasoline, telephone services and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the public work.

Notice Required: Any claimant who has a direct contractual relationship with any subcontractor but has no contractual relationship, express or implied, with the contractor must give written notice to the contractor within 120 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment stating (1) the name and address of the subcontractor giving notice, (2) general description of the real property on which the labor was performed or material was furnished, (3) general description of the subcontractor's contract, including names and addresses of the parties thereto, and (4) general description of the labor performed and material provided thereunder. This notice is required to 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 or served in any manner provided by law for the service of summons.

All contractors must also provide copies of the contractor's project statement (containing (1) the name of the project, (2) the physical address of the project, (3) the name of the contracting body, (4) the name of the contractor, (5) the name, phone number and mailing address of the agent authorized to accept service of requests for a copy of the bond, notice of public subcontract and notice of claim on payment bond, and (6) name and address of the principal place of business of the surety) to all subcontractors engaged, and subcontractors must provide copies of the contractor's project statement to all subcontractors they engage. Subcontractors who do not provide the required notice risk losing the right to recover the full amount of their claim from the payment bond. The law requires:

Contractors. Contractors must provide a copy of the payment bond within seven days of receiving a written request from a subcontractor or supplier on a public project. Contractors must also prepare a contractor's project statement (including details about the project, owner, contractor, bond surety and the contractor's agent designated to receive notices required by the statute) and furnish it to all of their subcontractors at the time they enter into the subcontract.

First Tier Subcontractors. At the time of contracting, first tier subcontractors must provide their subcontractors/suppliers with a copy of the contractor's project statement.

Lower Tier Subcontractors/Suppliers. In order to secure the right to assert a bond claim for the full amount being claimed, subcontractors and suppliers who are second tier and lower must provide to the general contractor's designated agent a notice of public subcontract. This notice must include details about the project, the labor or materials provided, and the parties in the contract chain. The statute does not specify when the notice must be provided, however, bond claims are limited to labor or materials provided by the subcontractor or supplier within the 75-day period before service of the notice of public subcontract. Therefore, the notice should be provided as close as possible to when labor or materials are first provided to the project. An exception exists allowing subcontractors and suppliers to assert bond claims of \$20,000 or less even if they have not served notices of public subcontract.

Time for Suit: At any time after the expiration of 90 days after claimant performed the last of the labor or furnished the last of the material for which he claims payment, but no such suit may 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 contractor."

Contracts Excluded: Under \$300,000 (\$500,000 for state contracts), from any contractor with a contract less than \$50,000.

Penalty for Failure to Take Bond: Designated official who fails to require the bonds guilty of a Class 1 misdemeanor.

Statutory Citation: North Carolina General Statutes, Chapter 44A, Article 2, Part 1, §§44A-25 to 44A-35.

NORTH DAKOTA

Amount of Bond: The amount of a bond obtained from a contractor on a public project shall be at least equal to the price stated in the contract. (§48-01.2-10).

Labor and Material Covered: The bond is security for all bills, claims and demands paid with preference to labor and material suppliers as to payment. (§48-01.2-10).

Notice Required: 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 90 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 90 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. (§48-01.2-11).

Time for Suit: 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. (§48-01.2-12).

Penalty for Failure to Take Bond: No penalty is codified.

Statutory Citation: North Dakota Century Code, Title 48, Chapter 48-01.2, §§48-01.2-01 to 48-01.2-25.

OHIO

Types of Projects: The bond for Public Projects is a combination bid bond, performance bond and payment bond. Upon a public authority entering into a contract with a successful bidder, the bid bond is automatically "converted" into a combined performance and payment bond.

Labor and Material Covered: All labor performed or all materials furnished in carrying forward, performing, or completing a contract for the construction, demolition, alteration, repair or reconstruction of any public improvement.

Notice Required: In order to preserve a bond claim on a public project in Ohio, any subcontractor, laborer or materialman who is not in direct contract with the principal (original) contractor, and who are supplying labor or materials that cost more than \$30,000, is required to serve a Notice of Furnishing on the principal contractor to preserve bond rights within 21 days of first performing labor or furnishing materials. Failure to serve the Notice of Furnishing within the first 21 days does not defeat all bond rights, merely only allows the bond claim to cover the previous 21 days of work, labor, or material from when the Notice of Furnishing is actually served. The bond claimant is required to serve a statement of the amount due to the surety(ies) within 90 days after acceptance of the project by the Public Authority. The notice should be given to the surety by a method that evidences proof of receipt. The notice should set forth in detail the name of the claimant, the amount of the claim, a description of services or materials which were provided and other information to support and substantiate the claim. Information on who the surety(ies) is/are can be found in the Notice of Commencement prepared by the Public Authority. Frequently, a bond claim on a public project will be served contemporaneously with the filing of a lien on the project funds. Providing to the surety a copy of the lien claim gives the surety helpful information.

Time for Suit: No suit shall be brought against the surety until after 60 days after the furnishing of the statement, but suit must be commenced not later than one year from date of acceptance of the public improvement by the Public Authority.

Contracts Excluded: No specific statutory provision.

Penalty for Failure to Take Bond: No specific statutory provision.

Statutory Citation: Ohio Statutes, Title 1, Chapter 153, §§153.56, 153.57, 153.571,

OKLAHOMA

Amount of Bond: 100 percent of the contract amount.

Labor and Material Covered: All indebtedness by contractor or his subcontractors for labor and materials and repairs to and parts for equipment used and consumed in the performance of said contract.

Notice Required: Any person having direct contractual relationship with a subcontractor performing work on said contract but no contractual relationship expressed or implied with contractor furnishing said payment bond must give written notice to the contractor and surety on said payment bond within 90 days from the date on which said person did or performed the last of the labor or furnished or supplied the last of the material or parts for which such claim is made stating with substantial accuracy the amount claimed and the names of the parties to whom the material or parts were supplied or for whom the labor was done or performed. Such notice is required to be served by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business together with a copy thereof to the surety or sureties on said payment bond.

Time for Suit: No action shall be brought on said payment bond after one year from the date on which the last of the labor was performed or materials or parts furnished for which such claim is made.

Contracts Excluded: Under \$50,000.

Penalty for Failure to Take Bond: No special statutory provisions.

Statutory Citation: Oklahoma Statutes, Title 61, §61.2.

OREGON

Amount of Payment Bond: Unless an exemption applies, a successful bidder for a public improvement contract shall promptly execute and deliver to the contracting agency 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)).

Proper Claimants under a Payment Bond: A person claiming to have supplied labor or materials for the performance of the work provided for in a public contract, including any person having a direct contractual relationship with the contractor furnishing the payment bond or a direct contractual relationship with any subcontractor, or an assignee of such person, or a person claiming moneys due the State Accident Insurance Fund Corporation, the Unemployment Compensation Trust Fund, or the Department of Revenue in connection with the performance of the contract, has a right of action on the contractor's payment bond, if the person or the assignee of the person has not been paid in full and the person gives written notice of the claim, as required in ORS §279C.605, to the contractor and the contracting agency. (ORS §279C.600(1)).

Notice Required: The notice of claim against a payment bond must be sent by registered or certified mail or hand delivered 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)). If the claim is for a required contribution to a fund of an employee benefit plan, the notice must be sent or delivered within 200 days after the employee last provided labor or materials. (ORS §279C.605(2)). The notice may be sent or delivered to the contractor at any place the contractor maintains an office or conducts business or at the residence of the contractor. (ORS §279C.605(1)).

The notice shall be in substantially the following form:

To: [name of the contractor or subcontractor and the name of the state agency or public body]

Notice hereby is given that the undersigned [name of the claimant] has a claim for [insert a brief description of the labor or materials performed or furnished and the person by whom performed or furnished; if the claim is for other than labor or materials, insert a brief description of the claim] in the sum of [amount] dollars against the [insert public works bond or payment bond] taken from [name of the principal and, if known, the surety or sureties upon the bond] for the work of [insert a brief description of the work concerning which the bond was taken]. Such material or labor was supplied to [name of the contractor or subcontractor]. (ORS §279C.605(3)). The person making the claim or giving the notice shall sign the notice. (ORS §279C.605(5)).

Action on Payment Bond: A person, or his assignee, who has provided proper and timely notice, may institute an action on the payment bond. (ORS §279C.610(1)). Such a lawsuit shall be on the relation of the commissioner, the claimant, or that person's assignee, as the case may be, and shall be in the name of the contracting agency that let the contract or, when applicable, the public agency or agencies for whose benefit the contract was let. (ORS §279C.610(2)).

Time for Filing Suit: A claimant may institute an action on the contractor's bond not later than two years after the person last provided labor or materials or two years after the worker listed in the commissioners' notice of claim last provided labor. (ORS §279C.610(3)).

Preference for Labor and Materials Claims: All labor and material claims against the payment bond have preference and are superior to all other claims against the payment bond. (ORS §279C.615).

Contracts Excluded: Contracts less than \$100,000 are excluded from payment bond requirements; or in the case of contracts for highways, bridges and other transportation projects, less than \$50,000. (ORS §279C.380(5)). Under ORS §279C.390, certain governmental agencies hold the power to exempt certain contracts from all or a portion of the requirements for a payment bond. If you intend to rely on a payment bond, obtain a copy of it before you execute a contract or agree to perform work.

Penalty for Failure to Take Bond: The State of Oregon and the officers authorizing the contract are jointly liable for the labor and material used in the performance of any work under the contract, and for claims due the State Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into with the State of Oregon and the officers of the public body neglected to require the execution of a payment bond. (ORS §279C.625(1)). If the contract was entered into on behalf of a public body other than the State of Oregon and no payment bond was obtained when required, the public body and the officers authorizing the contract are jointly liable for the labor and materials used in the performance of any work under the contract. (ORS §279C.625(2)).

Statutory Citation: Oregon Revised Statutes, Volume 7, Title 26, Chapter 279C, §§279C.380, 279C.390, 279C.600 to 279C.625.

PENNSYLVANIA

Amount of Bond: 100 percent of the contract price.

Labor and Material Covered: All labor or materials supplied to the prime contractor to whom the public works contract was awarded or to any of his subcontractors in the prosecution of the work provided for in such contract whether or not the material furnished or labor performed enters into and becomes a component part of the public building or other public work or public improvement including highway work. "Labor or materials" includes public utility services and reasonable rental of equipment, but only for the periods when equipment rented is actually used at the site. Materials supplied by a material supplier to another material supplier are not covered by the bond. Note: Under the Commonwealth Procurement Code, once a contractor has made payment to the subcontractor according to the provisions of the Code, future claims for payment against the contractor or its surety by parties owed payment from the subcontractor which has been paid, are barred. (62 Pa.C.S.A. § 3939(b)).

Notice Required: A claimant who has a direct contractual relationship with any subcontractor of the prime contractor who gave a payment bond but has no contractual relationship with such prime contractor may bring an action on the payment bond only if he has given written notice to such contractor within 90 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating 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.

Notice shall be served by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place where his office is regularly maintained for the transaction of business or served in any manner in which legal process may be served.

To municipality. Duplicate copy of financial security to be filed with contracting agency.

Time for Suit: An action upon any payment or performance bond must be commenced after the expiration of 90 days, but within one year, after performance.

Contracts Excluded: Under \$5,000.

Penalty for Failure to Take Bond: No statutory provisions.

Statutory Citation: Pennsylvania Consolidated Statutes, Title 8, §§191-202.

PUERTO RICO

Amount of Bond: *Public Bonds.* The Commonwealth of Puerto Rico requires a payment bond for not less than one-half the contract amount plus any additions, enlargement or increase thereto. The penal sum of the payment bond required by various authorities in Puerto Rico varies in amount. P.R. Laws Ann., Title 22, Chapter 3, §48.

Labor and Material Covered: *Public Bonds.* The payment bond required by the Commonwealth of Puerto Rico from every contractor who is awarded a contract for the construction, reconstruction, enlargement, alteration or preparation of any public work covers: (a) the payment to the workers and employees for the contractor, of the salaries and wages earned by them in their work; and (b) the payment, to the persons selling, supplying or delivering equipment, tools and material for the work of the price or value of the materials, equipment and tools supplied, sold or delivered. P.R. Laws Ann., Title 22, Chapter 3, §49.

Notice Required: *Public Bonds.* The law of Puerto Rico applicable to bonds taken by the Commonwealth of Puerto Rico first reads that every person who has worked as a worker or employee on or who has supplied, sold or delivered materials, equipment and tools for work and who has not been paid, in whole or in part, 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 on the bond without necessity for previous notice for recovery of any amount, which may for such reason be owing him.

It further reads: "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 said bondsmen, for the recovery of any part of: (a) 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 (b) 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 work.

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 30 days from the mailing of 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." P.R. Laws Ann., Title 22, Chapter 3, §§51, 55.

Time for Suit: *Public Bonds.* Cannot be filed until after 30 days from the date of mailing of notice to the contractor before instituting suit on the contractor's public work bonds. Suit must be instituted by all claimants within six months after final acceptance of the work by the Commonwealth of Puerto Rico. P.R. Laws Ann., Title 22, Chapter 3, §§51, 55.

Contracts Excluded: No special statutory provision.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: Puerto Rico Laws Annotated, Title 22, Chapter 3.

RHODE ISLAND

Amount of Bond: Not less than 50 percent and not more than 100 percent of the contract price.

Labor and Material Covered: All labor performed or materials and equipment furnished.

Notice Required: Any person having a direct contract with a subcontractor but no express or implied contract with the contractor furnishing the bond shall only have a right of action upon giving written notice to the contractor within 90 days of the date on which the person furnished or performed the last labor, materials or supplies. The notice must state with substantial accuracy the amount claimed and the name of the party to whom the labor or materials was furnished. The notice shall be served by mailing via certified mail, postage prepaid, in an envelope addressed to the contractor at any place he or she maintains an office or conducts his or her business or his or her residence.

Time for Suit: Any time after the expiration of 90 days after the day which the last of the labor was furnished or performed or material or equipment was furnished or supplied by any person claiming, but within two years, or under the maximum time limit as contained within any labor or material payment bond required under §37-12-1, whichever period is longer.

In any suit brought under this chapter, such personal notice of the pendency of the suit as the court may order shall be given to all known creditors or persons claiming to be such under the bond as shall not have entered their appearances in the suit. In addition, the notice of pendency must be published in some newspaper in the state of general circulation in the city or town where the work in the contract was carried out. Such publication shall be once a week for three consecutive weeks in such form as is ordered by the court. These notice requirements may, however, be waived by the court.

Contracts Excluded: Any public road or portion thereof or any bridge in which the contract price shall be in excess of \$50,000 shall be required to furnish a bond; no exclusion provided for other projects.

Penalty for Failure to Take Bond: No express statutory provision.

Statutory Citation: Rhode Island General Laws, Chapter 37-12, §§37-12-1 to 37-12-11.

SOUTH CAROLINA

Amount of Bond: For public highway construction contracts, a performance bond for 100 percent of the contract and in no case less than \$10,000; payment bond not less than 50 percent of the contract. For other public improvement contracts, a performance and payment bond, both equal to 100 percent of the contract price.

Labor and Material Covered: Labor and material supplied in the prosecution of the work.

Notice Required: No notice is required by a claimant having a contractual relationship, expressed or implied, with the principal contractor. However, any claimant having a direct contractual relationship with a subcontractor but no contractual relationship, expressed or implied, with the contractor must give written notice to contractor within 90 days from the date on which claimant did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made stating with substantial accuracy the amount claimed and the name of the party to whom material was furnished or supplied or for whom labor was done or performed.

Time for Suit: In no event, may suit be commenced more than one year after the final settlement of the contract with respect to highway work. As to all other state construction, suit must be brought within one year after plaintiff last supplied materials or labor.

Contracts Excluded: Under \$10,000 (highway work). In the case of other public improvement contracts valued at \$100,000 or less, the using agency may waive the bond requirements providing the using agency has protected the state.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: South Carolina Code of Laws, Title 29, Chapter 5, §29-5-440.

SOUTH DAKOTA

Amount of Bond: Municipal improvement bonds may be issued for the total cost of the improvements. (S.D. Codified Laws §9-44-3).

Labor and Material Covered: Labor and material used in the prosecution of the work provided for in the public contract. (S.D. Codified Laws §5-21-1).

Notice Required: Notice of a suit must be given to all known creditors informing each of their right to intervene. Notice must also occur by publication in a generally circulated publication for the county where the work is performed once a week for two successive weeks. The first publication must be made at least three months before the time for suit commences. (S.D. Codified Laws §5-21-8).

Time for Suit: A party may not sue for payment until six months after complete performance of the obligations of the contract for improvement. (S.D. Codified Laws §5-21-6).

Contracts Excluded: The state may waive the bond requirement on contracts of less than \$50,000 for any public improvement and \$25,000 for any contract for the purchase of supplies or services, other than professional services. (S.D. Codified Laws §§5-18a-14, 5-21-1.1).

Penalty for Failure to Take Bond: No penalty is codified.

Statutory Citation: South Dakota Codified Laws, Title 5, Chapter 18A, §5-18A-14. Title 5, Chapter 21, §§5-21-1 to 5-21-8. Title 9, Chapter 44, §9-44-3.

TENNESSEE

PUBLIC CONTRACTS AND HIGHWAY PROJECTS

Amount of Bond: Bond shall be 25 percent of the contract price on all public contracts (except highways) in excess of \$100,000. On highway projects the amount of the bond is fixed by the Department of Transportation (DOT).

Labor and Material Covered: All labor or materials used by the contractor or any remote subcontractor.

Notice Required: The person furnishing labor and/or material shall, after such labor or material is furnished and within 90 days after the completion of such public work, give written notice to either the contractor who executed the bond or the public official who had charge of the letting of the contract, by return-receipt certified mail or by personal delivery. Such written notice is to set forth: (1) the nature and itemized account of the material furnished or labor done; (2) the balance due; and (3) a description of the property improved. In the case of public work undertaken by a municipality, the required notice or statement, so mailed or delivered to the mayor thereof, shall be deemed sufficient. In the case of public work by any county, the required notice or statement, so mailed or delivered to the county mayor of such county, shall be deemed sufficient. In the case of public work by the state, the required notice or statement, so mailed or delivered to the governor, shall be deemed sufficient.

The statute pertaining to highway projects provides that the performance of a highway contract shall not be finally accepted until the general contractor has satisfied the DOT that all materials used by him, his subcontractors, or his agents have been paid for and until laborers and other employees working for him, his subcontractors, or his agents have been fully paid. The DOT is required to take the initiative and publish an advertisement in a newspaper in the county where the work was done 30 days prior to final settlement. Such advertisement must state the date of the proposed final settlement and notify claimants to file notice of claim with the DOT and the contractor's surety within 30 days after publication of the last advertisement. The notice of claim must be verified by oath and filed after publication of the first advertisement.

The DOT is required to withhold, for a period of 60 days after the date of the last advertisement, sufficient funds to pay all claims so filed. If a claimant brings suit against the contractor within such 60-day period, the DOT pays such retained funds into court, otherwise to the contractor.

Time for Suit: On public contracts an action shall be brought or claims so filed within six months following the completion of such public work or the furnishing of such labor or materials.

All actions on bonds furnished on highway projects shall be commenced within one year following publication of the first newspaper advertisement.

Penalty for Failure to Take Bond: A public officer who fails to obtain the bond for a public work commits a misdemeanor and is liable in a civil action to any furnisher of labor or materials who is damaged. There is no similar provision on highway projects.

Statutory Citation: Tennessee Code, Title 12, Chapter 4, Part 2, §§12-4-201 to 12-4-206; Title 54, Chapter 5, Part 1, 54-5-119 to 54-5-127.

TEXAS

Amount of Bond: The amount of the contract.

Labor and Material Covered: All “public work material” and “public work labor” supplied to the project.

“Public work material” means: (1) material used, or ordered and delivered for use, directly to carry out a public work; (2) specially fabricated material, which is material ordered by a prime contractor or subcontractor, that is specially fabricated for use in a public work and reasonably unsuitable for another use; (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 (4) power, water fuel and lubricants used, or ordered and delivered for use, directly to carry out a public work.

“Public work labor” means labor used directly to carry out a public work.

Notice Required: *Notice Required for Claim for Payment for Labor and Material.* To recover in a suit on a payment bond for a claim for payment for public work labor performed or public work material delivered, a payment bond beneficiary must mail to the prime contractor and the surety written notice of the claim 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. The notice must be accompanied by a sworn statement of account that states in substance the amount claimed is just and correct, and all just and lawful offsets, payments and credits known to the affiant have been allowed.

The statement of account shall include the amount of any retainage applicable to the account that has not become due under the terms of the public work contract between the payment bond beneficiary and the prime contractor or between the payment bond beneficiary and a subcontractor.

Notice of Claim for Unpaid Labor or Materials When Written Agreement Does Not Exist. When no written agreement exists between the claimant and the prime contractor or between the claimant and a subcontractor, the notice for a claim for unpaid bills must contain the name of the party for whom the public work labor was performed or to whom the public work material was delivered, the approximate date of performance or delivery, a description of the public work labor or material for reasonable identification and the amount due. The claimant shall generally itemize the claim and include with it copies of documents, invoices or orders that reasonably identify the public work labor performed or public work material delivered for which the claim is made, the job and the destination of delivery.

Notice of Claim for Multiple Items of Labor or Material. When the claim is for multiple items of public work labor or material, to be paid on a lump sum basis, the notice must describe the labor or material in a manner that reasonably identifies the labor or material, state the name of the party for whom the labor was performed or to whom the material was delivered, the approximate date of performance or delivery, whether the contract is written or oral, the amount of the contract and the amount claimed.

Notice of Claim for Unpaid Labor or Material Under Written Unit Price Agreement. Where a claimant who is a subcontractor or materialman to the prime contractor or to a subcontractor has a written unit price agreement that is wholly or partially completed, notice is sufficient if a claimant attaches to the sworn statement of account a list of units and unit prices as fixed by its contract, and a statement of those completed and partially completed units.

Additional Notice Required for Payment Bond Beneficiary Without Direct Contractual Relationship with Prime Contractor. A payment bond beneficiary who does not have a direct contractual relationship with the prime contractor for public work labor or material must also provide the following notices:

(1) To perfect a claim for contractual retainage, the payment bond beneficiary must provide written notice to the prime contractor that the contract provides for retainage, and generally indicates the nature of the retainage on or before the 15th day of the second month after the date of the beginning of the delivery of public work material or the performance of public work labor.

(2) To perfect a claim for unpaid public work labor performed or public work material delivered, a second tier payment bond beneficiary must provide written notice to the prime contractor on or before the 15th day of the second month after each month in which the labor was performed or the material was delivered. A copy of the statement sent to a subcontractor is sufficient as notice under this subsection; and

(3) To perfect a claim for specifically fabricated materials, a payment bond beneficiary must mail 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, written notice that the order has been received and accepted.

These additional notice provisions do not apply to a payment bond beneficiary who is an individual mechanic or laborer who makes a claim for wages.

Retainage. Retainage, as defined in the statute, means the part of the payments that is not required to be paid within the month after the month in which the labor is performed or material furnished.

Notice Required for Claim for Payment of Retainage. To recover on a payment bond for a claim for payment of retainage, a claimant whose contract with a prime contractor or subcontractor provides for retainage must mail written notice of the claim to the prime contractor and the surety on or before the 90th day after the date of the final completion of the public work contract. The notice shall consist of a statement stating the amount of the contract, any amount paid under the contract, and the outstanding balance. Notwithstanding the above, notice for claim for payment of retainage is not required if the amount claimed is part of a prior claim made for payments other than retainage.

Time for Suit: Suit on a payment bond may be filed if the claim is not paid before the 61st day after the date the notice of claim is mailed. No suit may be brought on the payment bond after the expiration of one year after the date the notice of claim is mailed.

Contracts Excluded: When the governmental entity is not a municipality or a joint board created under Subchapter D, Chapter 22 of the Transportation Code, contracts excluded are those less than \$25,000. When the governmental entity is a municipality or a joint board created under Subchapter D, Chapter 22 of the Transportation Code, contracts excluded are those less than \$50,000.

Penalty for Failure to Take Bond: If the payment bond is not furnished, the governmental entity is subject to the same liability that a surety would have if the surety had issued the payment bond and the governmental entity had required the bond to be provided.

Public/Private Partnerships: Chapter 2267 of the Texas Government Code allows governmental entities to enter into comprehensive agreements with private parties to construct qualifying projects, including buildings, hospitals, schools, public works, recreational facilities and other public projects. Among other things, Chapter 2267 provides a process for private parties to submit unsolicited proposals to governmental entities. Chapter 2267 requires subcontractors and suppliers to procure payment and performance bonds in compliance with Chapter 2253 of the Texas Government Code on projects funded by public/private partnerships.

Statutory Citation: Texas Government Code, Title 10, Subtitle F, Chapters 2253, 2267.

UTAH

Amount of Bond: A payment bond must be in an amount equal to 100 percent of the price specified in the contract.

Labor and Material Covered: Labor, service, equipment and/or material supplied to the contractor or its subcontractors for the performance of the work provided for in the contract.

Notice Required: No later than 15 days after commencement of physical construction work at a government project site, the original contractor, owner, or owner-builder shall file a notice of commencement with the State Construction Registry.

The notice of commencement must include the: (1) owner's name, address and email address; (2) original contractor's name, address and email address; (3) payment bond surety's name and address or a statement that a payment bond was not required; (4) project's address, if it reasonably identifies the project, or the name and general description of the location of the project if the address does not reasonably identify the project; and (5) government project-identifying information.

For subcontractors and suppliers, a preliminary notice must be filed with the State Construction Registry before making a payment bond claim. Conversely, those who contract directly with a project's owner (i.e., prime contractors) do not have to file a preliminary notice. Subcontractors and suppliers of all tiers must file a preliminary notice within 20 days of their first furnishing labor, service, equipment and/or material to a project or within 20 days of the filing of the notice of commencement, whichever is later. Preliminary notices filed after this timeframe only become effective five days after the date on which they are filed and preclude a subcontractor or supplier from filing a claim for compensation earned for labor, service, equipment and/or material furnished prior to the effective date of the preliminary notice, except as against the person with whom the subcontractor or supplier contracted. The preliminary notice must include the: (1) government project-identifying information; (2) claimant's name, address and telephone number; (3) name and address of the person who contracted for the labor, service, equipment and/or material; (4) name of the record or reputed owner of the project; (5) name of the original contract under which the work is performed; and (6) project address or a description of the location of the project.

A subcontractor or supplier who provides labor, service, equipment, and/or material before the filing of a notice of commencement need not file a preliminary notice to maintain any right they would otherwise have, if the notice of commencement is filed more than 15 days after the day on which the subcontractor or supplier begins work on the project.

Time for Suit: A period commencing 90 days after the date on which claimant supplied the last of the labor, service, equipment and/or material for which it claims payment to one year after the date of last supplied, labor, service, equipment and/or material for which the claim is made.

Contracts Excluded: There are no contracts excluded. However, rules may provide for waiver of the payment bond requirement for circumstances in which the state considers a payment bond to be unnecessary to protect the state.

Penalty for Failure to Take Bond: If the state or a political subdivision fails to obtain a payment bond, it shall, upon demand by a person who has furnished labor or supplied materials to the contractor or subcontractor for the work provided for in a contract promptly make payment to that person. That person shall have a direct right of action against the state or the political subdivision upon giving written notice to the state or political subdivision within 90 days from the date on which such person performed the last of the labor or supplied the last of the material for which claim is made. The person shall state in the notice a designation of the construction project and its location, the amount claimed, and the name of the party for whom the labor was performed or to whom the material was supplied. The notice shall be served by registered or certified mail, postage prepaid, on the state agency or political subdivision that is a party to the contract. No such action may 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 such person. There is some question as to whether preliminary notice is required as a prerequisite to commencing a failure to obtain payment bond action.

Statutory Citation: Utah Code, Title 14, Chapter 1, §§14-1-18 to 14-1-20; Title 38, Chapter 1b, §§38-1b-101 to 38-1b-203; Title 63G, Chapter 6, §§63G-6-505, 63G-6-506.

VERMONT

Amount of Bond: The Agency of Transportation has the power to require any contractor employed in a state project to file a surety bond to the State of Vermont acceptable to the agency. (19 V.S.A. §10(8)).

Labor and Material Covered: The VT Agency of Transportation can require contractors employed on a state transportation improvement project to post a surety bond to the secretary of the agency for the benefit of suppliers of labor, materialmen, machinery, and others, to secure payment of the claims of creditors that supply goods, services, or labor to the project. (19 V.S.A. §10(9)).

Notice Required: Claimants must file a sworn statement of claim under the bond with the secretary within 90 days after final acceptance of the project by the state, or within 90 days after the time taxes and contributions to the commissioner of labor are due and payable by the contractor. Within one year after filing the claim, the claimant must file suit in Superior Court, in the name of the secretary of transportation, to enforce the claim.

Statutory Citation: Vermont Statutes, Title 19, Chapter 1, §10. Note: The above is current through July 1, 2019, but is subject to change in 2019 legislative session.

VIRGINIA

Amount of Bond: Payment bonds in the sum of the prime contract amount required on all public construction contracts exceeding \$500,000 and all state transportation related projects exceeding \$350,000.

Labor and Material Covered: Labor performed and material furnished to the prime contractor or to a subcontractor in furtherance of the work in the prime contract, including public utility services and equipment rented.

Notice Required: No notice is required by a person having a contract with the prime contractor. Claimant having a contract with a subcontractor must give written notice of the bond claim to the prime contractor within 90 days from the date on which the claimant performed the last labor or furnished the last material for which he claims payment, stating with substantial accuracy the amount claimed and the name of the party to whom the work was performed or to whom the material was furnished. Such notice shall be served by registered or certified mail, postage prepaid, to the contractor at any place where his office is regularly maintained for the transaction of business. The 90-day time limit does not apply to claims for retainages.

Time for Suit: Suit must be instituted more than 90 days after the last day labor or material was supplied for which payment is claimed, but within one year after the day on which the claimant last performed labor or last furnished materials.

Contracts Excluded: Public construction contracts below \$500,000 and all state transportation related projects below \$250,000, unless required by the public body. Payment and performance bonds can be waived in state transportation related projects of less than \$350,000 if there is evidence that a surety company has declined an application from the contractor for a bond.

Penalty for Failure to Take Bond: No special statutory provision.

Waiver: A waiver of bond rights is void unless in writing and signed after the supply of labor or material. Also, a subcontractor, lower-tier subcontractor, or material supplier may not waive or diminish its bond rights in a contract in advance of furnishing any labor, services or materials. A provision that waives or diminishes a subcontractor's, lower-tier subcontractor's, or material supplier's lien bond in a contract executed prior to providing any labor, services, or materials is null and void.

Statutory Citation: Code of Virginia, Title 2.2, Chapter 43, §§2.2-4337 to 2.2-4341.

WASHINGTON

CONTRACTORS BOND ON PUBLIC PROJECTS

Types of Projects: Any contract for a public improvement by Washington State, or any county, municipality or other public body within Washington, requires a surety bond in the amount of 100 percent of the contract amount except: (1) when the contract is for \$150,000 or less, then at the option of the contractor or the general contractor/construction manager as defined in RCW 39.10.210, the public body may retain 10 percent of the contract price for a period of 30 days after the date of final acceptance, or until receipt of all necessary releases; or (2) when the contract is for \$150,000 or less, an individual surety or sureties may be substituted for a surety company. (RCW 39.08.010, RCW 39.08.030(1)(a)).

Additionally, cities, towns and water-sewer districts may by general ordinance fix and determine the amount of such bond and to whom such bond runs. (RCW 39.08.030(1)(a)).

On contracts for construction, maintenance or repair of a marine vessel, the department of transportation, a public transportation benefit area, a passenger-only ferry service district, or any county may permit the substitution of one or more of the following alternate forms of security in lieu of all or part of the bond: (1) certified check; (2) replacement bond; (3) cashier's check; (4) treasury bills; (5) an irrevocable bank letter of credit; and (6) assignment of a savings account, or other liquid assets specifically approved by the secretary of transportation or county engineer, a public transportation benefit area, or a passenger-only ferry service district, for their respective projects. (RCW 39.08.100).

Labor and Material Covered: All laborers, mechanics, subcontractors and material suppliers and all persons who shall supply such person or persons with provisions or supplies for the carrying on, prosecution, or doing of any public work. (RCW 39.08.030(1)(a)).

Notice Required by Suppliers: Every person, firm or corporation furnishing materials, supplies or provisions to someone other than the general contractor shall, not later than 10 days after the date of the first delivery of such materials or supplies, deliver or mail a notice to the contractor that is the recipient of the materials, supplies or provisions. (RCW 39.08.065). The notice should be sent via certified or registered mail, return receipt requested, or personally served. (RCW 39.08.065). It is recommended that this notice be sent to the claimant's customer, the bonding company and the public body.

Contents of Notice Required by Suppliers: The notice required by RCW 39.08.065 should state in substance and effect that such person, firm or corporation has commenced to deliver materials, supplies or provisions for use thereon, with the name of the subcontractor or agent ordering or to whom the same is furnished and that such contractor and his or her bond will be held for the payment of the same. No suit or action may be maintained in any court against the contractor or his or her bond to recover for such material, supplies or provisions or any part thereof unless the lien claimant gave the notice required by RCW 39.08.065.

Filing Claim: The lien claimant shall not have any right of action on the bond unless, within 30 days after acceptance of the project by the public body, the lien claimant files with such public entity a claim (*see* sample below). (RCW 39.08.030). The notice should be sent via certified or registered mail, return receipt requested, or personally served on the public body. It is recommended that this notice also be sent to the lien claimant's customer and the bonding company. The notice must give the claimant's name, the amount of the claim, the bonding

company and identify the project. This notice must be signed by the claimant or the claimant's agent making the claim or giving the notice and, after being presented and filed, the notice becomes a public record. (RCW 39.08.030(1)(b)).

Contents of Claim:

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 contract 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) _____ (RCW 39.08.030(1)(a)).

Time for Suit: No special statutory provision for suit against payment bond is in the statute but it is subject to the general six-year statute of limitations for contract actions or the limitations to bring suit contained in the bond itself. However no attorneys' fees will be allowed in any suit or action brought or instituted before the expiration of 30 days following the date of filing of the above notice. (RCW 39.08.030(1)(b)).

Penalty for Failure to Take Bond: A public body, excluding the state, is liable to all persons authorized to sue on the bond to the full extent and for the full amount of all debts due them by the contractor. (RCW 39.08.015).

Statutory Citation: Revised Code of Washington, Title 39, Chapter 39.08, §§39.08.010 to 39.08.100.

WEST VIRGINIA

Amount of Bond: In contracts for the construction, alteration or repair of public buildings other than school edifices, penal sum equal at least to the reasonable cost of the materials, machinery, equipment and labor required for the completion of said contract. In the case of highway work, in such penal sum as the State Road Commissioner shall require, but not to exceed the contract price. With respect to school construction, county boards of education shall require all persons contracting for the building or repairing of school property, where the contract exceeds \$10,000, to execute a bond, with approved security, in the amount of the contract price.

Labor and Material Covered: All materials, machinery, equipment and 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.

Contracts Excluded: No special statutory provision. However, see Payment is an Affirmative Defense (or Partial Defense) for Certain Owners discussed above. West Virginia Code §§38-2-21, 38-2-34.

Penalty for Failure to Take Bond: No special statutory provision.

Statutory Citation: West Virginia Code, Chapter 5, §§5-6-7, 5-22-1; Chapter 17, §17-4-20; Chapter 18, §18-5-12; Chapter 38, §§38-2-21, 38-2-34, 38-2-39.

WISCONSIN

Amount of Bond: At least equal to contract price.

Labor and Material Covered: All labor services, materials, plans or specifications performed, furnished or procured for the purpose of making the public improvement or performing the public work where the claimant has a direct contract with the prime contractor or with any subcontractor of the prime contractor. However, in the case of state highway projects, any claimant that only contracts with a subcontractor has no bond rights under the statute.

Notice Required: If a subcontractor or supplier has rights, then the subcontractor or supplier may only maintain an action if the claimant has, within 60 days after the first provision of labor or materials, notified the prime contractor in writing that the claimant has or will provide labor and materials on the project, except if the subcontractor or supplier is listed on the prime contractor's contract with the public body.

Time for Suit: No later than one year after the completion of the work under the contract.

Contracts Excluded: On contracts with the state, the state may not require a bond on contracts not exceeding \$148,000. On contracts with local governments, the local government may not require a bond on contracts not exceeding \$74,000.

Penalty for Failure to Take Bond: No special statutory provision.

Lien on Public Funds: Any claimant who has a direct contract with the prime contractor shall have a lien on the funds due or to become due the prime contractor, before payment is made to the prime contractor. Written notice must be served on the public body and prime contractor before payment is made to the prime contractor. The prime contractor has 30 days to dispute the claim. If no dispute then the public entity shall pay the claim. If the prime contractor disputes the claim then suit must be filed within three months of notice of the dispute of the claim, otherwise the lien rights are barred. Lower tier subcontractors, suppliers and materialmen have no lien rights on public funds.

Statutory Citation: Wisconsin Statutes, Chapter 779, §779.15, cited as Wis. Stat. §779.15.

WYOMING

PUBLIC PROJECT BONDS

Amount of Bond: Not less than one-half of the contract price, except where such price exceeds \$150,000, in which case the bond shall be in such amount as the appropriate officer, agency or governing body deemed sufficient.

Labor and Material Covered: All work, labor, material or goods of any kind which were used in the execution of the contract concerning any public building or other public structure.

Notice Required: Subcontractors or materialmen on projects of \$50,000 or more must give written notice to the general contractor of his rights under the bond within 60 days of first providing labor or materials. The notice must be sent by certified mail or delivered to and receipted by the prime contractor or his agent. If this notice is not given, all rights under the payment bonds are waived. The notice must contain the following information:

1. It shall state that it is a notice of a right to protection under the bond or guarantee;
2. The notice shall be signed by the subcontractor or materialman;
3. Must contain the subcontractor's or materialman's name, address, phone number and name of a contact person;
4. The name and address of the subcontractor's or materialman's vendor;
5. The type or description of the materials or services provided. (Wyo. Stat. §16-6-121).

However, for the notice requirement to be effective the prime contractor must post on the construction site a prominent sign *citing* Section 16-6-121 and stating that any subcontractor or materialman shall give notice to the prime contractor of a right to protection under the bond or guarantee and that failure to provide the notice shall waive the subcontractor or materialman's protection under the bond or guarantee and shall waive any right to a lien for materials or services provided. In addition, the owner or his agent must provide a written notice of the information required by Section 16-6-121 in the project specifications.

Time for Suit: Suit must be brought within one year after the date of the first publication of notice of final payment of the contract. Any person entitled to protection of the bond shall notify the obligee named in the bond at the beginning of his suit and shall include in said notice the names of the parties, a description of the guarantee and the amount and nature of his claim.

Contracts Excluded: \$7,500 or under.

Penalty for Failure to Take Bond: None.

Statutory Citation: Wyoming Statutes, Title 16, Chapter 6, Article 1, §§16-6-101 to 16-6-121.

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