CHAPTER 14

Performance & Payment Bonds

INTRODUCTION

What is a Bond?

The term “bond” can be confusing, because it has so many different meanings in various commercial contexts. A municipal bond or a corporate bond is an evidence of a debt and an investment for the person who buys it. A jail bond is provided as security to assure that a criminal defendant will appear at a later trial. All bonds, however, involve either a promise to pay or a promise to perform some sort of contractual obligation.

A bond posted pursuant to a construction contract is security to assure performance of the contract obligations. When a real estate owner desires to construct an office building, the owner may wish to have security that the general contractor will fulfill its obligations to complete the project and pay all subcontractors.

If the general contractor is a corporation, the real estate owner could require a personal guaranty from its president and sole shareholder. The individual shareholder of the general contractor corporation would be the “surety” on this bond. Additionally, the owner may wish to have security from outside the general contractor corporation. This would be a “third-party” bond, the most common type of bond used in construction contracts.

Surety

A “surety” provides a bond. The surety could be a wealthy individual (private surety), but it is more likely that the surety will be a large company in the business of providing surety bonds (corporate surety). Insurance companies are often corporate sureties.

Most sureties charge a “premium” for providing a bond. If a bond is provided for free (by a friend or family member), the provider is an “accommodation surety.”

Principal, Obligee and Obligor

The “principal” performs the construction contract and is the “primary obligor,” the person primarily obligated to complete the contract. The surety has no obligation unless the principal fails to fulfill the contract obligations.

An “obligee” is the person who requires a bond. A real estate owner who requires a bond from the general contractor is an obligee. Likewise, a general contractor who requires a bond from a subcontractor is an obligee under the subcontractor bond. The obligations under the bond run primarily to the obligee.

To summarize, the principal enters into the construction contract with the obligee. The principal finds the surety and pays any premium. If the principal fulfills its contract obligations, then the surety’s obligation is void. However, if the principal defaults on the construction contract, the obligee can make a claim against either the principal or the surety.

Beneficiary

The “beneficiary” is the person intended to benefit from the bond and is the person with the right to sue under the bond. In a performance bond, the obligee (usually the owner) will be the beneficiary. If the bond principal does not complete the contract, the owner can sue under the performance bond. In this case, the beneficiary is also the obligee.

Sometimes, the beneficiary is not a party to the bond at all. In a payment bond, the beneficiaries are all subcontractors and suppliers providing labor or materials to the bond principal. These people are not parties to the bond, are not obligees and may not even know that the bond exists. They are “third-party beneficiaries.[1]”

[1] *Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt.*, 283 Va. 787, 725 S.E.2d 550 (2012).

Types of Bonds

It is possible for one writing to be both a payment and performance bond. It all depends on the wording of the document.[2]

Payment Bond

In a payment bond, the surety provides security that all persons supplying labor and material to the project will be paid. Subcontractors and suppliers are the "beneficiaries" of a payment bond. They do not require the bond. They are not parties to the bond but are third-party beneficiaries. However, the payment bond ensures that subcontractors and suppliers will be paid so that the obligee does not have risk of claims or mechanic's liens if the principal fails to pay. If the principal defaults, beneficiary subcontractors and suppliers usually have the right to sue the surety directly for payment.

Performance Bond

In a performance bond, the surety provides security that the principal will perform all of its contract obligations in a timely and workmanlike manner.

Usually, a performance bond is only for the benefit of the obligee/owner of the construction project. If the principal defaults, the obligee/owner can require the surety to complete the project or to pay for the costs of completion. Subcontractors usually do not have the right to seek payment from the performance bond surety if the principal defaults.

A general contractor can require a subcontractor to obtain a performance bond as security that the subcontract will be completed in a timely and workmanlike manner. In this case, only the obligee/general contractor can require the surety to complete the subcontract work or to pay for the costs of completing the subcontract work.

Bid Bond

A bid bond provides security to the obligee/owner that if a contract bid is awarded to the principal, the obligee/owner will obtain a contract with the principal to have the work completed at that bid price. If the principal fails or refuses to enter into a contract for the bid price or to provide any required performance and payment bonds, the surety will be responsible for any costs incurred in rebidding the project and any increased contract costs. An owner can require bid bonds from all general contractors bidding on a project. A general contractor can also require bid bonds from all subcontractors bidding to the obligee/general contractor.

Mechanic's Lien Bond

A mechanic's lien bond is usually provided in connection with a court proceeding by a real estate owner or a general contractor to "bond off" a mechanic's lien. A real estate owner or a general contractor can remove a mechanic's lien from the land records by "bonding it off." The surety promises to pay the mechanic's lien claimant if the mechanic's lien is later proven valid. The mechanic's lien claimant is thus provided alternative security for the claim. The claimant no longer has the right to go against the real estate to obtain payment but can now go against the bond instead. This is discussed in greater detail in the chapters on mechanic's liens.

BONDS ON PUBLIC PROJECTS—THE FEDERAL MILLER ACT

Commonly referred to as the federal "Miller Act," 40 U.S.C.A. Section 3131, *et seq*., is the grandfather of all public project-bonding statutes. The Miller Act requires performance and payment bonds for the "construction, alteration, or repair of any public building or public work of the United States."[3] Payment and performance bonds are required for any contract for the construction, alteration or repair of any public building or public work of the

---

[2] *Phoenix Ins. Co. v. Lester Bros., Inc.,* 203 Va. 802, 127 S.E.2d 432 (1962); *Mayor of Baltimore v. Fidelity & Deposit Co.,* 282 Md. 431, 386 A.2d 749 (1978).

[3] 40 U.S.C.A. §3131(b); *K-Con, Inc. v. Sec'y of the Army,* 908 F.3d 719 (Fed. Cir. 2018) [Performance and Payment Bonds are mandatory on a construction contract, even though the solicitation did not included an express requirement that the Prime Contractor provide performance and payment bonds and did not include FAR clause 52.228-15, Performance and Payment Bonds.]; *citing G. L. Christian & Assocs. v. United States,* 160 Ct. Cl. 1, 12, 312 F.2d 418, 424 (1963) [If there was a legal requirement that the contract contain a certain clause, the contract must be read as if it did].

United States that is for an amount greater than $150,000.[4] It is possible, however, that the contracting officer can waive the payment and performance bond requirements on some projects.[5] On the other hand, a contracting officer can require performance and payment bonds on any particular project, even if they are not required by the Miller Act.[6] It is always best for potential claimants to inquire and obtain copies of the actual bonds before contracting. The payment bond must be equal to the total amount of the contract. The performance bond must be in an amount the contracting officer considers adequate for the protection of the Government.[7]

For any contract that is for an amount greater than $25,000, but less than $150,000, alternative forms of security must also be allowed for the payment protection of subcontractors and materials suppliers.[8] The contracting officer on such projects must select two or more acceptable forms of alternative security, from which the contractor may choose.[9] Alternative forms of security include a payment bond, an irrevocable letter of credit, a tripartite escrow agreement or a certificate of deposit.[10]

Most states have similar laws for state and municipal projects. These state laws are similar to the federal Miller Act and are referred to as “Little Miller Act” statutes. The Miller Act was first enacted in 1935, and federal courts have provided much guidance on its interpretation. State courts interpreting their own Little Miller Acts will often look to federal case law for guidance.

State bond principals and claimants should remember, however, that the Little Miller Acts in each state vary slightly and that state courts are not required to follow federal courts. It is dangerous to think you know the bond laws in Virginia because you have experience in Maryland or with federal projects. Nonetheless, the federal Miller Act is a good starting point for a discussion of public bonding law. This chapter will discuss the federal Miller Act, followed by a discussion of the Little Miller Acts of Virginia, Maryland, Pennsylvania and the District of Columbia, focusing on their differences with the federal Miller Act.

PAYMENT BONDS

Introduction

Contractors cannot file mechanic’s liens on public projects such as highways, schools, fire stations, etc. Enforcement of such a mechanic’s lien would result in the foreclosure of public real estate. Instead, contractors and suppliers on public projects are provided alternative security.[11] A general contractor on a public project usually must provide a payment bond to secure payment to all subcontractors and suppliers on the project. The general contractor is the principal on the bond. The third-party surety guaranties that qualified claimants will be paid.

The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they would receive under state mechanic’s lien statutes.[12] Because the Act is “highly remedial in nature,” it must be liberally construed and applied to promote Congress’s intent to protect subcontractors and suppliers whose labor and materials go into public projects.[13]

---

[4] 40 U.S.C.A. §3131 states that bonds are required for contracts over $100,000, but 48 CFR §28.102-2(b) apparently raises the threshold to $150,000. This may be increased to $200,000 in 2020.

[5] 40 U.S.C.A. §3131(d) [A contracting officer may waive the requirement of a performance bond and payment bond for work under a contract performed in a foreign country if it is impracticable for the contractor to furnish the bonds]; 40 U.S.C.A. §3134(a) [The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of Transportation may waive Miller Act bonding requirements on a cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work and on contracts for manufacturing, producing, furnishing, constructing, altering, repairing, processing, or assembling vessels, aircraft, munitions, materiel, or supplies for the Army, Navy, Air Force, or Coast Guard].

[6] 40 U.S.C.A. §3131(e).

[7] 40 U.S.C.A. §3131(b); *but see* 48 CFR §28.102-2.

[8] 40 U.S.C.A. §3132 provides for alternatives to payment bonds for a contract under $100,000, but 48 CFR §28.102-1(b) apparently raises the threshold to $150,000.

[9] 48 CFR §28.102-1(b)(1).

[10] 48 CFR §28.102-1(b)(1)(i-v).

[11] *F. D. Rich Co. v. United States for the Use of Indus. Lumber Co.*, 417 U.S. 116, 121-122 (U.S. 1974) [The Miller Act is highly remedial and entitled to a liberal construction]; *United States ex rel. Modern Elec. v. Ideal Elec. Sec. Co.*, 868 F. Supp. 10, 14 (D.D.C. 1994).

[12] *United States ex rel. Sherman v. Carter,* 353 U.S. 210, 216, 1 L. Ed. 2d 776, 77 S. Ct. 793 (1957); *Mai Steel Service, Inc. v. Blake Constr. Co.,* 981 F.2d 414, 416-17 (9th Cir. Cal. 1992).

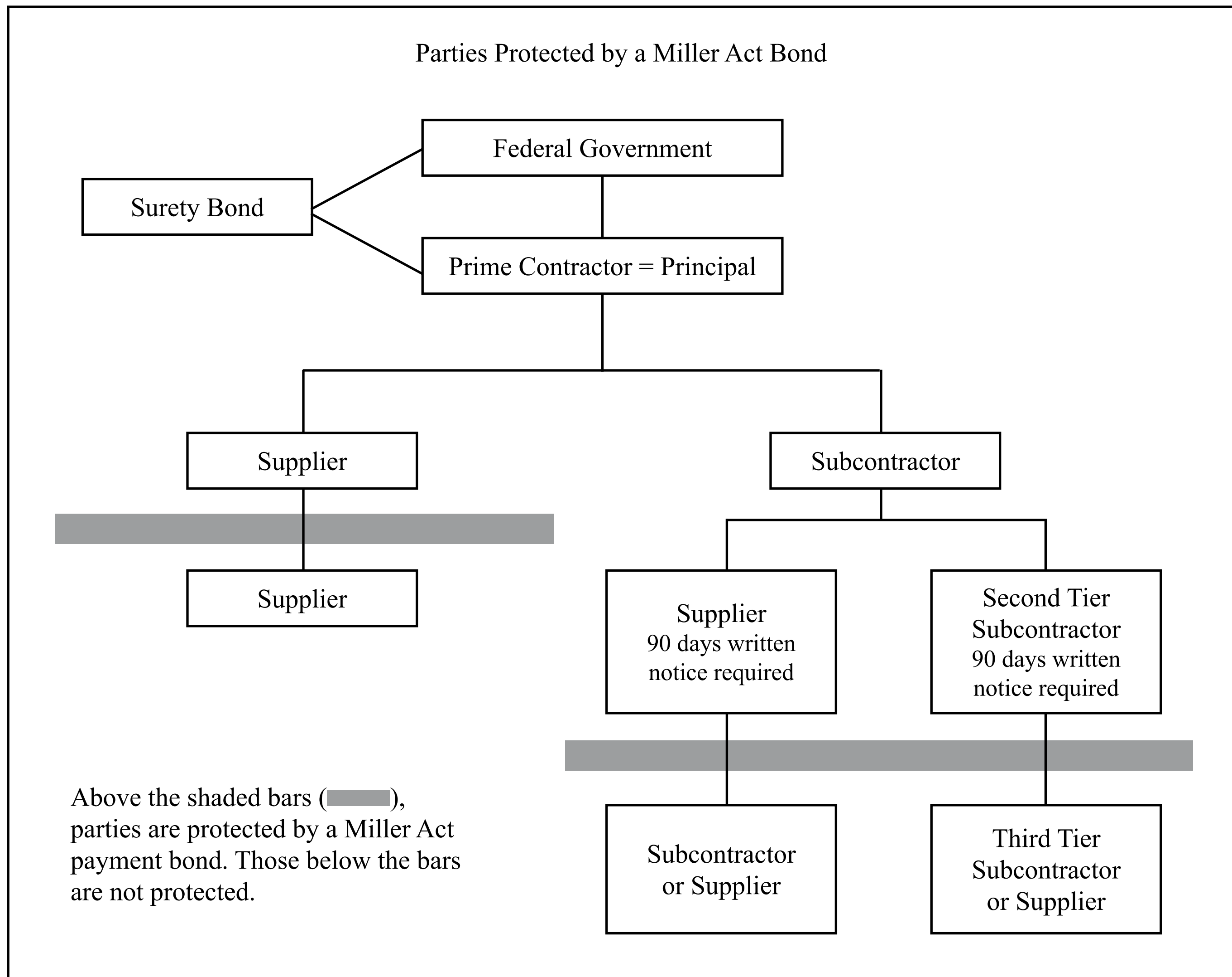
[13] *United States ex rel. Sherman v. Carter,* 353 U.S. 210, 216, 1 L. Ed. 2d 776, 77 S. Ct. 793 (1957); *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co.,* 322 U.S. 102, 107, 88 L. Ed. 1163, 64 S. Ct. 890 (1944).

The Miller Act does not limit a second tier subcontractor's (sub-subcontractor's) recovery to situations where the general contractor is at fault. A sub-subcontractor can recover against a Miller Act surety for labor and materials furnished to a subcontractor, even if the general contractor is blameless and has paid the subcontractor in full.[14] In other words, a general contractor with a payment bond can be required to pay for the same labor or material twice.[15]

Possible Bond Claimants

Miller Act payment bonds are for "the protection of all persons supplying labor and material in the prosecution of the work."[16] There are two main questions in determining who may make a claim (who is a beneficiary under the bond): (1) whether the claimant supplied a type of labor or material that is covered, and (2) whether the claimant is too remote contractually from the bond principal.

First, the claim must be for labor and material in the prosecution of the work. This generally means that traditional subs on the project such as electrical, masonry, etc., are covered. There are gray areas, however. Any contractor needs paper, pencils and office staff to perform work. In a sense, such labor and materials are figured into the contractor's bid and are a part of the project. Office staff cannot make bond claims for labor, however, nor can stationary stores make claims for materials because they have not supplied labor and material in the prosecution of the work.



14 *Mai Steel Service, Inc. v. Blake Constr. Co.,* 981 F.2d 414, 419 (9th Cir. Cal. 1992).

15 *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC,* 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011).

16 40 U.S.C.A. §3131(b)(2); *See Technica LLC ex rel. United States v. Carolina Cas. Ins. Co*., 749 F.3d 1149 (9th Cir. Cal. 2014) [Lack of contractor's license under state law is no defense to Miller Act Payment Bond claim].

A common problem involves architects, engineers, estimators and other professionals. These professionals will not have a claim unless they have a physical presence and duties on the job site.[17] Second, the federal courts decided long ago that the bond covers only "first tier" claimants, persons that have a contractual relationship with the prime contractor, or "second tier" claimants, persons supplying labor or materials to a subcontractor of the prime This means that bond claimants may only be so "remote" from the prime. As also discussed below, a "supplier to a supplier" will not usually have payment bond rights. This is graphically described by the following chart.

First tier claimants deal directly with the prime contractor. They are covered as long as they supplied labor or material used "in the prosecution of the work."

Second tier claimants are covered if they have dealt with a *subcontractor* and supplied labor or material used "in the prosecution of the work." This means a subcontractor that "took over" and performed a specific or recognizable portion of the prime contract.

Potential bond claimants, evaluating their security before supplying labor or materials to a project, should determine how far removed they are from the bond principal. A general contractor/bond principal can create related corporations that will act as subcontractors on a job. These "related subcontractors" could then contract with outside companies for labor and materials. There may be legitimate business reasons for creating these intervening related entities, but potential claimants should understand that they are now further removed from the bond principal and may not have any bond rights.[18] Courts can refuse to recognize "straw man" subcontractors and can look to the substance of the transaction instead of the form to hold that the claimant does have bond rights.[19]

Supplier to Supplier

The courts have recognized two levels of materialmen (suppliers). First tier materialmen supply materials to a subcontractor or to the prime. Second tier materialmen do not supply a subcontractor but supply only other materialmen. First tier materialmen are covered.[20] Second tier materialmen are not protected by Miller Act bonds.[21] In other words, a "supplier to a supplier" will not have bond rights. [22]

Federal courts interpreting the Miller Act have decided that materialmen are *not* subcontractors. There are two divergent definitions of "subcontractor." One definition requires that work is done at the construction site to qualify as a subcontractor. A subcontractor actually participates in the building or erection. A materialman supplies material either manufactured or fabricated elsewhere for use in that building. If the fabricator of material does not engage in any process that incorporates the material into the improvement under construction, he is a materialman. It does not matter whether the product is procured from another manufacturer and delivered unchanged to the building site or if it is shaped from other material before it is delivered to the job site.[23]

The alternative definition is that the essential feature which distinguishes a subcontractor from a materialman is the course of performance of the prime contract.[24] A subcontractor constructs a definite, substantial part of the work in accord with the plans and specifications, not that he enters upon the job site. A subcontractor does not necessarily install work at the site of the improvement. Rather, a subcontractor agrees with the prime contractor to perform a substantial specified portion of the work in accord with the plans and specifications and is in "charge of the construction" of that part of the work.[25]

---

[17] *United States for the Use and Benefit of Naberhaus-Burke v. Butt & Head, Inc.*, 535 F.Supp. 1155, 1158 (S.D. Ohio 1982).

[18] *United States for the Use and Benefit of Global Bldg. Supply, Inc. v. WNH Limited Partnership*, 995 F.2d 515 (4th Cir. Va. 1993).

[19] *United States use of Global Bldg. Supply, Inc. v. WNH Ltd. Partnership*, 995 F.2d 515, 519-520 (4th Cir. Va. 1993) [appropriate only where ordinary principles of corporate law permit the courts to disregard corporate forms]; *Glen Falls Ins. Co. v. Newton Lumber & Manuf. Co.*, 388 F.2d 66, 69-70 (10th Cir. 1967) [holding that alleged subcontractor was a sham for the purpose of avoiding liability and that the alleged subcontractor was really the prime contractor's agent].

[20] *United States for the Use and Benefit of Morris Const., Inc. v. Aetna Casualty and Ins. Co.*, 908 F.2d 375, 377 (8th Cir. 1990).

[21] *Atlantic Sea-Con, Ltd. v. Robert Dann Co.*, 321 Md. 275, 582 A.2d 981 (1990).

[22] *Atlantic Sea-Con, Ltd. v. Robert Dann Co.*, 321 Md. 275, 582 A.2d 981 (1990).

[23] *Preussag Int'l Steel Corp. v. March-Westin Co.*, 221 W. Va. 472, 478-79, 655 S.E.2d 494 (2007), *citing Vulcraft v. Midtown Business Park, Ltd.*, 110 N.M. 761, 800 P.2d 195, 197 (1990).

[24] *See also F. D. Rich Co. v. United States for the Use of Indus. Lumber Co*., 417 U.S. 116, 123-124 (U.S. 1974) [test for whether one is a subcontractor is the substantiality and importance of his relationship with the prime contractor. It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few "subcontractors" with whom he has a substantial relationship in the performance of the contract].

[25] *Preussag Int'l Steel Corp. v. March-Westin Co.,* 221 W. Va. 472, 478-79, 655 S.E.2d 494 (2007), *citing Vulcraft v. Midtown Business Park, Ltd.,* 110 N.M. 761, 800 P.2d 195, 197 (1990).

The material cannot be generic, stock, off-the-shelf items or items generally available without modification in order to be a subcontractor under the second definition. It must be fabricated uniquely or specially by the contractor for the requirements of the particular project. The work performed must also be substantial, not a small expenditure of labor in relation to a contract mainly for material.[26]

Generally, courts have found the following factors weigh in favor of a subcontractor relationship: (1) the product supplied is custom fabricated; (2) the product supplied is a complex integrated system; (3) a close financial interrelationship exists between the companies; (4) a continuing relationship exists with the prime contractor as evidenced by the requirement of shop drawing approval by prime contractor or the requirement that the supplier's representative be on the job site; (5) the supplier is required to perform on site; (6) there is a contract for labor in addition to materials; (7) the term "subcontractor" is used in the agreement; (8) the materials supplied do not come from existing inventory; (9) the supplier's contract constitutes a substantial portion of the prime contract; (10) the supplier is required to furnish all the material of a particular type; (11) the supplier is required to post a performance bond; (12) there is a back charge for cost of correcting supplier's mistakes; and (13) there is system of progressive or proportionate fee payment.

Generally, cases have found the following factors tend to weigh in favor of a materialman relationship: (1) a purchase order form is used by the parties; (2) the materials come from preexisting inventory; (3) the item supplied is relatively simple in nature; (4) the contract is a small percentage of the total construction cost; and (5) sales tax is included in the contract price.[27]

Assignment of Payment Bond Rights

The most obvious observation is that an assignment of payment bond rights is not effective if the claimant is not owed any money on the project. If the claimant was paid or the claimant defaulted on its contract, then the claimant also has no payment bond rights. Anyone with an assignment of bond rights from the claimant has no enforceable rights on the project.

An assignment of payment bond rights could solve remoteness issues, by bringing the creditor one tier closer to the owner and general contractor. However, it can be questionable whether bond rights are assignable.

Federal Miller Act bond rights do have some certainty on assignability. The case law seems fairly clear that federal Miller Act bond rights are assignable.[28] This federal law should be applicable to federal projects in all fifty states.

Many states have Little Miller Acts that are very similar to the federal Miller Act. However, the assignability of Little Miller Act bond rights will be state specific. State courts tend to look to the federal Miller Act to interpret their state Little Miller Act, unless the state law has a relevant difference in wording. However a state court is not bound to follow federal Miller Act case law and this will create uncertainty, unless a high-ranking court has ruled on the issue in a recorded case. There is no known case law of this subject in the Mid-Atlantic states. Accordingly, you can make a general prediction that state Little Miller Act bond rights are assignable. However, you do not have certainty unless there is clear high-level state case law that Little Miller Act bond rights are assignable.[29]

Private bond rights would not have the same public policy questions. A bond is a private contract. Contract rights are generally assignable. Accordingly, you can make a general prediction that private bond rights are assignable. However, the answer to this question will be state specific. There seems to be little case law on this subject and no known case law in the Mid-Atlantic states. You do not have certainty. Since a private bond is a private contract, there are also no restrictions on how the bond form is worded. Any owner and general contractor would be free to agree in

---

[26] *Preussag Int'l Steel Corp. v. March-Westin Co.,* 221 W. Va. 472, 478-79, 655 S.E.2d 494 (2007), *citing Vulcraft v. Midtown Business Park, Ltd.,* 110 N.M. 761, 800 P.2d 195, 197 (1990).

[27] *Preussag Int'l Steel Corp. v. March-Westin Co*., 221 W. Va. 472, 484, 655 S.E.2d 494 (2007) *citing U.S. for Use and Ben. of Conveyor Rental v. Aetna*, 981 F.2d 448, 451-452 (9th Cir. 1992); *see also Miller Equipment Co. v. Colonial Steel & Iron Co*., 383 F.2d 669, 674 (4th Cir. 1967), cert. den. 390 U.S. 955, 88 S.Ct. 1049, 19 L.Ed.2d 1148 (1968) [Colonial in actuality was a subcontractor as envisaged by the Miller Act and was certainly no ordinary materialman. The amount due it for successful performance of its contract was $115,000.00, more than 15% of the sum due under the prime contract and 64% of item 20 under the prime contract, a fundamental provision of that contract because it was the specification for structural steel. The agreement called not for the mere supply of materials but for the custom fabrication of massive girders and their accessories, key and integral components of the bridge, designed and fabricated to mesh precisely in their final assembly on the job-site].

[28] *U.S. ex rel. Sherman v. Carter*, 353 U.S. 210, 219 (1957).

[29] *Quantum Corporate Funding, Ltd. v. Westway Indus*., 4 N.Y.3d 211 (N.Y. 2005); *Trs. for Mich. Laborers' Health Care Fund v. Seaboard Sur. Co*.,137 F.3d 427 (6th Cir. 1998); *Shoshoni Lumber Co. v. Fidelity & Deposit Co*., 46 Wyo. 241 (Wyo. 1933); *Finch v. Enke*, 54 S.D. 164 (S.D. 1929).

the bond that rights would be nonassignable. They can also agree to add a defense of payment feature or add other limitations to the bond. This would further complicate the issue.

Possible Bond Claims—Compensable Costs

Labor

Since Miller Act payment bonds are for "the protection of all persons supplying labor and material in carrying out the work provided for in the contract"[30] the costs of physical labor performed on the job site will be recoverable.

There can be some uncertainty about what qualifies as "labor." Courts have generally rules that it means "physical toil" on the Job site.[31] The cost of professional services, such as architects, engineers and estimators, will not be recovered unless these services include on-site supervision or other on-site duties.[32] Similarly, the cost of office personnel, standing alone and without on-site responsibilities, is not recoverable on the bond. Paying invoices, reviewing proposals, and supervising hiring are clerical or administrative tasks which, even if performed at the job site, do not involve the physical toil or manual work necessary to bring them within the scope of the Miller Act.[33] However, in practice, all such home office expenses are figured into the contractor's bid. Any on-site contractor seeking the balance of its contract will also be able to recover these off-site costs.

Material

The cost of most materials will be recoverable under a payment bond. All materials supplied pursuant to and included in the prime contract should be recoverable under the bond, whether or not those materials are constructed on site or constitute a portion of the "construction" of the public building.[34]A frequently disputed issue involves the cost of materials or equipment not consumed in the performance of the work, such as tools and equipment. If a set of equipment tires is reasonably expected to be used up or consumed on this particular project, then the bond will cover the cost of those tires.[35] If a contractor buys new equipment for a project, but the equipment is expected to have a useful life after completion of the project, the cost of this equipment will not be recoverable.[36] The claimant is entitled to the reasonable rental value of the equipment and the cost of small repairs, but not for the capital value of lost or missing equipment.[37]

Rental Equipment

If the claimant had to rent equipment to perform its work, the cost of those rentals will be covered under Miller Act and most Little Miller Act payment bonds.[38]

---

[30] 40 U.S.C.A. §3131(b)(2).

[31] *Naberhaus-Burke, Inc. v. Butt & Head, Inc.,* 535 F. Supp. 1155, 1158-1160 (S.D. Ohio 1982) [Federal case law has adopted an admittedly somewhat narrow definition of the term "labor," . . . covering only skilled professional work which involves actual superintending, supervision, or inspection at the job site]; *but see Morgan Building & Spas, Inc. v. BKJ Solutions, Inc.,* 2012 U.S. Dist. LEXIS 101139 (W.D. Okla. July 20, 2012) [The Miller Act clearly limits its bond requirements to contracts awarded for the construction, alteration, or repair of any public building; however, it does not limit protection under the payment bond to those who specifically perform the construction, alteration or repair work. Rather, the Miller Act clearly and specifically states that the payment bond is "for the protection of all persons supplying labor and material in carrying out the work provided for in the contract"]; *See also Barber-Colman Co. v. United States Fid. & Guar. Co.,* 19 F.3d 1431 (4th Cir. 1994) [unpublished opinion].

[32] *United States for the Use and Benefit of Olson v. W.H. Cates Const. Co., Inc.,* 972 F.2d 987 (8th Cir. 1992); *Thayer v. Metro Constr. Corp.,* 330 F. Supp. 386 (E.D. Va. 1971) [Engineer that had no contractual obligation to visit a job site had no Miller Act rights].

[33] *Constructors, Inc. v. Gulf Ins. Co.,* 313 F. Supp. 2d 593, 597 (E.D. Va. 2004); *See also Shannon v. Fed. Ins. Co.,* 2006 U.S. Dist. LEXIS 56509, at *11-14 (S.D. Miss. 2006) [Project manager did not have a Miller Act claim for negotiating new contracts, determining bid amounts and change orders, preparing bid proposals, negotiating and signing new subcontracts and purchase orders, even if living on site. Performing routine office maintenance is not enough to constitute physical labor that went towards completion of the construction activities].

[34] *Morgan Building & Spas, Inc. v. BKJ Solutions, Inc*., 2012 U.S. Dist. LEXIS 101139 (W.D. Okla. July 20, 2012) [Bond rights for modular buildings constructed off site].

[35] *United States for the Use and Benefit of J.P. Byrne & Co. v. Fire Assoc. of Philadelphia*, 260 F.2d 541, 544 (2nd Cir. 1958).

[36] *United States for the Use and Benefit of Sunbelt Pipe Corp. v. United States Fidelity & Guaranty Co.*, 785 F.2d 468, 470 (4th Cir. 1986).

[37] *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC,* 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011).

[38] *United States for the Use and Benefit of Skip Kirchdorfer, Inc. v. AEGIS/Zublin Joint Venture*, 869 F.Supp. 387, 395 (E.D. Va. 1994); Va. Code Anno. §2.2-4337 (Michie 1950); *R.C. Stanhope, Inc. v. Roanoke Constr. Co.*, 539 F.2d 992 (4th Cir. 1976); Maryland State Finance and Procurement Code Ann. §17-101(b) (1988); Public Works Contractors' Bond Law 1967, 8 P.S. §193.

Material Not Actually Used and Good Faith Belief Rule

Common problems include materials delivered to one (bonded) job site but later moved to another job site. If the material supplier reasonably believed (had a good faith belief) that the materials would be used on the bonded job site, their value will be recoverable under the bond.[39]

The claimant can recover for rental equipment supplied after the customer had been terminated on a project, at least when the claimant had no notice of the termination.[40]

A bond claim will not be defeated if the materials are never actually incorporated into the project, are never even delivered to the project or if they are moved to another project.[41] But in order to "furnish" the materials, and have rights on the bond, it may be necessary to at least offer to deliver the materials.[42] Even if there have been prior payment problems, a manufacturer will not have bond rights by merely fabricating the materials and storing them, unless the materials goods were wrongfully rejected or delivery refused by the buyer.[43]

Delay and Constructive Change Costs

Some federal courts have ruled that the actual costs of delay[44] and other constructive changes are recoverable as costs of providing labor and material to the project.[45] Courts have also ruled that a surety cannot rely on a "no damage for delay" clause in a subcontract to avoid a bond claim for delay damages.[46]

However, lost profits caused by delay are not out-of-pocket expenditures for "labor and material" and consequently are not recoverable under a Miller Act payment bond.[47]

Interest and Attorney's Fees

The Miller Act now states that payment bonds shall be security for the "amount unpaid" claimants.[48] Earlier versions of the Miller Act stated that the payment bonds were security for "sums justly due" claimants.[49] Under this former "sums justly due" language, most federal courts held the surety liable to pay all interest or attorney's fees that are justly due to the claimant under their contract or under any federal law.[50] It appears that the change in language

---

[39] *United States for the Use and Benefit of Krupp Steel Products, Inc. v. Aetna Ins. Co*., 831 F.2d 978, 980 (11th Cir. 1987); *United States for the Use and Benefit of I. Burack, Inc. v. Sovereign Construction Co*., 338 F.Supp. 657 S.D.N.Y. (1972); *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC,* 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011); *Aetna Casualty & Surety Co. v. Circle Equipment Co*., 377 F.2d 160 (D.C. Cir. 1967).

[40] *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC,* 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011).

[41] *United States for the Use and Benefit of Westinghouse Electric Supply Co. v. Enderbrock-White Co. Inc.*, 275 F.2d 57 (4th Cir. 1960); *United States for the Use and Benefit of Sunbelt Pipe Corp. v. U.S.-Fidelity*, 785 F.2d 468 (4th Cir. 1986); *Solite Masonry Units Corp. v. Piland Const. Co., Inc.*, 217 Va. 727, 730-31, 232 S.E.2d 759, 761-62 (1977); *Can-Tex Industries v. Safeco Ins. Co. of America*, 460 F. Supp. 1022 (W.D.Pa. 1978); *United States for the Use and Benefit of Color Craft Corp. v. Dickstein*, 157 F.Supp. 126 (E.D.N.C. 1957).

[42] *F.L. Saino Mfg. Co. v. Fireman's Fund Ins. Co.,* 173 Ga. App. 753, 754 (Ga. Ct. App. 1985) [Merely manufacturing the goods, without any act of offering or delivering the goods, did not furnish, provide, supply or give them as is commonly contemplated by the use of the word "furnish"].

[43] *United States use of Lanahan Lumber Co. v. Spearin, Preston & Burrows, Inc.,* 496 F. Supp. 816 (M.D. Fla. 1980) [May be sufficient if the buyer refuses to accept delivery after the seller "tenders" delivery by notifying the buyer that the materials are ready for delivery].

[44] *Heller Electric Co. Inc. v. William F. Klingensmith, Inc.*, 670 F2d 1227, 1232 (D.C.Cir. 1982); *Mai Steel Service, Inc. v. Blake Constr. Co.,* 981 F.2d 414, 418 (9th Cir. Cal. 1992).

[45] *United States for the Use and Benefit of T.M.S. Mechanical Contractors, Inc. v. Millers Mutual Fire Ins. Co. of Texas*, 942 F.2d 946, 951 (5th Cir. 1991); *General Fed. Constr., Inc. v. D.R. Thomas, Inc.*, 52 Md.App. 700, 451 A.2d 1250 (1982); *Hartford Accident & Indemnity Co. v. District of Columbia*, 441 A.2d 969 (D.C.App. 1982).

[46] *Kitchens to Go v. John C. Grimberg Co.,* 283 F. Supp. 3d 476, 482 (E.D. Va. 2017) [The text of the Miller Act provides that a subcontractor's cause of action arises after the passage of time—specifically, 90 days after the subcontractor provides the last labor or materials for which the claim is made—not after the occurrence of some other condition such as payment by an owner. . . . In other words, the Miller Act text clearly makes the 90-day provision the only condition for an action on the payment bond. Thus, a no-damages-for-delay clause contradicts this plain statutory text by adding a condition to the action on the payment bond that a subcontractor can only bring a Miller Act claim if the owner has paid the prime contractor for the delays].

[47] *Consolidated Electrical & Mechanicals, Inc. v. Biggs General Contracting, Inc.*, 167 F.3d 432 (8th Cir. 1999); *Mai Steel Service, Inc. v. Blake Constr. Co.,* 981 F.2d 414, 418 (9th Cir. Cal. 1992).

[48] 40 U.S.C.A. §3133(b)(1).

[49] 40 U.S.C.A. §270(b)(a), *Superceded.*

[50] *United States ex rel. Rent It Co. v. Aetna Casualty & Surety Co*., 988 F.2d 88, 91 (10th Cir. Okla. 1993) [Even when a fee-shifting provision is enforceable against a Miller Act surety, the trial court has discretion to adjust or even deny a contractual award of fees if such an award would be inequitable or unreasonable]; *Taylor Construction, Inc. v. ABT Service Corp. Inc.*, 163 F3d. 1119 (9th Cir. 1998); *United States for the Use and Benefit of Southeastern Municipal Supply Co., Inc. v. National Union Fire Insurance Co.*, 876 F.2d 92 (11th Cir. 1989); *See also D & L Construction Company v. Triangle Electric Supply Co.*, 332 F.2d 1009 (8th Cir. 1964).

from "sums justly due" to "amount unpaid" claimants does not make a difference in this result.[51] The logic discussed below would still apply and that claimants should still be entitled to interest and attorney's fees. We will need a few more court decisions to give us complete guidance.

Under the "sums justly due" language, a claimant must still have a contract requiring payment of attorney's fees or interest above the legal rate before the surety is liable for these sums.[52] Notice that this language focuses on what is due the claimant, not on *who* owes the claimant. If the bond principal has signed a contract with the claimant calling for 18% interest and attorney's fees on default, then these costs are "sums justly due" to the claimant.[53] A second tier claimant, however, may have a contract that includes costs of collection. This second tier claimant would not have any *contract* claim against the bond principal for costs of collection, because the claimant and principal have no contract between them. However, the collection costs would still be sums justly due the claimant from the intermediate contractor and may be recoverable under the bond.[54] Similarly, the words "amount unpaid" should lead to the same result.

State law usually allows recovery of a legal rate of interest on any contract debt, even if there is no written contract term. The federal court will look to such state law or some other federal law to determine whether interest is a sum justly due the claimant. If the claimant has a contract term calling for interest above the state legal rate, then this higher rate may also be due under the bond.[55]

The Virginia Little Miller Act does not use the "sums justly due" language. It requires payment bonds "conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work."[56] The Maryland Little Miller Act similarly requires "security to guarantee payment for labor and materials."[57] This difference in language between the federal Miller Act and the Little Miller Acts means that these state statutes probably do not extend bond coverage to contract claims that are not for labor or materials.

Some state Little Miller Acts still use the "sums justly due" language. The District of Columbia Little Miller Act, for example, follows the language of the former Miller Act.[58] It is more likely that state courts would follow federal case law and allow a claim for contractual rates of interest and attorney's fees if the state law uses this same language.

Even if the state Little Miller Act does not use the "sums justly due" language, the actual bond forms used by the surety might. The surety and bond principal may voluntarily subject themselves to this liability, even though it is not required by statute. This is discussed further in the section on Bond Forms below.

Notice Requirements for Claimants

There are no notice requirements for first tier claimants who have a contractual relationship directly with the contractor providing the payment bond (bond principal). As discussed below, the first requirement for first tier subcontractors is to file suit on the payment bond within one year of last work. This makes sense since the nonpaying contractor knows it has not paid its subcontractors. Individuals farther down the chain, however, have very strict notice requirements.[59]

---

[51] *United States ex rel. Probuild Co. v. Scarborough*, 2012 U.S. Dist. LEXIS 62427, 22-24 (E.D. Va. Apr. 11, 2012); *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC*, 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011) and 2011 U.S. Dist. LEXIS 71755 (E.D. Va. July 5, 2011).

[52] *Taylor Construction, Inc. v. ABT Service Corp. Inc.*, 163 F3d. 1119 (9th Cir. 1998); *United States for the Use and Benefit of Southeastern Municipal Supply Co., Inc. v. National Union Fire Insurance Co.*, 876 F.2d 92 (11th Cir. 1989); *See also D & L Construction Company v. Triangle Electric Supply Co.*, 332 F.2d 1009 (8th Cir. 1964).

[53] *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC,* 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011) and 2011 U.S. Dist. LEXIS 71755 (E.D. Va. July 5, 2011).

[54] *See also United State for the Use and Benefit of Maddox Supply Company v. St. Paul Fire and Marine Insurance Company*, 86 F.3d 332 (4th Cir. 1996); *United States for the Use and Benefit of Carter Equipment Co., Inc. v. H. R. Morgan Inc.*, 554 F.2d 164 (11th Cir. 1977); *United States for the Use and Benefit of Southeastern Mun. Supply Co., Inc. v. National Union Fire Insurance Co.*, 876 F.2d 92 (11th Cir. 1989).

[55] *D & L Construction Company v. Triangle Electric Supply Co.*, 332 F.2d 1009 (8th Cir. 1964); *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC,* 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011) and 2011 U.S. Dist. LEXIS 71755 (E.D. Va. July 5, 2011).

[56] Va. Code Anno. §2.2-4337(2) (Michie 1950).

[57] Maryland State Finance and Procurement Code Ann. §17-101(b) (1988).

[58] D.C. Code §2-201.01 et al.; 40 U.S.C.A. §270b et al., *Superceded.*

[59] 40 U.S.C.A. §3133(b)(2).

In order to avoid a notice requirement, the claimant only needs a *contractual relationship*, express or implied, with the contractor furnishing the payment bond.[60] The claimant's contract with the bond principal does not necessarily need to be the contract for the supply of labor or materials that gave rise to the bond claim. An adequate contractual relationship was found, avoiding the need for notice, where the claimant had a guarantee of payment from the bond principal,[61] a written agreement by the bond principal to pay a specified third party,[62] or even a verbal agreement to pay for material previously delivered to the job site.[63]

Time Limits for Notice

A second tier payment bond claimant must provide written notice to the prime contractor within 90 days from the date on which the claimant supplied its last labor or material for which the claim is made.[64] The notice must state with substantial accuracy the amount claimed, the name of the party to whom the labor or material was furnished or supplied,[65] and that the claimant looks to the bond principal for payment.[66] The notice should make it clear that a claim is being made on the bond and that the claimant is looking to the bond principal for payment. This notice allows the prime contractor to protect itself by withholding money from its nonpaying sub.[67]

The federal Fourth Circuit Court of Appeals, which includes Virginia and Maryland, has decided that the bond principal must *receive* the notice within 90 days.[68] All claimants should make sure to leave enough time for actual receipt of the notice within the 90-day deadline.

Notice that the time limit runs from the date of last labor or *for which the claim is made.*"[69] This means that *paid* or COD deliveries will not extend the time for notice of bond claim.[70] The claimant is not "making a claim" for paid deliveries, and the notice must be sent within 90 days of the last delivery "for which the claim is made." The language of Miller Act and the Little Miller Acts in Virginia, Maryland, Pennsylvania and the District of Columbia are the same in this regard, so each of these state courts would probably come to the same result.

As we will discuss below, the time limit for *filing suit* does not use this "for which the claim is made" language, so paid or unpaid deliveries can extend the time for filing suit to enforce payment bond rights.

As we will also discuss below, a claimant cannot file suit on its payment bond claim until 90 days after the last supply of labor or material for which such claim is made. The initial notice of the bond claim, however, can be sent while work continues.[71] It may be necessary to send an additional notice after work is complete, however, in order to make sure the notice states with substantial accuracy the amount claimed after completion.

---

[60] 40 U.S.C.A. §3133(b)(2); *See also United States ex rel. Billows Elec. Supply Co. v. E.J.T. Constr. Co.*, 517 F. Supp. 1178, 1182 (E.D. Pa. 1981), *but see Noland Co. v. Armco, Inc*., 52 Md. App. 12, 15-16, 445 A.2d 1079, 1080-81 (Md. Ct. Spec. App. 1982).

[61] *Foley & Bro., Inc. v. United States Fidelity & Guaranty Co*., 113 F.2d 888, 890 (2d Cir. N.Y. 1940).

[62] *Noland Co. v. Wood*, 99 F.2d 80 (4th Cir. 1938).

[63] *American Casualty Co. v. Southern Materials Co*., 261 F.2d 197, 201 (4th Cir. Va. 1958).

[64] 40 U.S.C.A. §3133 (b)(2).

[65] *CTI/DC, Inc. v. Selective Ins. Co. of Am*., 392 F.3d 114, 120 (4th Cir. Md. 2004) [The name of the subcontractor is the crucial aspect of the "Little Miller Act's" notice requirements. Absent this information, the general contractor is left to use his or her imagination to attempt to determine which subcontractor not to pay] *citing United States ex rel. A. Edwards & Co. v. Thompson Const. Corp.*, 273 F.2d 873, 877 (2nd Cir. 1959).

[66] 40 U.S.C.A. §3133(b)(2).

[67] *Stauffer Constr. Co. v. Tate Eng., Inc*, 44 Md.App. 240, 407 A.2d 1191 (1979).

[68] *United States ex rel. B&R. Inc. v. Donald Lane Construction*, 19 F.Supp.2d 217 (D.Del. 1998); *Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1130 (4th Cir. 1992). A Virginia Circuit Court has come to the same result under the Virginia Little Miller Act. *R.T. Atkison Building Corp. v. Archer Western Construction, LLC*, 90 Va. Cir. 240 (Norfolk Cir. Ct. 2015); *But see Montgomery County Board of Education v. Glassman Constr. Co.,* 245 Md. 192, 204, 225 A.2d 448, 455 (1967) [Properly mailing the notice within the 90 day deadline is sufficient].

[69] 40 U.S.C.S. §3133 (b)(2). *Emphasis added.*

[70] *United States v. United States Fidelity & Guaranty Co.,* 422 F.2d 597 (4th Cir. 1970); *Du Kane Corp. v. United States Fidelity & Guar. Co.*, 422 F.2d 597 (4th Cir. 1970).

[71] *United States ex rel. Honeywell v. A & L Mechanical Contractors,* 677 F.2d 383,385 (4th Cir. N.C. 1982); *Stauffer Constr. Co. v. Tate Engineering, Inc.*, 44 Md. App. 240, 244, 407 A.2d 1191, 1193 (Md. Ct. Spec. App. 1979) [if there is a single contract, it is immaterial if a small part of the work is performed or a small part of the materials is furnished after the notice; the rule, however, is to the contrary if each delivery is a separate contract].

The requirement that the notice state with substantial accuracy the amount claimed does not require precision. Even if the claimant is later found to be due something less than its claim, the notice may still have been substantially accurate.[72]

Completion of Project and Claimant's Last Work

How do payment bond claimants know when their work on a project has been completed? Does trivial work, warranty work or repair work extend the deadline for filing suit on the bond?

The answers to these questions are extremely fact-sensitive. That means the answer depends on the particular facts in each case. Courts will look to the nature of the work performed in light of the overall project.[73] Factors courts will consider include the value of the materials supplied, the original contract specifications, the unexpected nature of the work and the importance of the materials to the operation of the system in which they are used.[74] Different courts sometimes seem to give inconsistent results although we can see a few consistent themes.

It does seem that long periods of time without supplying labor or material can be a problem, especially for open account suppliers or if there are a series of purchase orders or contracts. If an open account supplier has made no deliveries for ninety days, another delivery will not revive the right to a bond claim for those earlier deliveries.[75] A claimant with a single contract will have a claim for all deliveries, however, if there is a 90-day gap in deliveries, but the claimant then supplies additional labor or material necessary for completion of the contract scope of work.[76] Indeed, some courts hold that there is a bond claim only for open account deliveries within ninety days of the notice.[77] The majority view seems to be there is a bond claim for all open account deliveries, as long as notice is provided within ninety days of the last delivery.[78]

It also makes a difference whether the owner or general contractor required or demanded the additional work.[79] It is difficult to demand additional work because the contract is not yet complete and then later argue that contract was complete earlier. Responding to demands from an owner or general contractor helps a court determine that the claimant was "acting in good faith."

Some courts are concerned with the difference between "warranty" and "repair" work. Many contracts have warranty periods of a year or more. If a project really was one hundred percent complete at one time and the contractor declared they were complete by requesting full payment, "warranty" work months later may not extend the time.

The federal courts seem fairly set that repair work will not extend the time to provide notice or to file suit. The "test to be applied is whether the work was performed and the material supplied as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.'"[80]

The Virginia Supreme Court has held that so long as "a claimant does work in good faith, at the request of the owner and for the purpose of fully completing his contract according to its terms, the period required for giving the notice under the provisions of the bond runs from the time of the completion of such additional work."[81]

The Maryland cases dealing with this issue reject the idea that they must follow precedent based on the federal Miller Act. The date from which the 90-day provision is to run is the date the last work necessary to complete the

---

[72] *United States ex rel. Honeywell v. A & L Mechanical Contractors*, 677 F.2d 383, 386-387 (4th Cir. N.C. 1982) *CTI/DC, Inc. v. Selective Ins. Co. of Am*., 392 F.3d 114, 119 (4th Cir. Md. 2004) [In defining "substantial accuracy" as the term is used in the Federal Miller Act, courts find it sufficient that "there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness has been brought home to the general contractor], *citing Houston Fire and Cas. Ins. Co. v. United States ex rel. Trane Co.*, 217 F.2d 727, 730 (5th Cir. 1954).

[73] *United States Use of Georgia Electric Supply Co. v. United States Fidelity & Guaranty Co.,* 656 F.2d 993 (5th Cir. 1981).

[74] 69 A.L.R. Fed 600 at §7(d) (West 2003).

[75] *United States use of J. A. Edwards & Co. v. Peter Reiss Constr. Co*., 273 F.2d 880 (2d Cir. N.Y. 1959).

[76] *United States use of Noland Co. v. Andrews*, 406 F.2d 790, 792-793 (4th Cir. Va. 1969).

[77] *United States use of I. Burack, Inc. v. Sovereign Constr. Co*., 338 F. Supp. 657, 661 (S.D.N.Y. 1972) [under a series of purchase orders a bond claim fails for material not delivered within ninety days of the date of notice of claim even if no gap of ninety days exists between successive deliveries].

[78] *Noland Co. v. Allied Contractors, Inc.,* 273 F.2d 917 (4th Cir. Md. 1959).

[79] *Stauffer Construction Company v. Tate Engineering Inc.*, 44 MD App. 240, 407 A.2d 1191 (1979).

[80] *United States for Use of Magna Masonry, Inc. v. R.T. Woodfield, Inc*., 709 F.2d 249, 251 (4th Cir. Va. 1983); *United States for Use of Allsite Contracting, LLC v. Hartford Fire Ins. Co*., 2010 U.S. Dist. LEXIS 128024 (E.D. Va. Dec. 3, 2010) [digging up and replacing a sidewalk was not work under the original contract]; *United States ex rel. East Coast Contracting, Inc. v. United States Fidelity and Guarantee Company*, 2004 U.S. Dist. LEXIS 14441 (D. Md. 2004); *United States v. Western Electric Corp*., 337 F.2d 568 (9th Cir. 1964).

[81] *American Surety Company of New York v. L.T. Zoby, TradiND AS l.t. Zoby & Sons*, 204 Va. 325 (1963).

contract was performed or the date the last of the materials necessary to complete the contracts were furnished.[82] The Maryland Courts have also stated that they will follow the rule they use for determining the deadline to file a mechanic's lien, which is generally better for claimants than the federal bond cases.[83]

A claimant's recovery can often depend on whether it is a state, federal or private project.

Form of Notice

The bond claim notice need not follow any special form so long as it states with substantial accuracy the amount claimed, the name of the party to whom the labor and material were furnished, and that the claimant looks to the bond principal for payment. A letter including these items is usually sufficient. It is preferable that the notice clearly state that a claim is made on the bond or that the claimant is looking to the bond principal for payment.[84] An example Payment Bond Claim Notice is provided in the Appendices. It is safer, however, for claimants to include invoices or other details of the transaction. This also will help document the claim, makes it easier for the prime contractor or surety to investigate the claim, and make the prime contractor more likely to withhold money from the nonpaying subcontractor.

Under the former Miller Act, 40 U.S.C. §270(b)(a), the bond claim notice had to be sent by registered mail. Now, the Miller Act allows written notice by any means that provides written, third-party verification of delivery.[85] This would include commercial couriers or delivery services such as Federal Express. Even before these revisions, some courts held that actual notice is sufficient. In other words, if the prime contractor has received copies of invoices or a letter by hand delivery or regular mail, this may be sufficient notice under the bond.[86]

Written notice is still necessary. Oral notice is never enough unless the bond principal has acknowledged the claim in writing.[87] However, there is no reason for a potential claimant to take a chance on notice. Written notice should always be sent multiple times, in multiple methods and to multiple addresses, including to the owner, general contractor and surety company. If a claimant finds that it has failed to give proper notice within the time limit, the claimant should investigate whether the prime contractor received actual written notice within the time limit by some informal method.

Recipients of Notice

While the claimant *must* give notice to the prime contractor, additional notices should be given to other interested parties. Notice should be sent by certified mail to the bonding company and perhaps to the owner of the project. This will help ensure that the prime contractor does receive actual notice in case there was a problem with the first mailing. This also helps the claimant obtain payment as a practical matter. If the bonding company and the owner of the project are aware of a problem, they may put pressure on the prime contractor to resolve the problem, and they may withhold payment from the prime contractor. Claimants must weigh the benefits of this extra insurance against the potential political problems of involving the owner.

Enforcement of Payment Bond Claims

Bond claims are enforced by filing suit against the surety in the proper court. Federal Miller Act suits must be brought in the U.S. District Court for the district where the project is located.[88]

---

[82] *Stauffer Construction Company v. Tate Engineering Inc.,* 44 MD App. 240, 407 A.2d 1191 (1979).

[83] *Insurance Company of North America v. Genstar Stone Products Company*, 338 Md. 161, 656 A.2d 1232 (1995).

[84] *Charles R. Joyce & Son, Inc. v. F. A. Baehner, Inc.*, 326 F.2d 556 (2d Cir. N.Y. 1964); *Bowden v. United States*, 239 F.2d 572 (9th Cir. Cal. 1956); *but see S&G Excavating, Inc. v. Seaboard Sur. Co.*, 236 F.3d 883, 885 (7th Cir. Ind. 2001); *McWaters & Bartlett v. United States ex rel. Wilson*, 272 F.2d 291 (10th Cir. 1959).

[85] 40 U.S.C.A. §3131(B)(2)(a).

[86] *United States for the Use and Benefit of Consolidated Electrical Distributors, Inc. v. Altec, Inc.*, 929 F.2d 1089, 1092-93 (5th Cir. 1991); *United States for the Use and Benefit of Hillsdale Rock Co., Inc. v. Cortelyou & Cole, Inc.*, 581 F.2d 239, 243 (9th Cir. 1978).

[87] *Houston Fire & Casualty Ins. Co. v. United States for the Use and Benefit of Trane Co.*, 217 F.2d 727, 729-30 (5th Cir. 1954); *But see Noland Co. v. Armco, Inc.*, 52 Md.App. 12, 445 A.2d 1079 (1982).

[88] 40 U.S.C.A. §3133(b)(3)(B).

Time Limits for Enforcement of Payment Bond Claims—Statute of Limitations

A claimant is not permitted to enforce its bond rights by filing suit until 90 days after the last supply of labor or materials for which a claim is made.[89] This is a "nuisance" provision to prevent unnecessary litigation. A claimant must wait these 90 days in order to give the bond principal and surety a chance to make sure proper claimants are paid. The same "for which a claim is made" language is used here. Therefore, paid or COD deliveries will not *prevent* a claimant from filing suit, just as paid or COD deliveries will not *extend* the time for notice of bond claim.[90] The claimant is not "making a claim" for paid deliveries.

All bond claimants must enforce their claims within one year after the last of the labor was performed or material was supplied by the person bringing the action.[91] This is the "statute of limitations" for the claim. If a claimant waits more than one year, the claim is lost.[92]

As discussed above, it is important to notice the difference in the "trigger" date for the 90-day notice requirement and stay period on the one hand and the "trigger" date for the one year "statute of limitations" for filing suit on the other hand. A sub-subcontractor claimant must give notice of its bond claim to the bond principal within 90 days after the last supply of labor or *materials for which a claim is made*. No claimant is permitted to file suit until 90 days after the last supply of labor or materials *for which a claim is made*.[93] However, the deadline for filing suit is one year after *the last of the labor was performed or material was supplied by the person*. Therefore, paid or COD deliveries will not *extend* the time for notice of bond claim or *prevent* a claimant from filing suit, but paid or COD deliveries will *extend* the time for filing suit on the bond. The language of Miller Act and the Little Miller Acts in Virginia, Maryland, Pennsylvania and the District of Columbia are the same in this regard, so each of these state courts would probably come to the same result.

Each federal prime contract is a separate project for the purposes of this time limit. Separate federal contracts may cover a single building or group of buildings. More than one contract may go to a single general contractor. Each contract, however, will have its own payment bond. If a claimant is supplying labor or materials for more than one prime contract, then that claimant must keep track of the last labor or material supplied for each contract. The time limits for notice and for filing suit will be from the last labor or material supplied for each prime contract or project.

Parties and Claims in Enforcement Suit

The claimant must sue the surety within the time limit to preserve bond rights. The claimant may also name additional defendants and bring other claims in the same suit.[94]

The claimant will usually have a contract for the supply of labor or materials. The claimant can name its "contract debtor" as a party to the lawsuit and seek to enforce contract rights.[95] The contract debtor, the person with whom the claimant contracted, may or may not be the same person as the bond principal. A second tier subcontractor, for example, did not contract with the prime contractor/bond principal. This second tier subcontractor has rights against the bond and contract rights against the first tier subcontractor with whom he executed the contract.

In addition to the surety, the bond principal signs the bond and also has obligations under the bond if all proper claimants are not paid. This bond is another type of contract signed for the benefit of the claimant. A bond claimant can sue both the surety and the bond principal on this (bond) contract.

This means that a first tier claimant can sue: (1) the surety on the bond, (2) the prime contractor on the bond, and (3) the prime contractor as the contract debtor. The prime contractor's obligations to this first tier sub under the contract will vary from its obligations under the bond. It can be a tremendous advantage to the claimant to sue under both sets of obligations.

A second tier claimant can sue: (1) the surety on the bond, (2) the prime contractor on the bond, and (3) the first tier subcontractor with whom it had a contract (contract debtor). Thus, the second tier claimant has an additional defendant from whom he may be able to collect.

---

[89] 40 U.S.C.A. §3133(b)(3).

[90] *See* section above on Time Limits for Notice; *United States v. United States Fidelity & Guaranty Co.,* 422 F.2d 597 (4th Cir. 1970).

[91] 40 U.S.C.A. §3133(b)(4).

[92] Va. Code Anno. §2.2-4341(c) (Michie 1950); *Joseph F. Hughes & Co. v. George F. Robinson Corp.*, 211 Va. 4, 6, 175 S.E.2d 413, 415 (1970).

[93] 40 U.S.C.A. §3133(b)(3).

[94] *Board of County Commissioners v. Cam Constr. Co.*, 300 Md. 643, 651, 480 A.2d 795, 800 (1984) [Little Miller Act Rights nonexclusive].

[95] *United States ex rel. Leno v. Summit Constr. Co.*, 892 F.2d 788, 791 (9th Cir. 1989).

A claimant does not have to enforce all of these rights but has the option to pick and chose which to enforce. This can be important for political reasons in that it allows the claimant to avoid suing a longstanding customer. This is also important in the case of bankruptcy. If the contract debtor has filed for bankruptcy, the "automatic stay" prevents anyone from filing suit against this debtor. A claimant can elect, however, to refrain from suing the bankrupt debtor and go against the other candidates.

Pay When Paid Clauses

What if a subcontract agreement has a "pay when paid" or "pay if paid" clause? If the subcontractor could not sue the general contractor on that subcontract because the owner had not yet paid, could the subcontractor nonetheless sue under the payment bond? The prevailing view seems to be that the very purpose of securing a surety bond contract is to insure that claimants who perform work are paid for their work *in the event that the principal does not pay*. To suggest that non-payment by the owners absolves the surety of its obligation defeats the very purpose of a payment bond.[96] Permitting a Miller Act surety to avoid liability on the payment bond based on an unsatisfied "pay when and if paid" clause in the subcontract would, for all practical purposes, prohibit a subcontractor from exercising its Miller Act rights until the prime contractor has been paid by the government.[97]

A surety who did not include an express "pay when paid" condition precedent in the contract payment bond on a private project may not assert the "pay when paid" clause contained in the subcontract as a defense to its liability to pay on the bond.[98] It is probably not possible to effectively include a "pay when paid" condition in a payment bond to defeat a claimant's bond rights on a public project. Permitting a surety or bond principal to avoid liability on the Miller Act payment bond based on the unsatisfied "pay if and when paid" clause in the subcontract would prevent the subcontractor from exercising its rights in accordance with the express terms of the Miller Act.[99] It would, in effect, transform the subcontract agreement concerning the general contractor's contractual obligations into an implied waiver of rights under the Miller Act. However, this would be ineffective as a waiver of bond rights, because federal courts have uniformly required a waiver be clear and explicit.[100]

Waiver of Payment Bond Rights

Waivers of bond rights can appear in a contract for labor and material or they can be in a progress payment waiver form, just like waivers of mechanic's lien rights. Waiver forms vary greatly in their wording and effect. Contractors must learn to recognize and revise what they are signing, as is discussed in detail in the chapter on Contracts & Preserving Rights, section on Contract Administration, subsection on Waiver Forms.

There will be times that you have the opportunity to use your own waiver form. You want to be able to safely do that. The Supplier Lien and Bond Waiver in the Appendices protects the interest of the owner or general contractor without eliminating legitimate security rights for unpaid labor or materials.

All types of waivers must be "clearly and unambiguously expressed." This rule is meant to protect legal rights. It should not be possible to accidentally waive legal rights. This general rule on waivers also applies to waiver of bond rights. If there is doubt as to whether a waiver was given, then the claimant will likely retain bond rights. In addition to this general rule, the U.S. Congress and some state legislatures have created further protections for payment bond rights.

---

[96] *Moore Bros. Co. v. Brown & Root, Inc.,* 207 F.3d 717, 723 (4th Cir. Va. 2000*), citing Brown & Kerr, Inc. v. St. Paul Fire and Marine Ins. Co.*, 940 F. Supp. 1245 (N.D. Ill. 1996) [the subcontractor is suing under the Bond and not the sub contract. The two are separate agreements. The inability to proceed against the general contractor because of a "pay when paid" clause in the subcontract does not necessarily prevent recovery against the surety under the payment bond, because such an argument runs counter to the underlying purpose of the payment bond, the assurance of payment to subcontractors]. *See also United States ex rel. Aarow Equip. & Servs. v. Travelers Cas. & Sur. Co. of Am*., 2010 U.S. Dist. LEXIS 24042 (E.D. Va. Mar. 16, 2010), *vacated and remanded* on other grounds at 417 Fed. Appx. 366; *United States ex rel. U.S. Glass, Inc. v. Patterson*, 2014 U.S. Dist. LEXIS 13827, 4-7 (E.D. Pa. Jan. 31, 2014), *but see BMD Contrs., Inc v. Fid. & Deposit Co. of Md*., 679 F.3d 643, 654-57 (7th Cir. Ind. 2012).

[97] *United States ex rel. Walton Tech. v. Weststar Eng'g, Inc*., 290 F.3d 1199, 1208 (9th Cir. Wash. 2002).

[98] *Moore Bros. Co. v. Brown & Root, Inc.,* 207 F.3d 717, 723 (4th Cir. Va. 2000; *M&T Elec. Contrs., Inc. v. Capital Lighting & Supply, Inc. (In re M&T Elec. Contrs., Inc.),* 267 B.R. 434, 440 (Bankr. D.D.C. 2001), decided on Virginia law and stating that a surety cannot rely upon a "pay-when-paid" clause in a subcontract unless the bond explicitly gives the surety the right to rely upon the defenses provided in that subcontract. *Servs. v. Travelers Cas. & Sur. Co. of Am*., 2010 U.S. Dist. LEXIS 24042 (E.D. Va. Mar. 16, 2010).

[99] *U.S. ex rel. Acoustical Concepts, Inc. v. Travelers Cas. & Sur. Co. of Am*., 635 F. Supp. 2d 434, 440-41 (E.D. Va. 2009); *United States ex rel. McKenney's, Inc. v. Gov't Tech. Servs., LLC*, 531 F. Supp. 2d 1375, 1380 (N.D. Ga. 2008).

[100] *United States ex rel. Walton Tech. v. Weststar Eng'g, Inc*., 290 F.3d 1199, 1208 (9th Cir. Wash. 2002), *citing In Youngstown Welding & Engineering v. Travelers Indemnity Co.*, 802 F.2d 1164 (9th Cir. 1986).

For a waiver to be valid, the waiver must be in writing and signed by the person whose rights are waived.[101] Courts strictly construe the waiver requirements in favor of those providing labor and materials.[102]

A potential federal Miller Act or Virginia Little Miller Act claimant cannot waive its payment bond rights prior to supplying labor or materials.[103]

The Virginia code states that a subcontractor, lower-tier subcontractor, or material supplier may not waive or diminish its right to assert payment bond claims in a contract in advance of furnishing any labor, services, or materials.[104] This seems to apply to both private and Virginia State projects.

In addition, the Maryland Code prohibits any waiver of bond rights that is contained in an executory construction contract. Any waiver of bond rights must be in a separate document, or it is void as a matter of public policy.[105] This means that contractors could possibly waive bond rights in Maryland before supplying labor or material, but this waiver cannot be *in the contract* to supply labor or material. It must be in a separate document. This policy applies to public and private bonds for construction projects located in Maryland. Pennsylvania and the District of Columbia have no protection against waivers in contracts.

The bottom line is that bond waivers *in a contract* are unenforceable on any federal project, or in any public or private contract in Virginia and Maryland. A progress payment waiver after labor and material are supplied, however, can eliminate bond rights even if the claimant has not been paid. Accordingly, all contractors and suppliers should still be careful to review contracts and eliminate lien or bond waivers to be safe. Contractors should also make all progress payment bond waivers conditional, as discussed in the Contracts Terms and Preserving Rights chapter.

Assignment of Payment Bond Rights

Federal Miller Act payment bond rights are assignable. [106] This federal law should be applicable to federal projects in all fifty states.

The many state Little Miller Acts are very similar to the federal Miller Act. However, the assignability of Little Miller Act bond rights will be state specific. State courts tend to look to the federal Miller Act to interpret their state Little Miller Act, unless the state law has a relevant difference in wording. However, you do not have certainty unless there is clear high level state case law that Little Miller Act bond rights are assignable.[107] Private bond rights would not have the same public policy questions. A bond is a private contract. Contract rights are generally assignable. Accordingly, you can make a general prediction that private bond rights are assignable. However, the answer to this question will again be state specific. There seems to be little case law on this subject and no known case law in the Mid-Atlantic states. Since a private bond is a private contract, there are also no restrictions how the bond form is worded. Any owner and general contractor would be free to agree in the bond that rights would be nonassignable. This would further complicate the issue.

Getting Copies of Payment Bonds

The payment bond security rights available are important information to collect on a construction project. How do you find out whether a project is bonded? How do you get a copy of the bond?

There is no question it is best to get copies of bonds early. Subcontractors and suppliers want to know what security rights they have *before* agreeing to supply labor and materials. If a project is bonded, then the risk factor is lower and they can bid the project far more aggressively. It is also far easier to collect such information while everyone is still friendly. Debtors, general contractors and owners are not as likely to cooperate once labor and materials are already supplied and problems occur. When a customer is more than 60 days past due, they are not likely to return phone calls, much less provide copies of payment bonds. Once there is a problem, claimants will also be very short on time.

---

[101] 40 U.S.C.A. §3133(c); Va. Code §2.2-4341(d) (Michie 1950).

[102] *United States ex rel. Walton Tech. v. Weststar Eng'g, Inc*., 290 F.3d 1199, 1208 (9th Cir. Wash. 2002); *United States use of Farwell, Ozmun, Kirk & Co. v. Shea-Adamson Co. et al*., 21 F Supp. 831 (Dist. Minn. 1937).

[103] 40 U.S.C.A. §3133(c); Va. Code §2.2-4341(d) (Michie 1950).

[104] Va. Code Anno. §11-4.1:1 (Michie 1950). This was a 2016 amendment and it is not yet clear whether a conduit clause, notice and claim requirements or a pay if paid clause "diminishes" these rights within the meaning of the statute and would be void.

[105] Md. Real Property Code Ann. §9-113.

[106] *U.S. ex rel. Sherman v. Carter, 353 U.S. 210, 219 (1957).*

[107] *Quantum Corporate Funding, Ltd. v. Westway Indus.*, 4 N.Y.3d 211 (N.Y. 2005); *Trs. for Mich. Laborers' Health Care Fund v. Seaboard Sur. Co.,*137 F.3d 427 (6th Cir. 1998); *Shoshoni Lumber Co. v. Fidelity & Deposit Co.*, 46 Wyo. 241 (Wyo. 1933); *Finch v. Enke*, 54 S.D. 164 (S.D. 1929).

On public projects there are legal mechanisms to get copies of bonds, such as the Freedom of Information Act discussed below. After a problem has developed, however, claimants will be so short of time that these legal mechanisms may not help much. If the project is a public construction project and large enough to be covered by a Miller Act, at least a claimant knows that there is supposed to be a bond. The claimant knows that notice to the general contractor within 90 days of last work will preserve bond rights in the short run. The claimant can and should send that notice, whether or not they have a copy of the bond.

On a private project, it is impossible to know whether a project is bonded unless someone gives the claimant a copy of the bond. It is also impossible to know the terms of the bond or where the claimant must send notice. Private bond forms often require notice to the owner, the bonding company and/or the general contractor.

If a claimant failed to get a copy of the bond before supplying labor or material, the best tactic is to simply send a notice to every name and address available, making a claim on the bond and requesting a copy. A claimant does not need to know there is a bond to make a claim on the bond. It is impossible to send notice to too many people. The notice will often produce a copy of a bond. Even if it does not, making all players on the project aware of a payment problem will tend to freeze money and help a claimant collect. An example of a Payment Bond Claim Notice is provided in the Appendices.

It will be necessary to get a copy of the bond, or at least find out the name of the bonding company, in order to file suit on the bond. A claimant normally has a year after last work to file suit, however, so this is less often a time pressure concern. Even without a copy of the bond, it is actually possible to file suit on the bond just against the general contractor. The bond is an "undertaking" or agreement by the bonding company *and* the general contractor to pay all claimants.

A general contractor will not advertise the fact that the job is bonded and may be very reluctant to provide a copy of the bond. Normally, there is no rule saying they have to provide copies of bonds—and they usually do not want to. This general contractor will be at risk to pay the bond claims, even if that general contractor has paid all of their subcontractors in full. Owners are usually the most motivated to provide copies of bonds. Private owners required the bond to avoid mechanic's liens. A threat of lien will often produce a bond from an owner. Public owners are often required to provide copies of bonds.

The federal Miller Act[108], as well as the Little Miller Acts in the District of Columbia,[109] Maryland[110] and Pennsylvania,[111] designate certain government officials who provide certified copies of payment bonds and prime contracts to claimants who submit an affidavit stating that they provided labor or materials to the project and have not been paid. Virginia allows anyone to make a request in accordance with the Virginia Freedom of Information Act[112] and the Virginia Little Miller Act.[113] In other words, in Virginia you do not need to be an unpaid claimant to receive such documents.

The Freedom of Information Act[114] or FOIA has also improved public access to federal agency records regarding public construction projects. Many states have adopted similar legislation.

The Freedom of Information Act normally just requires a written request for information. The keys are directing the request to the right person and making as specific a request as possible. Requesting "all of the documents regarding the project" will often result in an objection from the government and will always delay production. The government can charge for the cost of reproduction and that is another reason to make requests short and specific. A request for a copy of the Payment bond provided, along with a good description of the project, is normally the best request.

Federal agencies are required in the Federal Register to provide contact and procedural information for making information requests.[115] State agencies also often have FOIA officers. Phone calls to the contracting agency will normally determine the name and address of the FOIA officer for that agency. It also is often helpful to send the FOIA request to the contracting officer and a government attorney, if this information is available, since they may be in a better position to respond promptly.

---

[108] 40 U.S.C.A. §3133(a).
[109] DC Code §2-201.03.
[110] Md. State Finance and Procurement Code Ann. §§17-108(c).
[111] 8 P.S. §196 (2004)
[112] Virginia Code §2.2-3700 *et seq*.
[113] Virginia Code §2.2-4342.
[114] 5 U.S.C.S. §552.
[115] The Federal Register can be searched online https://www.federalregister.gov/.

The Freedom of Information Act is an effective method to get bonding and contract information, but it normally takes too much time to help after a problem has developed. Potential claimants should consider making FOIA requests early in a project, before a problem develops, and perhaps even during the bidding process. The FOIA officer will probably not even inform the contractors involved that a FOIA request was received.

PERFORMANCE BONDS

Introduction

The performance bond is for the benefit of the bond obligee, providing security that the contract or subcontract will be completed in a timely and workmanlike manner.[116] In a Miller Act or Little Miller Act project, the bond obligee is the government owner. A private owner could also require a performance bond from the general contractor. A general contractor could require a performance bond from a subcontractor. Whoever requires the bond is the "obligee," who is the only beneficiary of the bond. Whoever supplies the bond to the obligee is the bond "principal." In the event of default on the contract, the surety can usually either take over and complete the project or allow the bond obligee to complete it and the surety would pay the costs incurred.

The Miller Act and Little Miller Act statutes state only that the performance bond is required, but do not say much about how performance bond rights are enforced or how they can be lost. Most of the guidance on these issues is found in the bond itself and court case law established over centuries of suretyship law. The Miller Act does not require a certain form for the performance bond, but the Code of Federal Regulations does "prescribe" a standard form.[117] That "prescribed" form is apparently not required, but is usually used.

A performance bond is simply a contract.[118] Normal principles of contract interpretation are used to determine the rights and obligations of the surety and bond obligee (whoever required the bond).[119] The bond will typically incorporate the contract by reference, making the contract a part of the bond. Accordingly, the provisions of the contract and the performance bond must be read together in order to properly interpret the bond.[120]

Owners and general contractors (bond obligees) that require bonds should be careful with the "bond form" they are accepting. A performance bond form can add more requirements to preserve rights under the bond, including multiple notices of default, required meetings or long waiting periods before replacing or supplementing a bond principal (contractor that supplied the bond). Of course, sureties want all these requirements so that they can adequately investigate claims and to discourage rash action by an owner. The same requirements, however, can cause additional delays in completion and higher legal fees.

Possible Bond Claimants

Only the bond obligee can make a claim under a performance bond for *completion* of a project. Suppliers of labor and material can seek payment only under the payment bond.[121] However, the payment bond and performance bond are sometimes included in one document.[122] Especially in a private project, it is important to read the operative language in a payment or performance bond. It does not matter that the title of a document is "Performance Bond."

---

[116] *State Highway Admin. v. Transamerica Ins. Co.*, 278 Md. 690, 367 A.2d 509 (1976); *Mayor of Baltimore v. Fidelity & Deposit Co.*, 282 Md. 431, 386 A.2d 749 (1978).

[117] 48 CFR §53.228 (b).

[118] *United States Plywood Corp. v. Continental Casualty Co*., 157 A.2d 286 (D.C. Ct. App. 1960); *Bd. of Trs. v. Int'l Fid. Ins. Co*., 2014 U.S. Dist. LEXIS 149342, 8-9 (E.D. Pa. Oct. 21, 2014); *L & A Contracting Co. v. Southern Concrete Servs*., 17 F.3d 106, 109 (5th Cir. Miss. 1994).

[119] *Siegfried Constr., Inc. v. Gulf Ins. Co.,* 2000 U.S. App. LEXIS 1304, 9-10 (4th Cir. Va. 2000) [The court's task is to enforce contracts as written, not to unilaterally alter the parties' obligations], *citing D.C. McClain, Inc. v. Arlington County*, 249 Va. 131, 452 S.E.2d 659, 662 (Va. 1995).

[120] *Siegfried Constr., Inc. v. Gulf Ins. Co.,* 2000 U.S. App. LEXIS 1304, 11 (4th Cir. Va. 2000), *citing New Amsterdam Cas. Co. v. Moretrench Corp.*, 184 Va. 318, 35 S.E.2d 74, 77 (1945), *Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth*., 2012 U.S. Dist. LEXIS 86283, 14-16 (W.D. Va. 2012).

[121] *Sun Insurance Co. of New York v. Diversified Engineers, Inc.*, 240 F.Supp. 606, 611 (D.Mont. 1965).

[122] *See e.g., Phoenix Ins. Co. v. Lester Bros., Inc*., 203 Va. 802, 127 S.E.2d 432 (1962); *Baltimore v. Fidelity & Deposit Co*., 282 Md. 431, 386 A.2d 749 (1978).

If the operative language guarantees payment to all subcontractors supplying labor or material to the project, then subcontractors and suppliers will have a claim under the bond.[123]

Possible Bond Claims—Compensable Costs

The performance bond will generally cover the owner's cost in completing the contract in the event of default by the bond principal. In general terms, the liability of a surety is coextensive with that of the principal. In other words, the surety is liable for all the contractual obligations of the bond principal.[124] A surety is bound to perform whatever is legally required of its principal.[125]

However, some courts have held that a surety is not liable for consequential damages, delay damages or legal fees unless the bond contract states that the surety is liable for these types of damage. In other words, the surety's liability is limited by the provisions of the bond contract.[126] If the bond states only that the surety is liable for the "cost of completion," then the surety may not be liable for delay or legal fees.[127]

Most bonds refer to and "incorporate" the contract into the bond, and the majority view is that most damages from any breach of the contract are recoverable from the bond surety. This includes warranty obligations or correction of defective work. As discussed, below, the surety usually has several different options to complete the contract or provide funding for completion.

Delay Damages

If the performance bond incorporates the construction contract and "time is of the essence" in contract performance, then the bond obligee (usually owner) can sometimes recover damages for delay. Both of these features are in most performance bonds, but it is important for the bond obligee to confirm this before accepting a bond. Some courts have ruled that a surety has no liability for delay damages of any type, unless the bond form states that the surety is liable for such damages.[128]

If there is a liquidated damages provision in the bonded contract and the contract is incorporated into the bond, then these liquidated damages should be payable by the surety.[129] In fact, delay damages from the surety may be limited to the liquidated damages provision,[130] although courts have allowed delay damages in excess of the liquidated amount in the event of abandonment of the project.[131]

Attorney's Fees

In general, attorney's fees are not recoverable in any litigation unless there is an agreement in a contract or a statute allowing legal fees.[132] The Miller Act statute does not call for recovery of legal fees in a performance bond, so recovery of legal fees would normally require a contract term in either the construction contract or the bond itself.[133] Two exceptions would be legal fees incurred in reprocurement contracts as a cost of completion[134] or where a breach of contract has forced the bond obligee to maintain or defend a lawsuit with a third person.[135]

---

[123] However, a bond obligee does have the right to seek payment from a performance bond surety if a bond principal fails to pay subcontractors and suppliers. *Mai Steel Service, Inc. v. Blake Constr. Co*., 981 F.2d 414, 421 (9th Cir. Cal. 1992). A bond principal does not perform its contractual obligations for purposes of a performance bond until it pays for all the labor and materials used in completing its work. A failure to pay a supplier constitutes a breach of the contract. *Glens Falls Indem. Co. v. United States ex rel. Westinghouse Elec. Supply Co*., 229 F.2d 370, 375 (9th Cir. 1955).

[124] *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298 (4th Cir. Va. 1979); *Dale Benz, Inc. Contractors v. American Casualty Co*., 303 F.2d 80 (9th Cir. Ariz. 1962).

[125] *Turner Constr. Co. v. First Indem. of Am. Ins. Co*., 829 F. Supp. 752, 759 (E.D. Pa. 1993), *aff'd* 22 F.3d 303 (3rd Cir. 1994).

[126] *N. Am. Specialty Ins. Co. v. Chichester Sch. Dist.,* 158 F. Supp. 2d 468, 473 (E.D. Pa. 2001).

[127] *Downingtown Area Sch. Dist. v. International Fid. Ins. Co.,* 769 A.2d 560, 565-566 (Pa. Commw. Ct. 2001).

[128] *Downingtown Area Sch. Dist. v. International Fid. Ins. Co.,* 769 A.2d 560, 565-566 (Pa. Commw. Ct. 2001); *N. Am. Specialty Ins. Co. v. Chichester Sch. Dist.,* 158 F. Supp. 2d 468, 473 (E.D. Pa. 2001) [delay damages identified in the bond].

[129] *Southern Roofing & Petroleum Co. v. Aetna Ins. Co*., 293 F. Supp. 725, 731-32 (E.D. Tenn. 1968).

[130] *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298, 1306-07 (4th Cir. Va. 1979).

[131] *Continental Realty Corp. v. Andrew J. Crevolin Co*., 380 F. Supp. 246, 257 (S.D. W. Va. 1974).

[132] *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298, 1301 (4th Cir. Va. 1979).

[133] *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298, 1301-04 (4th Cir. Va. 1979).

[134] *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298, 1305 (4th Cir. Va. 1979); *Turner Constr. Co. v. First Indem. of Am. Ins. Co.*, 829 F. Supp. 752, 765 (E.D. Pa. 1993), *aff'd* 22 F.3d 303 (3rd Cir. 1994).

[135] *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298, 1301-05 (4th Cir. Va. 1979).

Legal fees incurred by the bond obligee in a dispute with the bond principal or the surety would not be recoverable in the absence of a statute or contract term.[136] Performance bonds sometimes expressly require payment by the surety of legal fees incurred.[137] Some commonly used bond forms have an attorney's fee provision.[138] However, there is no requirement of such a term. Bond obligees would normally want to require an attorney's' fee provision in a bond, in order to recover those expenses in the event of default and insolvency of the bond principal. Sureties and bond principals would normally want to avoid such a term.

Some states have statutes allowing an award of attorney's fees for a surety's "bad faith" in failing to investigate or pay a claim.[139]

An attorney's fee provision in the bonded contract would allow recovery of attorney's fees in litigation on against the bond principal. If the bond principal remains solvent, this would allow the bond obligee to recover legal expenses. Such a construction contract term may also allow recovery of legal fees on the performance bond, depending again on the wording of the bond.[140] If the bond allows for recovery of all damages resulting from the principal's breach of the construction contract, legal fees may be recoverable on the bond. If the bond only allows for the cost of completion of the scope of work, however, legal fees may not be covered. Some courts only allow recovery of legal fees from the surety if the bond states that the surety is liable for legal fees.[141] Again, bond obligees, sureties and bond principals should pay attention to the wording of the bonds they require or provide.

Interest

Under the federal Miller Act, an award of prejudgment interest by the surety after default on performance bond obligations is in the sound discretion of the trial court. However, the purpose of prejudgment interest is compensatory, not penal.[142] Under some state law, prejudgment interest is mandatory for liquidated amounts in some state Little Miller Act or private bond cases.[143] Interest is sometimes awarded based on the time of the obligee's first demand or the time that the surety should have performed its obligations under the bond.[144]

Warranty Obligations

Depending on the wording of the performance bond form, the surety can be liable for warranty obligations lasting longer than what the statute of limitations on the bond would otherwise be. If the bond states that the surety will be liable until the principal has faithfully performed all terms of the contract, which includes a five-year warranty on a roof, then the surety may also bound for that five-year period.[145]

Performance Bond Surety Rights and Duties

A potential performance bond claimant has two overriding concerns to make sure the surety will be obligated to pay damages. A claimant must look at the bond itself to determine what will create an obligation to the surety.[146] Second, a potential claimant should avoid prejudicing the surety and make sure the surety has every opportunity to protect itself and minimize losses to the obligee (usually owner) and surety.

The bond may state that the surety is liable whenever the bond principal (contractor) is "in default." More often the surety has no obligation until the obligee has "declared the contractor in default." Sometimes, the surety has no

---

[136] *Turner Constr. Co. v. First Indem. of Am. Ins. Co.*, 829 F. Supp. 752, 765 (E.D. Pa. 1993), *aff'd* 22 F.3d 303 (3rd Cir. 1994).

[137] *Ranger Constr. Co. v. Prince William County School Board*, 605 F.2d 1298, 1303 (4th Cir. Va. 1979).

[138] *See e.g.*, AIA Document A312.

[139] 42 Pa.C.S. § 8371; *Turner Constr. Co. v. First Indem. of Am. Ins. Co*., 829 F. Supp. 752, 763 (E.D. Pa. 1993), *aff'd* 22 F.3d 303 (3rd Cir. 1994).

[140] *Dale Benz, Inc. Contractors v. American Casualty Co*., 303 F.2d 80, 85 (9th Cir. Ariz. 1962).

[141] *N. Am. Specialty Ins. Co. v. Chichester Sch. Dist.,* 158 F. Supp. 2d 468, 473 (E.D. Pa. 2001).

[142] *United States v. Seaboard Surety Co*., 817 F.2d 956, 965-966 (2d Cir. N.Y. 1987) [interest cannot be assessed prior to the date the government began paying to complete the project], *citing Rodgers v. United States*, 332 U.S. 371, 373, 92 L. Ed. 3, 68 S. Ct. 5 (1947).

[143] *Turner Constr. Co. v. First Indem. of Am. Ins. Co*., 829 F. Supp. 752, 762 (E.D. Pa. 1993), *aff'd* 22 F.3d 303 (3rd Cir. 1994) [the Pennsylvania Supreme Court directs that in all cases of contract interest is allowable at the legal rate from the time payment is withheld after it has become the duty of the debtor to make the payment. Allowance of interest does not depend upon discretion but is a legal right; *citing Palmgreen v. Palmer's Garage, Inc*., 383 Pa. 105, 108, 117 A.2d 721, 722 (1955); D.C. Code § 15-108].

[144] *London & Lancashire Indem. Co. v. Smoot*, 287 F. 952, 956-957 (D.C. Cir. 1923); *New Amsterdam Casualty Co. v. United States Shipping Board Emergency Fleet Co*., 16 F.2d 847, 852 (4th Cir. Md. 1927).

[145] *Turner Constr., Inc. v. American States Ins. Co*., 579 A.2d 915, 919 (Pa. Super. Ct. 1990); *Milwaukee Bd. of Sch. Dirs. v. BITEC, Inc*., 2009 WI App 155 (Wis. Ct. App. 2009).

[146] *United States Plywood Corp. v. Continental Casualty Co*., 157 A.2d 286 (D.C. Ct. App. 1960) [payment bond].

obligation until the bond principal's contract has been actually "terminated." Usually, the surety has no obligation under the bond if the obligee itself has breached the contract. There is no substitute for referring to the bond regularly to make sure a claimant is following the correct procedure at each step.[147]

A surety normally has no liability until the Principal has defaulted on the contract.[148] The surety also has no obligation to act until the "conditions precedent" in the bond occur. In fact, the surety must be careful to avoid interfering with its own principal and their contract. Before a declaration of default, sureties face possible tort liability for meddling in the affairs of their principals, usually a claim of tortuous interference with contract.[149] After a declaration of default, the relationship changes dramatically, and the surety owes immediate duties to the obligee (usually owner).[150]

As discussed below, a bond will usually provide multiple options to a surety once there is an obligation to act, including financing the principal to continue work, providing a replacement contractor, or the surety taking over the project.[151]

Subrogation

When a principal defaults on a contract guaranteed by a performance or payment bond and the surety performs on the bond and contract, the doctrine of equitable subrogation allows the surety to enforce the rights of the principal against the obligee. Equitable subrogation arises by operation of law. It is not based on contract or the privity of parties.[152] Most important, the surety is entitled to receive the balance of the contract owed by the obligee once the surety performs that contract.[153]

The surety's subrogation right to the contract balance held by the obligee has priority over the claims of the contractor's general or judgment creditors and trustee in bankruptcy.[154] The subrogated bonding company has priority over other secured lenders of the bond principal, regardless of when the secured lender filed its UCC Financing Statement. Many cases state that there is no need for a surety to file a UCC Financing Statement.[155]

The surety cannot, however, assert any greater rights than the bond principal. The surety has priority over the contract balance only to the extent it paid expenses in performing the contract. For example, the surety cannot recover from the obligee the surety's incidental expenses incurred enforcing its rights against the principal.[156]

Notice of Default

A contractor is usually entitled to notice of default before their contract can be terminated. It is even more critical to give the performance bond principal and surety notice of contractor default, in order to preserve performance bond rights. If the contract is incorporated into the bond and requires notice a certain number of days before termination, the surety may be relieved of any obligation if the contractor is terminated early.[157]

---

[147] For example, under an AIA Document A312-2010 (Performance Bond), Section 3 (paraphrased), the surety has no obligation to act until:

1. The Owner first provides notice to the Contractor and Surety that the Owner is considering declaring Contractor in default, and
2. The Owner then declares a Contractor default AND terminates the Contract AND notifies the Surety, and
3. The Owner agrees to pay the balance of the Contract price to the Surety, and
4. There is no Owner default under the Contract.

[148] *Granite Computer Leasing Corp. v. Travelers Indem. Co.*, 894 F.2d 547, 551 (2d Cir. N.Y. 1990).

[149] *See e.g., Gerstner Electric, Inc. v. American Ins. Co.*, 520 F.2d 790 (8th Cir. Mo. 1975).

[150] *Zoby v. United States*, 364 F.2d 216, 219 (4th Cir. Va. 1966), *citing Phoenix Ins. Co. v. Lester Bros., Inc.*, 203 Va. 802, 127 S.E. 2d 432 (1962); *L & A Contracting Co. v. Southern Concrete Servs.*, 17 F.3d 106, 111 (5th Cir. Miss. 1994).

[151] *Granite Computer Leasing Corp. v. Travelers Indem. Co.*, 894 F.2d 547, 551 (2d Cir. N.Y. 1990).

[152] *XL Specialty Ins. Co. v. DOT*, 269 Va. 362, 370, 611 S.E.2d 356,370 (2005).

[153] *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 136, 9 L. Ed. 2d 190, 83 S. Ct. 232 (1962); *Finance Co. of America v. United States Fidelity & Guaranty Co.*, 277 Md. 177, 182-184, *353 A.2d 249, 252-53 (*Md. Ct. Spec. App. 1976).

[154] *Western Casualty & Surety Co. v. Brooks*, 362 F.2d 486, 490 (4th Cir. W. Va. 1966); *International Fidelity Ins. Co. v. Ashland Lumber Co.*, 250 Va. 507, 511-512, *463 S.E.2d 664, 666-67* (1995); *Fid. & Deposit Co. v. Royal Bank*, 2003 U.S. Dist. LEXIS 7687, 6-8 (E.D. Pa. 2003).

[155] *Finance Co. of America v. United States Fidelity & Guaranty Co.*, 277 Md. 177, 182-184, *353 A.2d 249, 252-53 (*Md. Ct. Spec. App. 1976); *Fid. & Deposit Co. v. Royal Bank*, 2003 U.S. Dist. LEXIS 7687, 6-8 (E.D. Pa. 2003).

[156] *Western Casualty & Surety Co. v. Brooks*, 362 F.2d 486, 491 (4th Cir. W. Va. 1966).

[157] *Dragon Constr. v. Parkway Bank & Trust*, 287 Ill. App. 3d 29, 33 (Ill. App. Ct. 1st Dist. 1997) [An obvious reason for this requirement was to allow the surety to exercise its right under the performance bond to participate in the selection of a successor contractor. Since the obligee replaced the contractor before informing the surety that the contractor was to be terminated, the surety was stripped of

It is impossible to send a surety too many notices, only too few notices or insufficiently clear notices.[158] Again, you must consult the bond itself to see exactly what type of notice or wording is required to invoke surety liability. If the contract and the bond have no requirement of notice of default, courts have held that it is not necessary to provide notice of default.[159] Nonetheless, it is the best practice for bond obligees to keep sureties informed of all problems on the project and all corrective actions, no matter what the requirements of the bond.

A legally sufficient cure notice must inform the contractor and surety of the specific defaults, which the obligee regards as sufficiently material to future contract performance to warrant termination of the contract if the defaults are not cured.[160] A declaration of default sufficient to invoke the surety's obligations under the bond must be made in clear, direct and unequivocal language.[161] Correspondence regarding problems on the project is insufficient to put the surety on notice of possible termination. It is also important to provide this notice of default early, while there is a greater possibility of avoiding damage and before the bond obligee takes steps and incurs costs in remedying the default.[162]

Some courts have held that a surety must show that it was prejudiced by the lack of notice.[163] This may be a minority view, however. Most courts would say that proper notice is essential to surety liability if the bond wording clearly establishes notice as a condition precedent to surety liability.

Once the contractor and surety are put on notice of default in accordance with the contract and bond, the surety is in a difficult spot if the default is disputed. The surety still needs to worry about interfering with the principal's contract and business if there is any question that the principal is in default. As a practical matter, the principal is the surety's customer, the person that chose the surety and pays the bond premium. This is an important business relationship. On the other hand, the surety is also at risk of breaching its obligations to the obligee under the bond

Surety Options on Performance Bond Default

Sureties and claimants must again review the bond form to determine the surety's options once the principal is properly declared in default.[164] Generally, the surety may be able to (1) finance the original bond principal to complete the project, (2) "tender" a replacement contractor, acceptable to the obligee, that will complete the project under a

---

its contractual right to minimize its liability under the performance bond by ensuring that the lowest responsible bidder was selected to complete the job].

[158] *Stonington Water St. Assoc., LLC v. Hodess Bldg. Co*., 792 F. Supp. 2d 253, 266-267 (D. Conn. 2011); *Balfour Beatty Constr. v. Colonial Ornamental Iron Works*, 986 F. Supp. 82 (D. Conn. 1997) [Performance bond requirements for notice of default and demand that surety step in and perform under the bond must be met before an obligee can recover damages under the performance bond].

[159] *American Surety Co. v. United States*, 317 F.2d 652, 656 (8th Cir. Mo. 1963), *citing New Amsterdam Casualty Co. v. United States Shipping Board Emergency Fleet Co.*, 16 F.2d 847, 851-852 (4th Cir. Md. 1927).

[160] *Clark Constr. Group Inc. v. Allglass Sys*., 2004 U.S. Dist. LEXIS 15459, 26-27 (D. Md. Aug. 6, 2004), *citing 5 Bruner & O'Connor, Construction Law* § 12:41 (2004).

[161] *L & A Contracting Co. v. Southern Concrete Servs*., 17 F.3d 106, 111 (5th Cir. Miss. 1994).

[162] *Hunt Constr. Group, Inc. v. Nat'l Wrecking Corp*., 587 F.3d 1119 (D.C. Cir. 2009).

[163] *New Amsterdam Casualty Co. v. United States Shipping Board Emergency Fleet Co.*, 16 F.2d 847, 851-852 (4th Cir. Md. 1927); *Conesco Industries, Ltd. v. Conforti & Eisele, Inc., D. C*., 627 F.2d 312, 317 (D.C. Cir. 1980); *Blackhawk Heating & Plumbing Co. v. Seaboard Surety Co*., 534 F. Supp. 309, 316-18 (N.D. Ill. 1982). The bond form may also require a showing of prejudice. For example, AIA Document A312-2010 (Performance Bond), Section 4 states:

> §4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.

[164] For example, AIA Document A312-2010 (Performance Bond), Section 5 states:

> §5 When the Owner has satisfied the conditions of [Notice of Default and Termination], the Surety shall promptly and at the Surety's expense take one of the following actions:
> §5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;
> §5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;
> §5.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contractor Default; or
> §5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:
> .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
> .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.

contract with the obligee, (3) "take over" the project and complete it under contracts between the surety and replacement contractors, (4) simply pay the bond obligee the penal amount of the bond, or (5) "do nothing" and let the obligee complete the project.[165] Each option (if each exists) has potential risks and advantages to the surety and obligee.

A surety is entitled to the unpaid contract balance from the obligee to complete the project. The surety's ultimate loss is usually a function of the amount of the unpaid contract balance held by the obligee compared to the costs of completion. For this reason, it is a problem for the surety if the principal succeeded in negotiating a contract that is "front-end loaded." A surety can also be released inadvertently if the bond obligee advances money early in order to keep the principal working.[166]

A surety's first choice will usually be to help the bond principal complete the project. Of course, a surety does not like to risk more money with a principal that is in trouble. However, this will usually result in the lowest costs to the surety, as long as the principal is capable of completing the project. This will be the fastest way to complete the contract, lowering the risk of delay damages. The existing contractor is the most familiar with the project and is already mobilized. The biggest issue is whether the principal is competent, honest and capable of completion and whether the obligee is willing to allow the principal to continue.

In order to tender a replacement contractor, the surety must investigate the status of work to be complete and prepare a complete bid package to send out to potential contractors. One disadvantage is that this takes time on a project that is already delayed. A replacement contractor can also be a problem with public owners that are bound by statute to use particular competitive bidding procedures. A surety would typically require a performance bond from the new contractor. The surety then offers the new contractor to the obligee, along with the new performance bond and payment for any price increase in exchange for a release from any further obligation on the original performance bond. Obligees often do not want to provide such a release and instead want to require the surety to take over the project using the same replacement contractor.

A "takeover agreement" with the surety will often save time, because the surety can often begin work on some portions of the project almost immediately, while perhaps seeking competitive bids for some later portions of the project. This will also usually save money, since a replacement contractor on a troubled project is usually going to be at a high price, with large contingency factors. The surety and obligee must negotiate a takeover agreement. That usually involves issues of whether the surety's costs will still be limited to the penal amount of the bond and whether the obligee will waive some or all of any delay claim. In the absence of such an agreement, the surety could end up liable for costs of completion greater than the penal amount of the bond.[167]

A surety will usually have the option of "buying back the bond," by simply paying the penal amount to the obligee. This is certainly the quickest solution and allows the surety to move forward on its primary goal of selling more bonds on other projects. However, a surety will usually hope to pay less than the full penal amount of a project. Accordingly, this is a good option only if it is clear that the obligee's damages will be the full penal amount and the surety gets the agreement of the bond principal and indemnitors. Of course, it is always possible to negotiate a lesser amount with the obligee for a full release, but an obligee will do this only if they are comfortable about the risks and costs of completion.

Some performance bonds give the surety the option of doing nothing, letting the obligee complete the project and then pay the obligee's damages. One problem with this approach is that the surety has no control over costs (or the scope of work). Sureties sometimes do nothing, whether the bond requires affirmative action or not. This can result in a bad faith type of claim in itself,[168] although a surety is generally entitled to accept their principal contractor's position and deny liability.[169]

---

[165] *United States v. Seaboard Surety Co*., 817 F.2d 956, 950-66 (2d Cir. N.Y. 1987).

[166] *Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 170-71, 366 S.E.2d 104, 107-08 (1988).

[167] *Mid-State Sur. Corp. v. E. Bethlehem Twp. Mun. Auth*., 2005 U.S. Dist. LEXIS 15447, 50-51 (W.D. Pa. 2005); *International Fid. Ins. Co. v. County of Rockland*, 98 F. Supp. 2d 400, 428 (S.D.N.Y. 2000).

[168] *Continental Realty Corp. v. Andrew J. Crevolin Co*., 380 F. Supp. 246 (S.D. W. Va. 1974) [surety liability in excess of the penal amount of the bond, where failure to recognize breach of principal and surety obligation under the bond were tantamount to bad faith]; *but see United States v. Seaboard Surety Co*., 817 F.2d 956, 966 (2d Cir. N.Y. 1987) [award in *Continental Realty in* excess of penal amount because General Insurance had disregarded a court injunction].

[169] *United States v. Seaboard Surety Co*., 817 F.2d 956, 950-66 (2d Cir. N.Y. 1987) [A surety may, of course, also challenge the propriety of the default termination, thereby, in effect, denying liability on the bond].

Performance Bond Surety Defenses

The surety has all the defenses that their bond principal has in defending a claim from an obligee.[170] However, a surety stands in the place of its principal and may raise only defenses available to the principal on the contract,[171] although a surety would still have "personal defenses" based on the surety bond.

Lack of Default or Wrongful Termination

If the bond principal was not in default of the contract, or the default was not material, then neither the principal nor the surety is liable.[172]

If the bond principal was wrongfully terminated, then the obligee would not be entitled to damages from the bond principal or the surety.[173] In other words, even if the bond principal was in material default, the surety may be released if the obligee did not follow the proper termination procedure. In fact the surety can recover costs the surety expended to complete the project after a wrongful termination.[174]

Lack of Notice of Default

As discussed in greater detail above in Performance Bond Surety Rights & Obligations, Notice of Default, the surety may have a defense to liability if the obligee failed to give the surety notice of default or termination in accordance with the terms of the bond, at least to the extent the surety was prejudiced by that lack of notice.

Material Alteration of Contract

If the creditor and principal modify the contract, imposing a greater risk of loss on a surety, the surety can be released at least to the extent the surety is prejudiced.[175] The burden is on the surety to show a material alteration of the obligation.[176]

Courts do differ on whether that surety must show that it was prejudiced by the modifications of the contract. Some courts hold that the payment of substantial sums before they are due, or failure to retain the required percentage, are variations in the terms of the contract that will discharge the surety from its obligations without any showing of prejudice to the surety.[177] The surety does not even need to show prejudice from the action, because the material deviation, in itself, establishes sufficient prejudice.[178]

It seems that the more modern majority view is that the surety must show prejudice by the contract modifications, and the surety's obligation will then be discharged only to the extent of that prejudice.[179]

Many performance bond forms state that the surety will be bound by any modification without notice. This will make it more difficult for the surety to obtain a release based on a material alteration. A surety may consent to material modifications in the bond contract that will affect his obligations. Further, a surety may waive notice of material

---

[170] *Board of Supervisors v. Southern Cross Coal Corp*., 238 Va. 91, 96, 380 S.E.2d 636, 639 (1989); *Board of Supervisors v. Safeco Ins. Co*., 226 Va. 329, 337-38, 310 S.E.2d 445, 450 (1983).

[171] *Board of Supervisors v. Southern Cross Coal Corp*., 238 Va. 91, 96, 380 S.E.2d 636, 639 (1989); *Board of Supervisors v. Safeco Ins. Co*., 226 Va. 329, 337-38, 310 S.E.2d 445, 450 (1983).

[172] *Fox Lake v. Aetna Casualty & Surety Co*., 178 Ill. App. 3d 887, 534 N.E.2d 133 (Ill. App. Ct. 2d Dist. 1989).

[173] *Bell BCI Co. v. HRGM Corp.,* 2004 U.S. Dist. LEXIS 15305 (D. Md. Aug. 6, 2004); William Green Constr. Co. v. United States, 201 Ct. Cl. 616, 629 (Ct. Cl. 1973).

[174] *Carchia v. United States*, 202 Ct. Cl. 723, 485 F.2d 622 (Ct. Cl. 1973).

[175] *XL Specialty Ins. Co. v. DOT*, 269 Va. 362, 370, 611 S.E.2d 356, 370 (2005); *Chas. H. Tompkins Co. v. Lumbermens Mut. Casualty Co*., 732 F. Supp. 1368, 1377 (E.D. Va. 1990) [In Virginia, a compensated surety will be excused from its obligation if the other parties materially alter the underlying risk without its consent]; *Board of Supervisors v. Southern Cross Coal Corp*., 238 Va. 91, 94, 380 S.E.2d 636, 638 (1989) [the rule is otherwise for an accommodation (unpaid volunteer) surety, who would historically be discharged from any obligation if there is *any* change in the obligation]; *Travelers Indem. Co. v. Ballantine*, 436 F. Supp. 2d 707, 712 (M.D. Pa. 2006).

[176] *Board of Supervisors v. Southern Cross Coal Corp*., 238 Va. 91, 95, 380 S.E.2d 636, 639 (1989) [whether an alleged material variation occurs before or after the principal's default, a compensated surety has the burden of showing it by a preponderance of the evidence].

[177] *Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 170-71, 366 S.E.2d 104, 107-08 (1988).

[178] *Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 170-71, 366 S.E.2d 104, 108 (1988), *citing* A. Stearns, *The Law of Suretyship* § 6.3 (5th ed. 1951); *Continental Ins. Co. v. City of Virginia Beach*, 908 F. Supp. 341, 347-348 (E.D. Va. 1995).

[179] *Mergentime Corp. v. Washington Metro. Area Transit Auth*., 775 F. Supp. 14, 20-21 (D.D.C. 1991) [If the principal and creditor modify their contract, without the surety's consent, the compensated surety is discharged if the modification materially increases his risk, and not discharged if the risk is not materially increased, but his obligation is reduced to the extent of loss due to the modification]; *Pennsylvania R. Co. v. Fidelity & Deposit Co*., 81 F.2d 526, 529 (3d Cir. 1935); *North Am. Specialty Ins. Co. v. Chichester Sch. Dist*., 2000 U.S. Dist. LEXIS 10745, 39-40 (E.D. Pa. July 20, 2000).

modifications with specific language in the surety agreement.[180] There is no question, however, that the best practice for any bond obligee is to involve the surety in any modification of the contract and obtain the surety's consent.[181]

Impairment of Collateral & Early Contract Payments

The obligee can lose the right to demand coverage if he impairs any collateral to which the surety could look for reimbursement. [182] This can include early contract payments to the bond principal, since the surety has subrogation (security) rights in the unpaid contract balance.[183] Most courts rule that the surety must show prejudice by the early payments[184] and the surety's obligation will then be discharged only to the extent of that prejudice. If the bond principal uses early payments to complete the project, for example, the surety is not prejudiced by these payments.[185]

Release of Security or Right of Subrogation

If a creditor holding collateral security surrenders it to the debtor, without the knowledge or consent of the surety, the surety is discharged, at least to the extent of the value of the property surrendered.[186] Likewise, a creditor's interference with a surety's right to subrogation may act to discharge the surety's liability.[187]

Release of Principal

Release of the debtor by the creditor, without the consent of the surety, can release the debtor's surety.[188] In other words, an owner could not come to a settlement agreement with a contractor and then pursue the surety for additional costs of completion.

Damages

Any type of bond can be a "penal" bond or an "indemnifying" or a "performance" bond. A penal bond would be payable to the obligee on breach of the underlying contract, as a punishment. In other words, the obligee has no need to prove damages. Most performance bonds are indemnifying bonds, providing a guarantee of completion of the contract.[189]

The obligee's recoverable damages are the reasonable costs of completing the contract, not to exceed the penal amount of the bond.[190] If the completion contract materially deviates from the original contract, the increased completion cost is not recoverable. However, the cost difference remains applicable if the variations are immaterial and have not affected the contract price.[191]

Depending on the wording of the bond and the contract, the obligee can recover even special damages and other amounts recoverable under the contract.[192]

---

[180] *Travelers Indem. Co. v. Ballantine*, 436 F. Supp. 2d 707, 712 (M.D. Pa. 2006).

[181] *See e.g., Mergentime Corp. v. Washington Metro. Area Transit Auth*., 775 F. Supp. 14, 20-21 (D.D.C. 1991).

[182] *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp*., 646 F.2d 1064, 1073 (5th Cir. Tex. 1981), *citing United States v. Continental Casualty Co*., 512 F.2d 475, 478 (5th Cir. 1975).

[183] *Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 170-71, 366 S.E.2d 104, 107-08 (1988).

[184] *Pickens County v. National Surety Co.,* 13 F.2d 758, 762 (4th Cir. S.C. 1926).

[185] *Ramada Development Co. v. United States Fidelity & Guaranty Co*., 626 F.2d 517, 522 (6th Cir. Mich. 1980); *Transamerica Ins. Co. v. Kennewick*, 785 F.2d 660 (9th Cir. Wash. 1986).

[186] *First Am. Title Ins. Co. v. First Alliance Title, Inc*., 718 F. Supp. 2d 669, 682 (E.D. Va. 2010), *citing Morton v. Dillon*, 90 Va. 592, 19 S.E. 654, 655 (Va. 1894); *see also Phoenix Ins. Co. v. Lester Bros., Inc*., 203 Va. 802, 808, 127 S.E.2d 432 (1962).

[187] *First Am. Title Ins. Co. v. First Alliance Title, Inc*., 718 F. Supp. 2d 669, 682 (E.D. Va. 2010), *citing Francisco's Adm'r v. Shelton's Ex'r,* 85 Va. 779, 8 S.E. 789, 795 (1889).

[188] *Food Lion v. S.L. Nusbaum*, 202 F.3d 223, 226 (4th Cir. 2000).

[189] *But see Board of Supervisors v. Safeco Ins. Co*., 226 Va. 329, 336, 310 S.E.2d 445, 448-49 (1983) [It is unnecessary for an obligee to prove a financial loss as a prerequisite to recovery, since a performance bond is intended to guarantee completion of the improvements it covers and the obligee need not incur any expense before collecting on the bond]. *Safeco* is criticized in a dissent as incorrectly interpreting an indemnifying bond as a penal bond.

[190] *Board of Supervisors v. Ecology One, Inc*., 219 Va. 29, 36-37, 245 S.E.2d 425, 429-30 (1978); *but see Board of Supervisors v. Safeco Ins. Co*., 226 Va. 329, 336, 310 S.E.2d 445, 448-49 (1983) (*Safeco* is criticized in a dissenting opinion and seems inconsistent with *Ecology One).*

[191] *American Surety Co. v. United States*, 317 F.2d 652, 657 (8th Cir. Mo. 1963).

[192] *Continental Realty Corp. v. Andrew J. Crevolin Co*., 380 F. Supp. 246, 253 (S.D. W. Va. 1974); *Miracle Mile Shopping Center v. National Union Indem. Co*., 299 F.2d 780, 783 (7th Cir. Ind. 1962).

The obligee must prove that the damages were from the breach of the bonded contract.[193] It is not necessary that the obligee has actually completed the work and incurred the expenses, as long as the obligee can prove what the costs will be.

Enforcement of Performance Bond Claims

Bond claims are enforced by filing suit against the surety in the proper court. Federal Miller Act suits must be brought in the U.S. District Court for the district where the project is located.[194] Various state laws dictate the proper court for filing any Little Miller Act or private payment lawsuits.

Time Limits for Enforcement of Performance Bond Claims—Statute of Limitations

There is some uncertainty or inconsistency on the time limit (statute of limitations) to file suit to enforce performance bond rights, depending on a variety of factors. Some states have an explicit time limit in their public procurement act for a governmental body to file suit on a performance bond. However, it is still a question whether the government could agree to waive this time limit by accepting a bond form with a shorter time limit.

Some states have general statutes of limitations to file a suit on a bond, but it is not clear whether this time limit would also apply to governmental bodies. There is also a common law rule that no statute of limitations applies to the King (the government).[195] Depending on the jurisdiction, this may or may not impact time limits agreed in bond contracts.

The federal Miller Act does not create a time limit for the U.S. government to enforce its performance bond rights. Federal law also has the general common law rule that no statute of limitations applies to the government.[196] It is not clear, however, whether the federal government waives this general rule by accepting a bond with a stated time limit to file suit.

The Virginia Public Procurement Code has an explicit time limit (statute of limitations) for a governmental body to file suit on a performance bond.[197] It is possible that a surety could agree in the actual bond contract to a longer time limit to file suit,[198] although it is possible that a court would find this an impermissible violation of the statute.[199] On a private project in Virginia, the general statute of limitations of five years on any written contract would apply,[200] unless the bond contract called for a shorter time limit. A one-year time limit for enforcement written in a private bond is valid in Virginia.[201]

Maryland has a 12-year general statute of limitations for enforcement of performance bond rights that seems to apply to both public and private projects.[202] It seems that even an attempt by the government to enforce rights after these time limits should fail. However, it also seems that any shorter time limit written into a bond contract is void as a matter of public policy.[203] A Maryland public or private owner will always have twelve years to enforce its rights on a performance bond.

---

[193] *Board of County Supervisors v. Sie-Gray Developers, Inc*., 230 Va. 24, 30, 334 S.E.2d 542, 546-47 (1985); *but see Board of Supervisors v. Safeco Ins. Co*., 226 Va. 329, 335, 310 S.E.2d 445, 449 (1983).

[194] 40 U.S.C.A. §3133(b)(3)(B).

[195] N*ullum tempus occurrit regi* or *nullem tempus occurrit republicae; Wilson Area Sch. Dist. v. Skepton*, 71 Pa. D. & C.4th 142, 151-52, 2005 Pa. Dist. & Cnty. Dec. LEXIS 174 (Pa. County Ct. 2005); *MCI Constructors v. Greensboro*, 125 F. App'x 471, 478-79 (4th Cir. 2005).

[196] *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-133, 58 S. Ct. 785; 82 L. Ed. 1224 (U.S. 1938).

[197] Va. Code Ann. §2.2-4340 (Michie 1950) [within five years on any VDOT project and within one year on all other Virginia public projects after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty that gave rise to the action], which should be applicable only to Virginia Little Miller Act Public bonds.

[198] *Reliance Ins. Co. v. Trane Co.*, 212 Va. 394, 184 S.E.2d 817 (1971).

[199] *APAC-Atlantic, Inc. v. General Ins. Co*., 273 Va. 682; 643 S.E.2d 483 (2007); *Hughes & Co. v. Robinson Corp.*, 211 Va. 4, 175 S.E.2d 413 (1970).

[200] Va. Code Ann. § 8.01-246(2) (Michie 1950).

[201] *In re 1616 Reminc Ltd. Partnership*, 9 B.R. 679, 682 (Bankr. E.D. Va. 1981) *citing 3A Michie's Jur., Building Contracts*, § 22 (1976 Replacement).

[202] Maryland Courts and Judicial Proceedings Code Section 5-102 [An action on one of the following specialties shall be filed within 12 years after the cause of action accrues: (2) Bond except a public officer's bond].

[203] Md. Insurance Code Ann. §12-104; *Hagerstown Elderly Assocs. L.P. v. Hagerstown Elderly Bldg. Assocs. L.P.,* 368 Md. 351, 356-63, 793 A.2d 579, 582-86 (2002).

Pennsylvania also has a general statute of limitations for enforcement of performance bond rights.[204] On its face, this statute would apply to both public and private projects. However, Pennsylvania also recognizes the common law that no statute of limitation applies to the government (time does not run on the King). There is no time limit on the government, unless it is an agreed limit in the bond form. A time limit in the performance bond contract accepted would be enforceable against the government in Pennsylvania. The government can waive its unlimited time to enforce performance bond rights by accepting a bond that has a time limit for enforcement of rights[205]

The District of Columbia applies the common law that no statute of limitation applies to the government in the performance of public functions.[206]

Parties and Claims in Performance Bond Enforcement Suit

The obligee must sue the surety within any time limit to preserve bond rights. The claimant may also name additional defendants and bring other claims in the same suit.[207]

The obligee will usually have a contract with the bond principal for the supply of labor or materials. The claimant can name the principal as a party to the lawsuit and seek to enforce contract rights.

In addition to the surety, the bond principal signs the bond and also has obligations under the bond, if the contract is breached. This bond is another type of contract signed for the benefit of the obligee. A obligee can sue both the surety and the bond principal on this (bond) contract.

An obligee does not have to enforce all of these rights but has the option to pick and chose which to enforce. This can be important in the case of bankruptcy. If the contract principal has filed for bankruptcy, the "automatic stay" prevents anyone from filing suit against this debtor. An obligee can elect, however, to refrain from suing the bankrupt debtor and go against just the surety.

Assignment of Performance Bond Rights

The general rule is that a governmental body can assign its rights under a bond for the purpose of obtaining the contract performance guaranteed by the bond and upon showing that the improvements have been made.[208] In other words, the government can assign the right to payment from the surety as a financing tool to get the contract improvements complete. A guarantor on the contract, for example, may be motivated to get the contract complete and can then collect the costs from the surety.

Surety Rights and Defenses on Both Performance and Payment Bonds

Duty to Investigate

Any surety should and usually will promptly investigate any claims made on a bond.[209] The surety has no duty to create plaintiffs' claims, but rather to corroborate the accuracy of properly documented claims. If the claimant fails to submit substantiated claims, the surety has no further duty to investigate.[210] Once a surety confirms that a genuine dispute over liability exists, the surety has no further duty to investigate the claim on the bond. The surety has every right to await the outcome of the liability dispute before paying on the performance bond.[211]

---

[204] 42 Pa.C.S. §5523 [The following actions and proceedings must be commenced within one year: (3) An action upon any payment or performance bond, both of which would appear to apply to both public and private bonds].

[205] N*ullum tempus occurrit regi* or *nullem tempus occurrit republicae; Wilson Area Sch. Dist. v. Skepton*, 71 Pa. D. & C.4th 142, 151-52, 2005 Pa. Dist. & Cnty. Dec. LEXIS 174 (Pa. County Ct. 2005).

[206] *District of Columbia v. Owens-Corning Fiberglas Corp*., 572 A.2d 394, 403-404 (D.C. 1989).

[207] *Board of County Comm'rs v. Cam Constr. Co.,* 300 Md. 643, 651, 480 A.2d 795, 800 (1984) [Little Miller Act Rights nonexclusive].

[208] *Board of County Supervisors v. Sie-Gray Developers, Inc*., 230 Va. 24, 30, 334 S.E.2d 542, 546 (1985); *Board of Supervisors v. Ecology One, Inc*., 219 Va. 29, 33, 245 S.E.2d 425, 428 (1978), *citing Clearwater Associates v. F. H. Bridge & Son, Contractors*, 144 N.J. Super. 223, 229, 365 A.2d 200, 204 (1976); *County of Will v. Woodhill Enterprises, Inc.*, 4 Ill. App. 3d 68, 74, 75, 274 N.E.2d 476, 481-82 (1971).

[209] *See e.g.,* Va. Code Anno. §38.2-510 (Michie 1950); 40 P.S. §1171.5(a).

[210] *Farmer's Union Cent. Exchange, Inc. v. Reliance Ins. Co*., 675 F. Supp. 1534, 1542 (D.N.D. 1987).

[211] *Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc*., 971 F.2d 272, 283 (9th Cir. Cal. 1992).

Duty to Settle Claims in Good Faith

A surety has to be concerned about paying claims prematurely or without adequate basis.[212] However, many indemnity agreements, signed by the principal for the benefit of the surety, grant the right to settle claims or require additional security if the principal wishes to litigate claims. The surety has much greater leeway to settle claims with such contract terms.[213]

A surety also has to be concerned about delaying payment on legitimate claims, which can also constitute bad faith.[214]

Execution, Delivery and Acceptance of Bond

It is hornbook law that a payment or performance bond must be executed, delivered[215] to the obligee and accepted by the obligee in order to be enforceable.[216] Courts have developed a number of elastic interpretations of these requirements, however, when the facts of the case require some flexibility.

It seems fairly certain that an enforceable payment or performance bond must be executed by the surety. The more common issue is when the bond has not been signed by the principal. Bonds usually state on their face that the surety and principal "jointly and severally" agree, meaning they are liable together and separately. Accordingly, at least the surety is still liable on the bond if only the surety signed it. In any event, failure of a principal to sign a bond does not invalidate the bond.[217] A principal that never signed the bond can still be liable on the bond, however, if the principal signed a related document. The bonded contract, for example, usually states that the bond principal will supply the payment and performance bonds. If the principal signed this contract, this may be enough to create principal liability on the bond in addition to liability on the contract.[218]

Similarly, delivery of the bond to the principal is normally sufficient to bind the surety to the bond. In other words, delivery to the bond obligee is not necessarily required. A bond is considered delivered once it has passed beyond the dominion, control and authority of the surety and is no longer subject to recall.[219] The bond principal may act as the surety's agent for such purpose.[220] Courts sometimes also state that the bond is an enforceable contract once the parties agree to supply the bond, whether the document is ever delivered.[221]

Acceptance of the bond presents the least difficulty. Acceptance is presumed if the bond is retained.[222] Physical possession of a bond may not be necessary for acceptance. The obligee's acceptance of delivery is presumed if beneficial to the obligee. [223] However, there is no acceptance if the obligee expressly rejects the bond because it is in an improper form.[224]

---

[212] *See e.g., St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc.,* 160 F.R.D. 464 (S.D.N.Y. 1995*); Cincinnati Ins. Co. v. Savarino Constr. Corp*., 2011 U.S. Dist. LEXIS 29899, 28-29 (S.D. Ohio Mar. 21, 2011).

[213] *General Accident Ins. Co. of Am. v. Merritt-Meridian Constr. Corp*, 975 F. Supp. 511, 515-517 (S.D.N.Y. 1997); *In re Kora & Williams Corp*., 2006 Bankr. LEXIS 4207, 27-28 (Bankr. D. Md. 2006).

[214] *Argonaut Ins. Co. v. Wolverine Constr., Inc*., 976 F. Supp. 2d 646, 654 (D. Md. 2013), *citing Atl. Contracting & Material Co., Inc. v. Ulico Cas. Co*., 380 Md. 285, 844 A.2d 460, 473-74 (Md. 2004); *Continental Realty Corp. v. Andrew J. Crevolin Co*., 380 F. Supp. 246 (S.D. W. Va. 1974) [surety liability in excess of the penal amount of the bond, where failure to recognize breach of principal and surety obligation under the bond were tantamount to bad faith]; *but see United States v. Seaboard Surety Co*., 817 F.2d 956, 966 (2d Cir. N.Y. 1987) [award in *Continental Realty in* excess of penal amount because surety had disregarded a court injunction].

[215] *Berry v. United States Fidelity & Guaranty Co*., 249 Md. 150, 154, 238 A.2d 907, 909 (1968), *citing* Stearns, *The Law of Suretyship*, § 2.9 at 20-21 (5th Ed., 1951).

[216] *John McShain, Inc. v. Eagle Indem. Co*., 180 Md. 202, 206, 23 A.2d 669, 670 (1942); *McDevitt & St. Co. v. Seaboard Sur. Co*., 1995 U.S. App. LEXIS 15076 (4th Cir. N.C. 1995).

[217] *Central National Insurance Company v. Whitehall Construction, Inc.*, 1988 U.S. Dist. LEXIS 2121 (N.D. Ill. 1988), *citing Donaldson v. Hartford Acci. & Indem. Co*., 269 Pa. 456, 464, 112 A. 562, 565 (1921).

[218] *Central National Insurance Company v. Whitehall Construction, Inc.*, 1988 U.S. Dist. LEXIS 2121 (N.D. Ill. 1988).

[219] *Donaldson v. Hartford Acci. & Indem. Co*., 269 Pa. 456, 464, 112 A. 562, 565 (1921); *Central National Insurance Company v. Whitehall Construction, Inc.*, 1988 U.S. Dist. LEXIS 2121 (N.D. Ill. 1988).

[220] *Berry v. United States Fidelity & Guaranty Co*., 249 Md. 150, 154, 238 A.2d 907, 909 (1968), *citing* Stearns, *The Law of Suretyship*, §2.9 at 20-21 (5th Ed., 1951); *Central National Insurance Company v. Whitehall Construction, Inc.*, 1988 U.S. Dist. LEXIS 2121 (N.D. Ill. 1988); *but see Rachman Bag Co. v. Liberty Mut. Ins. Co*., 46 F.3d 230 (2d Cir. N.Y. 1995).

[221] *Donaldson v. Hartford Acci. & Indem. Co*., 269 Pa. 456, 465-66, 112 A. 562, 566 (1921).

[222] *John McShain, Inc. v. Eagle Indem. Co*., 180 Md. 202, 206-207, 23 A.2d 669, 670 (1942).

[223] *McDevitt & St. Co. v. Seaboard Sur. Co*., 1995 U.S. App. LEXIS 15076 (4th Cir. N.C. 1995).

[224] *John McShain, Inc. v. Eagle Indem. Co*., 180 Md. 202, 206-207, 23 A.2d 669, 670 (1942); *McDevitt & St. Co. v. Seaboard Sur. Co*., 1995 U.S. App. LEXIS 15076 (4th Cir. N.C. 1995).

Fraud by Obligee

A surety can obtain a release of liability if the obligee committed some type of fraud or concealment of material facts, resulting in issuance of the bond. An obligee cannot actively and fraudulently conceal pertinent facts from a surety during negotiations and then turn to the surety for reimbursement of damages.[225] The most common material facts involve the financial strength of the principal[226] or current default on a contract.[227]

In general, an obligee does not have to disclose unrequested information to a surety. A surety has a duty to seek out important information that is available to it. The surety cannot neglect to ask questions and then avoid liability by accusing the obligee of failing to disclose information that it was not required to disclose under the surety contract.[228] However if there is a request for information, there is a duty to disclose known facts. There may also be a duty to inform if the obligee is aware that the surety is mistaken as to material facts.[229]

Penal Amount

A performance or payment bond has a penal amount, which is usually the amount of the bonded contract, but could be less. A surety cannot usually be liable for more than the penal amount of the bond, even if the obligee or claimant has suffered damage in excess of that penal amount.[230] Some courts have allowed recovery for more than the penal amount, when the surety has acted in bad faith in failing or refusing to fulfill its obligations under a performance bond.[231] In other words, the surety breached its bond contract, in addition to the principal breaching the underlying contract.[232] In addition, if the surety and principal agree to a "takeover agreement" by the surety after default on a performance bond, the surety could end up liable for costs of completion greater than the penal amount.[233]

VIRGINIA LITTLE MILLER ACT

The Virginia Little Miller Act is found as a part of the Virginia Procurement Act, Virginia Code Section 2.2-4337 through 4342. This outline will focus on the differences between the Virginia Little Miller Act and the federal Miller Act. The outline on the federal Miller Act above should be consulted for a general discussion of public project bonds and some specific discussion of Virginia public project bonds. State courts will tend to follow the federal courts in interpreting bond statutes,[234] although differences in the wording of the Acts can yield different results and state courts are not bound to follow the federal courts in any event.

The Virginia Procurement Act applies to all procurements by the state, counties, cities and their agencies such as the Virginia Department of Transportation, state universities and all county school boards. Virginia requires bid, performance and payment bonds for most construction contracts in excess of $500,000, but requires bonding for most transportation related projects exceeding $350,000.[235] Bonds may be required for smaller construction contracts. A contractor may provide a certified check or cash escrow as alternative security instead of a bid, performance or payment bond and, with permission, may substitute a personal bond, property bond or letter of credit.[236]

The government can generally bring an action against the surety on a performance bond "within one year after (i) completion of the contract, including the expiration of all warranties and guaranties, or (ii) discovery of the defect

[225] *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp*., 646 F.2d 1064, 1072-73 (5th Cir. Tex. 1981).

[226] *Magee v. Manhattan Life Ins. Co*., 92 U.S. 93, 98, 23 L. Ed. 699, 700 (1875).

[227] *Rachman Bag Co. v. Liberty Mut. Ins. Co*., 46 F.3d 230 (2d Cir. N.Y. 1995).

[228] *Turner Constr. Co. v. First Indem. of Am. Ins. Co*., 829 F. Supp. 752, 761 (E.D. Pa. 1993), *aff'd* 22 F.3d 303 (3rd Cir. 1994).

[229] *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp*., 646 F.2d 1064, 1072-73 (5th Cir. Tex. 1981).

[230] *Board of Supervisors v. Safeco Ins. Co*., 226 Va. 329, 338-39, 310 S.E.2d 445, 450-51 (1983); *Turner Constr. Co. v. First Indem. of Am. Ins. Co*., 829 F. Supp. 752, 759 (E.D. Pa. 1993), *aff'd* 22 F.3d 303 (3rd Cir. 1994).

[231] *Continental Realty Corp. v. Andrew J. Crevolin Co*., 380 F. Supp. 246, 252-53 (S.D. W. Va. 1974); *but see United States v. Seaboard Surety Co*., 817 F.2d 956, 966 (2d Cir. N.Y. 1987) [award in *Continental Realty in* excess of penal amount because General Insurance had disregarded a court injunction].

[232] *London & Lancashire Indem. Co. v. Smoot*, 287 F. 952, 956-957 (D.C. Cir. 1923) [liable for prejudgment interest in excess of penal amount]; *New Amsterdam Casualty Co. v. United States Shipping Board Emergency Fleet Co*., 16 F.2d 847, 852 (4th Cir. Md. 1927) [liable for prejudgment interest in excess of penal amount].

[233] *International Fid. Ins. Co. v. County of Rockland*, 98 F. Supp. 2d 400, 428 (S.D.N.Y. 2000).

[234] *Solite Masonry Units Corp. v. Piland Constr. Co.*, 217 Va. 727, 232 S.E.2d 759 (1977); *Vulcan Materials Company v. Betts*, 315 F.Supp. 1049, 1050 (W.D. Va. 1970).

[235] Va. Code Anno. §2.2-4337 (Michie 1950). Bonds for transportation related projects can only be waived in projects of less than $350,000 if there is evidence that a surety company has declined an application from the contractor for a bond.

[236] Va. Code Anno. §2.2-4338 (Michie 1950).

or breach of warranty ..."[237] This "discovery" provision can leave sureties and bond principals open to claims for an indefinitely long period of time. For example, the Virginia Department of Transportation can bring an action within five years of completion of the work on their projects.

Virginia Payment Bonds

Possible Bond Claimants

The Virginia Little Miller Act payment bond shall be "for the protection of claimants who have and fulfill contracts ... to the prime contractor ... or to any subcontractor ..." It seems, therefore, that protection extends to the second tier.[238] No Virginia Court has decided that a "mere materialman" is not a subcontractor. Second tier materialmen should consider making a claim on a payment bond on Virginia projects. State courts may follow federal case law on this issue, however, since State Little Miller Acts are patterned after the federal Miller Act.

Notice Requirements for Claimants

Anyone dealing directly with the bond principal is not required to give notice of their bond claim until the suit to enforce.[239] Anyone who did not deal directly with the bond principal must give written notice of their claim to the bond principal.[240] Notice must be given within 90 days after "the claimant performed the last of the labor or furnished the last of the materials for which he claims payment."[241] A Virginia Circuit Court has decided that the bond principal must receive the notice within 90 days under the Virginia Little Miller Act.[242] A claim for sums withheld as retainage is not subject to *any* time limit for notice.[243]

These provisions can leave a general contractor vulnerable to claimants with whom it did not contract for an extended period of time. The general contractor may not even know that the claimant was supplying labor or material to the project. As a result, general contractors must take great care before releasing progress payments or retention. *See* the section on Pitfalls for General Contractors below. General contractors should also seriously consider requiring subcontractor payment bonds.[244]

Enforcement of Bond Claims

An action to file suit on a payment bond must be brought within one year after the last day the claimant supplied labor or materials.[245] The action must be brought in the Circuit Court for the county where the project is located.[246]

A claimant dealing directly with the bond principal is not permitted to file suit on the bond until 90 days after the last supply of labor and materials for which the claim is made. However, a second tier subcontractor or materialman claimant is permitted to file suit on the bond at any time and does not need to until 90 days after the last supply of labor and materials. This is a difference between the federal Miller Act and Virginia Little Miller Act.

The Virginia Supreme Court has ruled that the statute of limitations in the Little Miller Act statute is prohibitory and that the language in a bond form agreed by the parties did not extend the statutory deadline to file suit.[247] The Virginia Supreme Court has also ruled that the Virginia Public Procurement Act statute of limitations provision need not be incorporated by reference, but is applicable because the dispute arose out of a Virginia Public project.[248] This Virginia Supreme Court opinion also states that disputes arising under the bond were subject to the limitations period contained in the Virginia Public Procurement Act "unless the parties specifically contract for a different time

---

[237] Va. Code Anno. §2.2-4340 (Michie 1950).

[238] *Thomas Somerville Co. v. Broyhill*, 200 Va. 358, 105 S.E.2d 824 (1958).

[239] Va. Code Anno. §2.2-4341(A) (Michie 1950).

[240] Va. Code Anno. §2.2-4341(B) (Michie 1950).

[241] *Commercial Construction Specialties, Inc. v. ACM Construction Management Corp.*, 242 Va. 102, 405 S.E.2d 852 (1991).

[242] *R.T. Atkison Building Corp. v. Archer Western Construction, LLC*, 90 Va. Cir. 240 (Norfolk Cir. Ct. 2015).

[243] Va. Code Anno. §2.2-4341(B) (Michie 1950).

[244] *Thomas Somerville Co. v. Broyhill*, 200 Va. 358, 105 S.E.2d 824 (1958).

[245] Va. Code Anno. §2.2-4341(C) (Michie 1950).

[246] Va. Code Anno. §8.01-261(6) (Michie 1950).

[247] *Hughes & Co. v. Robinson Corp.*, 211 Va. 4, 175 S.E.2d 413 (1970); *but see Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 171-72, 366 S.E.2d 104, 108-09 (1988).

[248] *APAC-Atlantic, Inc. v. General Insurance Company of America*, 273 Va. 682, 643 S.E.2d 483 (2007).

limitation." Accordingly, the question still remains whether it is possible to contractually agree to a longer statute of limitations for a bond claim on a Virginia public project.

Usually, this means the lawsuit must be filed within one year after the last day the claimant supplied labor or materials. The lawsuit may be probably filed after that, however, if the claimant has taken a voluntary nonsuit (dismissal) of a previously filed lawsuit. A claimant in any lawsuit has the right voluntarily nonsuit (dismiss) their lawsuit in Virginia.[249] If they do, they have right to refile that lawsuit within six months after taking the nonsuit, even if the statute of limitations (deadline) to file the lawsuit has otherwise expired.[250] This probably also applies to a lawsuit to enforce payment bond rights under the Little Miller Act statute this could add six months to the time to enforce.[251]

No Waiver in Subcontract

The Code Virginia does not allow a bond claim waiver in subcontracts. Some general contractors use contract forms stating that subcontractors "hereby waive all rights to a bond claim." Such a provision in a subcontract waiving mechanic's lien or payment bond rights is void in Virginia.

On a Virginia Little Miller Act project, a bond claim wavier is void unless it is in writing, signed by the person whose right is waived, and executed after such person has performed labor or furnished material in accordance with the contract documents.[252]

On either a state public or private project in Virginia a subcontractor, lower-tier subcontractor, or material supplier may not waive or diminish its right to assert payment bond claims or the right to assert claims for demonstrated additional costs in a contract in advance of furnishing any labor, services, or materials.[253]

It is still possible to waive mechanic's lien or bond rights in a document separate from the construction subcontract.

MARYLAND LITTLE MILLER ACT

Maryland's Little Miller Act is located in Maryland State Finance and Procurement Code Sections 17-101 through 17-110. This outline will focus on the differences between the Maryland Little Miller Act and the federal Miller Act. The outline on the federal Miller Act above should be consulted for a general discussion of public project bonds and some specific discussion of Maryland public project bonds. Maryland courts will tend to follow the federal courts in interpreting bond statutes.[254] However, differences in the wording of the two acts may yield different results, and state courts are not bound to follow the federal courts in any event.[255]

Note that the Maryland Code prohibits any waiver of payment bond rights that is contained in an executory construction contract. Any waiver of bond rights must be in a separate document, or it is void as a matter of public policy.[256] This policy applies to public and private bonds for construction projects located in Maryland.

The Maryland Little Miller Act applies to construction contracts by the state, counties, municipal corporations, other political subdivisions, public instrumentalities and government units authorized to award a contract.[257] Performance and payment bonds are required for construction contracts in excess of $100,000.[258] Bonds may be required for

---

[249] Va. Code Anno. §8.01-380 (Michie 1950).

[250] Va. Code Anno. §8.01-229(E)(3) (Michie 1950).

[251] Va. Code Anno. §8.01-229(E)(3) (Michie 1950) [If a plaintiff suffers a voluntary nonsuit as prescribed in 8.01-380,the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, *regardless of whether the statute of limitations is statutory or contractual*, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer....] The italicized words were a 2016 amendment and it is not yet entirely clear whether it applies to the Virginia Little Miller Act.

[252] Va. Code Anno. §2.2-4341 (Michie 1950).

[253] Va. Code Anno. §11-4.1:1 (Michie 1950). This was a 2016 amendment and it is not yet clear whether a conduit clause, notice and claim requirements or a pay if paid clause "diminishes" these rights within the meaning of the statute and would be void.

[254] *Stauffer Constr. Co. v. Tate Eng., Inc*, 44 Md.App. 240, 407 A.2d 1191 (1979).

[255] *General Fed. Constr., Inc. v. D.R. Thomas, Inc.*, 52 Md.App. 700, 451 A.2d 1250 (1982).

[256] Md. Real Property Code Ann. §9-113 (2018).

[257] Md. State Finance and Procurement Code Ann. §17-101(d) (2018).

[258] Md. State Finance and Procurement Code Ann. §17-103(a) (2017).

construction contracts between $50,000 and $100,000.[259] Apparently, a bond is never required for contracts below $50,000. A bid bond is required on any contract over $100,000.[260]

The one-year statute of limitations under §17-109(b) of the State Finance and Procurement Article applies only to claims on payment bonds and does not apply to claims on performance bonds. The 12-year statute of limitations in Maryland Courts and Judicial Proceedings Code Ann. §5-102(a)(2) applies to performance bonds.[261]

Maryland Payment Bonds

Any person who has supplied labor or materials on a public construction contract, but has not been paid, can obtain a certified copy of the required payment bond by submitting an affidavit to the State Comptroller or the officer in charge of keeping the bond.[262] This required production of the bond is an aid to claimants, who otherwise might be unable to obtain a copy of the bond. However, it apparently does not help claimants until they have a payment problem.

The prime contractor on the construction contract can provide security in the form of a bond, cash or other security acceptable to the public body awarding the contract.[263] This could be a problem if a public body makes the mistake of accepting inadequate security. Subcontractors and suppliers may wish to determine exactly what form of security has been provided before providing labor or materials to a project.

Possible Bond Claimants

The Maryland Little Miller Act explicitly extends to claimants one tier lower than the federal or Virginia Acts. Maryland State Finance and Procurement Code Section 17-108 allows suit on the bond by any claimant with a direct contractual relationship with a subcontractor or *sub-subcontractor* of the prime contractor.[264]

Maryland follows federal law in holding that a "mere materialman" is not a subcontractor.[265]

Notice Requirements for Claimants

Claimants with a direct contract with the prime contractor are not required to provide notice of their bond claim until filing suit. All other claimants must provide written notice "within 90 days after the labor or materials for which the claim is made were last supplied."[266] The notice must be sent certified mail to the prime contractor's residence or office, and must state with substantial accuracy both the amount claimed, the person to whom the labor or material was supplied.[267] Under the Maryland Little Miller Act, it is unnecessary that the notice state disclose explicitly or impliedly that the claimant looks to the bond principal for payment.[268] Properly mailing the notice within the 90 day deadline is sufficient.[269]

Enforcement of Bond Claims

A claimant can file suit on the payment bond up until one year after the public body finally accepts the work performed under the contract.[270] This can greatly extend the time for filing suit beyond the time permitted under the federal or Virginia acts. This one-year statute of limitations applies only to claims on payment bonds and does not apply to claims on performance bonds. A 12-year statute of limitations applies to public performance bonds and to

---

[259] Md. State Finance and Procurement Code Ann. §17-103(b) (2017).

[260] Md. State Finance and Procurement Code Ann. §13-207 (2018).

[261] Md. Courts and Judicial Proceedings Code Ann. §5-102(a)(2); *Anne Arundel County v. Fidelity & Deposit Co*., 336 Md. 282, 648 A.2d 193 (1994).

[262] Md. State Finance and Procurement Code Ann. §17-108(c) (2018).

[263] Md. State Finance and Procurement Code Ann. §17-104 (2018).

[264] *Atlantic Sea-Con, Ltd. v. Robert Dann Co.*, 321 Md. 275, 582 A.2d 981 (1990).

[265] *Atlantic Sea-Con, Ltd. v. Robert Dann Co.*, 321 Md. 275, 582 A.2d 981 (1990).

[266] Md. State Finance and Procurement Code Ann. §17-108(b) (2018); *CTI/DC Incorporated v. Selective Insurance of America*, 392 F.3d 114 (2004).

[267] Md. State Finance and Procurement Code Ann. §17-108(b) (2018); *CTI/DC Incorporated v. Selective Insurance of America*, 392 F.3d 114 (2004).

[268] *Westinghouse Electric Corp. v. Minnix*, 259 Md. 305, 311-316, 269 A.2d 580, 585-86 (1970).

[269] *Montgomery County Board of Education v. Glassman Constr. Co*., 245 Md. 192, 204, 225 A.2d 448, 455 (1967).

[270] Md. State Finance and Procurement Code Ann. §17-109(b) (2018); *General Fed. Constr., Inc. v. D.R. Thomas, Inc.*, 52 Md.App. 700, 451 A.2d 1250 (1982).

private payment and performance bonds that do not contain a specific shorter deadline.[271] Claimants dealing directly with the prime contractor, and therefore not required to give notice, may still have bond rights years after they supplied a project depending on when the work is finally accepted.

A claimant is still not permitted to file suit on the bond until 90 days after the last supply of labor and materials for which the claim is made.[272] Suit must be brought in the Circuit Court where the prime contract was executed and performed *or* where the prime contractor has its principal place of business.[273]

No Waiver in Subcontract

The Maryland Code does not allow bond claim waiver in construction subcontracts. Some general contractors use contract forms stating that subcontractors "hereby waive all rights to a bond claim." Such a provision in a subcontract waiving mechanic's lien or payment bond rights is "void as against public policy" in Maryland.[274] It is still possible to waive mechanic's lien or bond rights in a document separate from the construction subcontract.

A "pay when paid" clause will not defeat bond rights.[275] A subcontractor may (and is probably still required to) enforce bond rights within the time deadline, even though the subcontract states that payment is not due until the owner has paid the general contractor.

PENNSYLVANIA LITTLE MILLER ACT

The Pennsylvania Little Miller Act is found in the Public Works Contractor's Bond Law of 1967, Title 8 P.S. §191, *et seq*. Award and Execution of Public Contracts, Title 73 P.S. §1621, *et seq.* provides additional requirements.[276] This outline will focus on the differences between the Pennsylvania Little Miller Act and the federal Miller Act. The outline on the federal Miller Act above should be consulted for a general discussion of public project bonds and some specific discussion of Pennsylvania public project bonds. State courts will tend to follow the federal courts in interpreting bond statutes,[277] although differences in the wording of the Acts can yield different results and state courts are not bound to follow the federal courts in any event.

The Pennsylvania Public Works Contractor's Bond Law applies to all public contracts for the Commonwealth of Pennsylvania, any local authorities or any state aided institution.[278] The Pennsylvania Public Works Contractor's Bond Law requires both payment and performance bonds for any contract exceeding $5,000 for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highway work.[279] Contractors may provide any financial security that is acceptable to and approved by the contracting body, including irrevocable letters of credit and restrictive or escrow accounts from a federal or Commonwealth of Pennsylvania lending institution.[280]

Pennsylvania Payment Bonds

Possible Bond Claimants

The Pennsylvania Public Works Contractor's Bond Law payment bond is "for the protection of claimants supplying labor or materials to the prime contractor ... or any of his subcontractors ..."[281] Payment bond protection, therefore, extends only to second tier suppliers of labor and materials to the general contractor or subcontractor.[282] Pennsylvania courts have also decided that a "mere materialman" is not a subcontractor; therefore, a supplier to a

[271] Md. Courts and Judicial Proceedings Code Ann. §5-102(a)(2); *Anne Arundel County v. Fidelity & Deposit Co*., 336 Md. 282, 648 A.2d 193 (1994).

[272] Md. State Finance and Procurement Code Ann. §17-108(a)(2) (2018).

[273] Md. State Finance and Procurement Code Ann. §17-109(a) (2018).

[274] Md. State Finance and Procurement Code Ann. §17-108(d) (2018); Maryland Real Property Code Section 9-113(a) (2018).

[275] Maryland Real Property Code Section 9-113(b) (2018).

[276] Title 73 P.S. §1621 *et seq*. describes procedures for awarding and executing public contracts and is applicable to public contracts (excluding highway work) in excess of $50,000.

[277] *Lite-Air Products, Inc. v. Fidelity & Deposit Co. of Maryland*, 437 F. Supp. 801 (D.C. Pa. 1977).

[278] 8 P.S. §192; 73 P.S. §1621.

[279] 8 P.S. §193.

[280] 8 P.S. §193.1.

[281] 8 P.S. §193(a)(2).

[282] *Nicholson Const. Co. v. Standard Fire Ins. Co.*, 760 F.2d 74 (3rd Cir. Pa. 1985).

supplier has no bond rights.[283] Pennsylvania state courts follow federal case law on this issue, since the state Little Miller Act is patterned after the federal Miller Act.[284]

Any person who has supplied labor or materials on a public contract, but has not been paid, can obtain a certified copy of the required payment bond by submitting an affidavit to the contracting body.[285]

Notice Requirements for Claimants

Anyone dealing directly with the bond principal is not required to give notice of their bond claim until the suit to enforce.[286] The bond principal would be the prime contractor on most jobs but also may include subcontractors providing their own payment bonds.

Anyone who did not deal directly with the bond principal must also give written notice of their claim to the bond principal.[287] Notice must be given within 90 days after "the claimant performed the last of the labor or furnished the last of the materials for which he claims payment."[288] The notice must state with substantial accuracy the amount claimed, the name of the person for whom the work was performed and that the claimant looks to the bond principal for payment.[289] Courts have ruled that a notice that failed to state any amount due is completely defective.[290]

The notice must be served by registered or certified mail to the bond principal at any regular place of business. If the notice is actually received, however, the absence of service by registered mail is not of legal significance.[291]

Enforcement of Bond Claims

Any action on a Public Works Contractor's Bond must be brought within one year after the last day the claimant supplied labor or materials.[292] Subsequent repairs performed by a subcontractor do not extend this one-year period.[293] Furthermore, a suit against a payment bond cannot be filed until the end of a 90-day waiting period after the last day the claimant supplied labor or materials.[294] The suit must be filed in the county where the project is located.[295]

Possible Bond Claims—Compensable Costs

Payment bonds cover the payment of "all material furnished or labor supplied or performed in the prosecution of the work."[296] Labor or materials includes public utility services and reasonable rentals of equipment. However, the rental is limited to equipment that is actually used at the site.

Finance charges above the legal rate and attorney's fees also do not constitute labor and materials and are not recoverable under a Pennsylvania Public Works Bond, unless expressly included in the bonding agreement.[297] In addition, a claim for lost profits[298] and damages for delay are not recoverable against a bond.[299] However, interest at the legal rate is recoverable.[300]

---

[283] *Webster Brick Co., Inc. v. Fidelity & Deposit Co., of Maryland*, 27 D. & C.3d 7 (1983).

[284] *Eastern Insulating Glass Co. v. Raymon R. Heddon & Co.*, 21 D. & C.3d 611 (1981).

[285] 8 P.S. §196.

[286] 8 P.S. §194(a).

[287] *United Plate Glass Co. Div. of Chromalloy American Corp. v. Metal Trims Industries, Inc.,* 525 A.2d 468, 106 Pa.Cmwlth. 22 (1987).

[288] 8 P.S. §194(b).

[289] 8 P.S. §194(b).

[290] *Eastern Insulating Glass Co. v. Raymon R. Heddon & Co.*, 21 D. & C.3d 611 (1981).

[291] *Eastern Insulating Glass Co. v. Raymon R. Heddon & Co.*, 21 D. & C.3d 611 (1981).

[292] 42 P.S. §5523(3). *Manganas Printing Co., Inc. v. Joseph Bucheit and Sons Co.*, 601 F.Supp. 776 (W.D.Pa.1985).

[293] *Valley Forge Industries, Inc. v. Armand Const., Inc.*, 374 A.2d 1312, 248 Pa.Super. 53 (1977), transferred to 394 A.2d 677, 38 Pa.Cmwlth. 603.

[294] *Centre Concrete Co. v. AGI, INC.*, 559 A.2d 516, 522 Pa. 27 (1989).

[295] 8 P.S. §151.

[296] 8 P.S. §193(a)(2).

[297] *Can-Tex Industries v. Safeco Ins. Co. of America*, 460 F. Supp. 1022 (W.D.Pa. 1978); *Lite-Air Products, Inc. v. Fidelity & Deposit Co. of Maryland*, 437 F. Supp. 801 (D.C. Pa. 1977).

[298] *Lite-Air Products, Inc. v. Fidelity & Deposit Co. of Maryland*, 437 F. Supp. 801 (D.C. Pa. 1977).

[299] *Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc.*, 580 A.2d 853, 398 Pa.Super 86, (1990), appeal dismissed as improvidently granted 601 A.2d 806, 529 Pa. 62; *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co., Inc.*, 454 A.2d 39, 38 Pa.Super. 98 (1982).

[300] *Lite-Air Products, Inc. v. Fidelity & Deposit Co. of Maryland*, 437 F. Supp. 801 (E.D. Pa. 1977).

Defense of Payment under Pennsylvania Little Miller Act

Under the federal Miller Act and the Little Miller Acts for Virginia and Maryland previously discussed, there is no "defense of payment" available to the bond principal or the surety. In other words, if a general contractor pays its subcontractor in full on a project, but that subcontractor fails to pay its supplier or sub-subcontractor, the unpaid claimant still has recourse against the general contractor and the surety on the payment bond. It does not matter that the general contractor has already paid its subcontractor. The unpaid supplier or sub-subcontractor can force the general contractor to pay again.[301]

This is no longer the situation in Pennsylvania, however, which now has a defense of payment on a Little Miller Act bond. A change in Pennsylvania's Prompt Payment Act,[302] means that once a general contractor has paid a subcontractor in full, claims for payment against the general contractor or the general contractor's surety are barred.[303] However, common language found in the actual bond form can waive this defense of payment on a Pennsylvania Little Miller Act bond.[304]

DISTRICT OF COLUMBIA LITTLE MILLER ACT

The District of Columbia Little Miller Act is almost identical to the former federal Miller Act.[305] The outline on the federal Miller Act above should be consulted for a discussion of public project bond requirements in the District. Although District of Columbia Courts are not technically bound to follow the federal courts in interpreting bond statutes, they can be expected to.

Under the District of Columbia Act, the Mayor's office makes all decisions concerning bonds.[306] The Mayor's office may require bonds for contracts less than $25,000.[307] Performance, payment[308] and bid bonds[309] are required for construction contracts in excess of $100,000.

Any person who has supplied labor or materials on a public contract, but has not been paid, can obtain a certified copy of the required payment bond by submitting an affidavit to the Mayor.[310]

Suits to enforce bond rights may be brought in the District of Columbia Superior Court within one year after the last supply of labor or materials.[311] Suits may also be brought in federal court if diversity or other grounds for federal jurisdiction exist.[312]

DC also has a "Prompt Pay Act" that restricts a contractor's ability to withhold payment from subs and suppliers.[313] This Prompt Pay act also states that a "pay when paid" clause will not defeat payment bond rights. A subcontractor may (and is probably still required to) enforce bond rights within the deadline, even though the subcontract states that payment is not due until the owner has paid the general contractor.

---

[301] *Mai Steel Service, Inc. v. Blake Constr. Co.,* 981 F.2d 414, 419 (9th Cir. Cal. 1992).

[302] 62 Pa.C.S. §3939(b).

[303] *Trumble Corporation v. Boss Construction, Inc., et al.*, 768 A.2d 368 (Pa. Commw. Ct. 2001).

[304] *Berks Prods. Corp. v. Arch Ins. Co.,* 72 A.3d 315 (Pa. Commw. Ct. 2013).

[305] D.C. Code §2-201.01 et al.

[306] D.C. Code §2-201.01(b).

[307] D.C. Code §2-201.01(b).

[308] D.C. Code §2-357.02.

[309] D.C. Code §2-357.01.

[310] D.C. Code §2-201.03.

[311] D.C. Code §2-201.02.

[312] *District of Columbia ex rel John Driggs Co. v. Ranger Constr. Co.*, 394 F.Supp. 801 (D.C.Cir. 1974); *District of Columbia ex rel American Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041 (D.C.Cir. 1986).

[313] DC Code Section 27-134. Prompt payments to subcontractors.

(a) If a contract is between a contractor and subcontractor, or between a first-tier subcontractor and a second-tier subcontractor, the contractor or subcontractor shall pay undisputed amounts owed to its subcontractor within 7 days after receipt by the contractor or subcontractor of each payment received for its subcontractors' work or materials.

(b) Notwithstanding subsection (a) of this section, conditions of payment to the subcontractor on receipt by the contractor of payment from the owner may not abrogate or waive the right of the subcontractor to:

(1) Claim a mechanics' lien; or

(2) Sue on a contractor's bond.

(c) Any provision of a contract made in violation of subsection (b) of this section is void as against the public policy of the District.

Generally, such "pay when paid" clauses are effective. The subcontractor may not be able to sue the general contractor "on the contract" if that contract contains a properly worded "pay when paid" clause. This does not mean, however, that the subcontractor cannot enforce its bond rights.

METROPOLITAN WASHINGTON AIRPORT AUTHORITY (MWAA)

The Metropolitan Washington Airport Authority (MWAA) is a regional public entity established by an interstate compact, approved by the United States Congress in 1986.[314] The Virginia General Assembly and the City Council of the District of Columbia enacted legislation to establish the MWAA.[315] According to the Virginia Code,[316] the MWAA is "a public body corporate and politic and independent of all other bodies," created for the purpose of "acquiring, operating, maintaining, developing, promoting and protecting Ronald Reagan Washington National Airport and Washington Dulles International Airport."[317]

Dulles and National Airport are owned by the federal government. The MWAA Authority in 1987 entered into a 50-year lease with the federal government, transferring control from the Department of Transportation to the Authority. In 2003, the lease was extended for another 30 years. Virginia's enabling legislation,[318] which created MWAA's limited sovereign immunity, states that MWAA shall be liable for its contracts.

This limited sovereign immunity may mean that no mechanic's lien can be filed against the MWAA's leasehold interest in the airport,[319] although there is no direct case law on this point.[320]

Courts have ruled that neither the federal Miller Act, nor the Virginia Little Miller Act apply to WMAA projects.[321] Accordingly, although MWAA projects tend to look and act much like Miller Act or Little Miller Act projects, it is important to bear in mind that neither procurement statute applies.

The MWAA has promulgated a Contracting Manual that is similar to public procurement statutes of many municipalities.[322] The MWAA Contracting Manual states that upon the award of any construction contract exceeding $100,000, the prime contractor shall furnish performance and payment bonds to the Authority and that the:[323]

> payment bond shall be in the sum of the contract amount and conditioned upon the prompt payment for material furnished or labor supplied or performed in the prosecution of the work. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract. The bond shall cover utility services and reasonable rentals of equipment but only for periods when the equipment rented is actually used at the site.

This wording is similar to, but has some significant differences with, the Miller Act and Little Miller Acts. There is no case law providing guidance on these instructions, and it is not clear in any event that this Contracting Manual would override the wording of any a particular bond form as would a statute. Therefore, contactors should treat the project as a private project.[324] A claimant has no idea of the proper procedure to make a claim without reading the actual payment bond, and all contractors should be careful to obtain an actual copy of the any payment bond before beginning work.

---

[314] *See* 49 U.S.C. §49101 *et seq.*

[315] Va. Code Anno. Code §5.1-152 *et seq* (Michie 1950); D.C.Code §9-901 *et seq.*

[316] Va. Code Anno. Code §5.1-153 (Michie 1950); *see also* 42 U.S.C. §49106(a)(2); D.C.Code §9-902,

[317] Va. Code Anno. Code §5.1-156 (Michie 1950).

[318] Va. Code Anno. Code §5.1-153 (Michie 1950); *See also Gray v. Va. Secy. of Transp*., 276 Va. 93 (Va. 2008).

[319] *Gray v. Va. Secy. of Transp*., 276 Va. 93, 662 S.E.2d 66 (2008).

[320] *Alpine Air Inc. v. MWAA*, 62 Va. Cir. 115 (2003) [MWAA is immune from tort liability].

[321] *Blumenthal-Kahn Electric Ltd. v. American Home Assurance Co*., 219 F. Supp.2d 710 (E.D.VA. 2002).

[322] MWAA Contracting Manual, Second Edition, (2008): http://www.metwashairports.com/file/Contracting_Manual-2ndEdition.pdf.

[323] MWAA Contracting Manual, Second Edition, (2008), Chapter 3, Section 3.11.7: http://www.metwashairports.com/file/Contracting_Manual-2ndEdition.pdf.

[324] *See* section below on Private Payment Bonds.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY (WMATA)

In 1966, Congress created the Washington Metropolitan Area Transit Authority (WMATA) by approving an interstate compact between the Commonwealth of Virginia, the State of Maryland and the District of Columbia. WMATA operates a system of underground and surface trains traveling to and from points in Virginia, Maryland and Washington, D.C.[325] By signing the WMATA Compact, Maryland, Virginia and the District of Columbia conferred upon WMATA their respective sovereign immunities.[326] However, in the WMATA Compact, WMATA is expressly given the authority to "sue and be sued" and "shall be liable for its contracts."[327]

This limited sovereign immunity may mean that no mechanic's lien can be filed against WMATA's property.[328] However, the WMATA Procurement Manual states that the Contracting Officer shall require a contractor to furnish performance and payment bonds or other security on any construction contract when the Authority's independent estimate of the cost of the contract exceeds $100,000.[329]

This wording provides even less guidance than the MWAA Contracting Manual. There is no case law providing guidance on WMATA bonds, and it is not clear in any event that this Procurement Manual would override the wording of any a particular bond form as would a statute. Although WMATA projects tend to look and act much like Miller Act or Little Miller Act projects, it is important to bear in mind that neither procurement statute applies. Therefore, contactors should treat the project as a private project.[330] A claimant has no idea of the proper procedure to make a claim without reading the actual payment bond, and all contractors should be careful to obtain an actual copy of the any payment bond before beginning work.

PITFALLS FOR CLAIMANTS

Arbitration Clauses

Many construction contracts have arbitration clauses. All courts seem to agree that arbitration clauses between contractors are enforceable even if the plaintiff sues to enforce his bond rights. Arbitration clauses will still affect the timing of bond suits, the order in which they proceed and the parties to the suit. On these issues, even different federal courts have come to different results. A bond claimant's biggest practical concern will be to avoid multiple suits and delays by making sure the surety is included and bound by any proceeding.

A public bond claim must be enforced in accordance with the public statute requiring the bond. All public bonding statutes include strict rules about the court location and the time deadline for the suit. These rules must be carefully followed to preserve rights.[331] This lawsuit normally should include the contract debtor/bond principal. All parties can waive an arbitration clause and decide not to enforce the arbitration clause.[332] This leaves the parties with a single lawsuit, frequently the best result for everyone.

An arbitration clause will be enforceable between the parties to the contract containing the clause.[333] If a claimant sues a contract debtor, that contract debtor will be able to get the action stayed or dismissed and force the claimant to seek arbitration instead. If a claimant sues only the surety on the performance or payment bond, the bond principal (contract debtor) may be able to intervene and get that bond action stayed until arbitration is completed between the

---

[325] *Dant v. District of Columbia*, 829 F.2d 69, 71 (D.C. Cir. 1987) *citing Washington Metropolitan Area Transit Authority Compact*, Pub. L. No. 89-774, 80 Stat. 1324 (1966), amended by Pub. L. No. 94-306, 90 Stat. 672 (1976) (authorizing creation of WMATA police force).

[326] *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, (C.A.D.C.,1997) *citing* DC Code 1981, §1-2431, Tit. III, §80. *See also Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987) [The signatories of the Compact and Congress clothed WMATA with sovereign immunity].

[327] *In re Metromedia Fiber Network, Inc.*, 281 B.R. 524 (Bkrtcy.S.D.N.Y.2002), *citing* DC Code Ann. §9-1107.1(12)(a).

[328] *Watters v. WMATA*, 295 F3d 36 (D.C. Cir. 2002) [Sovereign immunity of District of Columbia, Maryland, and Virginia extends to suits for breach of attorney's liens. District of Columbia, Maryland and Virginia have sovereign immunity against imposition and enforcement of equitable liens, and against related devices like garnishment, in their own courts].

[329] WMATA Procurement Procedures Manual, Version 7.1, (Dec. 21, 2015), Chapter 14, Section 14-4(a), http://www.wmata.com/business/procurement_and_contracting/WMATA%20Procurement%20Procedures%20Manual.pdf\.

[330] *See* section below on Private Payment Bonds.

[331] *United States for the Use and Benefit of Harvey Gulf Int'l Marine, Inc. v. Maryland Casualty Ins. Co.*, 573 F.2d 245 (1978).

[332] 6 C.J.S. §37 (1986); *Howard Hill, Inc. v. George A. Fuller Co., Inc.*, 473 F.2d 217 (C.A.Ga.).

[333] Uniform Arbitration Act, Va. Code Anno. §8.01-581.01 *et seq.*, (Michie 1950).

claimant and bond principal.[334] Can the claimant also force the surety to arbitrate?[335] Can the claimant continue to sue the surety on the bond while arbitrating with the contract debtor? Courts differ in their answers.[336] In the dance that follows, the claimant should focus on keeping the two cases together and avoiding two trials.

Most bond forms refer to the contract and incorporate the contract by reference. Some courts have held that this incorporates the entire contract, including the arbitration clause, and the surety is bound to arbitrate. Courts have allowed a surety to compel arbitration, even though the surety was not a signatory of the subcontract with an arbitration clause.[337] A claimant that decides to arbitrate also should also seek arbitration against the bonding company. Arbitrators will sometimes rule that the surety can be forced to arbitrate. The surety will then be bound by the results of the arbitration, and the claimant may avoid two trials.

If the surety successfully gets out of the arbitration proceeding, at least the surety will not be able to later argue that it had no notice of the arbitration and no opportunity to present evidence. If the surety is not bound to arbitrate, then the claimant may not be bound either. The claimant may be able to dismiss or stay the arbitration with the contract debtor/bond principal and proceed directly against only the surety in court.[338] This would again avoid multiple suits. Remember that the claimant will probably have to file a lawsuit against the surety anyway to preserve bond rights.[339]

If the claimant does arbitrate against the contract debtor only, there is a risk that the claimant will have to try the same case twice. If the contract debtor is solvent and the claimant can enforce an arbitration award against the contract debtor, it will never be necessary to go against the surety. However, if the contract debtor is insolvent the claimant now has an uncollectible arbitration award.

Some courts will hold that this arbitration award is conclusive against the surety, especially if the surety had notice of the arbitration. The general rule is that a surety is bound by any judgment against the bond principal, default or after at trial on the merits, when the surety had full knowledge of the action against the principal and an opportunity to defend.[340] Most courts will hold that the surety has "personal defenses," such as lack of notice under the bond or that the claim is not covered under the bond. This will avoid the need to relitigate the factual issues concerning the debt, but a separate proceeding on these personal defenses will still be necessary. In some situations, the surety will be allowed to relitigate the underlying debt to the claimant; this is the situation the claimant wants most to avoid.

Insolvent Surety or Inadequate Security

The existence of a bond does not assure payment to an obligee, subcontractor or supplier. The surety may be insolvent and no better able to make payment than the bond principal. Even corporate sureties can fail because of bad business practices, a bad loss history or inadequate capitalization.

Both the surety *and* the bond principal (general contractor) usually sign and are "jointly and severally" liable under the bond. Claimants usually have the choice of suing just the surety or just the bond principal or both at the same time.[341] If the surety is insolvent, the claimant should review the bond form to see whether the general contractor is "jointly and severally" liable. If the general contractor is solvent, the claimant may be protected.[342]

---

[334] *United States ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co*., 239 F.R.D. 404, 419 (W.D. Pa. 2006).

[335] *Western Sur. Co. v. United States Eng'g Co.,* 211 F. Supp. 3d 302 (D.D.C. 2016) [Surety had not agreed to subject itself to arbitration].

[336] *Schneider Elec. Bldgs. Critical Sys. v. W. Sur. Co.,* 454 Md. 698, 165 A.3d 485 (2017) [A surety's agreement to be jointly and severally liable for the performance of a construction contract does not constitute assent to the subcontract's mandatory arbitration clause when the clause refers specifically to disputes between the contractor and the subcontractor]; *but see United States ex rel. Duncan Telcom, Inc. v. Pond Constructors, Inc.,* 2016 U.S. Dist. LEXIS 141419 (E.D. Va. 2016) [Under the Miller Act, the claimant's cause of action accrued 90 days after completion of its work. The Act permits Duncan to bring suit at that time, not when and if the claimant recovers from the contract debtor. Moreover, conditioning claimant's right to recover from the surety on the completion of the arbitration process with the contract debtor—a process that has not yet been initiated and, under the terms of the Subcontract Agreement itself, can only be initiated by the contract debtor—is at odds with the terms of the Miller Act itself]; *See also D.C. ex rel. Strittmatter Metro, LLC v. Fid. & Deposit Co. of Md.,* 208 F. Supp. 3d 178 (D.D.C. 2016).

[337] *Blumenthal-Kahn Electric Ltd. v. American Home Assurance Co.*, 236 F.Supp.2d 575 (E.D. Va. 2002).

[338] *But see Board of County Commissioners v. Cam Constr. Co.*, 300 Md. 643, 480 A.2d 795 (1984).

[339] *United States for the Use and Benefit of Portland Constr. Co. v. Weiss Pollution Control Corp.*, 532 F.2d 1009 (5th Cir. 1976).

[340] *American Safety Casualty Insurance Co. v. C.G. Mitchell Construction, Inc.*, 268 Va. 340, 350, 601 S.E.2d 633 (2004); *First Am. Title Ins. Co. v. First Alliance Title, Inc*., 2010 U.S. Dist. LEXIS 58433 (E.D. Va. June 14, 2010); *citing Drill South, Inc. v. Int'l Fid. Ins. Co.*, 234 F.3d 1232, 1235 (11th Cir. Ala. 2000).

[341] *Faerber Elec. Co. v. Atlanta Tri-Com, Inc*., 795 F. Supp. 240, 243-244 (N.D. Ill. 1992), *citing United States ex rel. S.C.I. Construction Co. v. Gajic*, 684 F. Supp. 190, 191 (N.D. Ill. 1988). Where a bond exists, sub-subcontractors can sue the prime contractor directly. They are not limited to proceeding against the surety only.

[342] *Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt*., 283 Va. 787, 725 S.E.2d 550 (2012).

It is very important to remember that a claimant has no recourse if the contract debtor and the surety both fail. It will still be impossible to file a mechanic's lien on government property. The government has no liability for allowing an insolvent surety to provide the bond or for neglecting to require bonds at all.[343]

Unfortunately, there are also shady bonding companies who inflate or falsify financial statements in order to meet government qualifications. They will often issue bonds to shady contractors who are unable to obtain other sureties. Large premiums can be charged to provide bonds to risky contractors. Such bonding companies can disappear, however, when large claims appear.

Some government contracting officers are also permitted to approve private sureties. Wealthy individuals are sometimes in the business of providing private surety bonds. Some individuals will also inflate or falsify financial statements in order to qualify.

Insolvent private sureties have been a problem even on federal projects. In one local case, private sureties showed vast real estate holdings on financial statements and were approved by the federal government. After multiple projects failed, many subcontractors and suppliers filed claims against these private sureties. The real estate on the financial statements turned out to be parkland. Subcontractors and suppliers ended up with judgments against an insolvent general contractor and an insolvent surety.[344]

For corporate sureties, subcontractors and suppliers have ready access to financial rating information such as:

Moody's	www.moodys.com	212-553-0377
Standard & Poor's	www.standardandpoors.com/ratings/en/us	212-438-2400
Best's	www.ambest.com	908-439-2200
Financial Management Services/ U.S. Dept. of the Treasury (U.S. government-approved sureties)	www.fms.treas.gov/c570	202-874-6850
Surety & Fidelity Association of America	www.surety.org	202-463-0600

A general contractor may not be willing to supply the financial statements of these sureties. In marginal cases, however, a subcontractor may wish to make this a contract condition.

PITFALLS FOR SUBCONTRACTORS AND SUPPLIERS

Payment bonds are generally better security for subcontractors and suppliers than mechanic's lien rights. Bond rights are usually less expensive to enforce. There is no "defense of payment" under most payment bonds.[345] Even if a general contractor has paid all of its subcontractors in full, an unpaid sub-sub or supplier with protection under the bond can still force the general contractor to pay again.[346] This puts the burden on the general contractor to make sure that all subcontractors forward payment to their creditors. For this reason, general contractors on public projects often require subcontractors to provide subcontractor payment bonds.[347]

However, there are dangers for subcontractors and suppliers on public projects. Subcontractors must remember that they have no mechanic's lien rights on public projects, even if their payment bond rights fail.

In an initial credit evaluation for each project, subs and suppliers should review the payment bond requirements of the particular municipality involved. Requirements vary slightly on federal projects and in each state. Local municipalities may have additional requirements. It is very dangerous for a subcontractor or supplier to assume that a new project will have the same requirements as the last. The safest course is to obtain a copy of the bond during an initial credit evaluation and before bidding on the project. The legal requirements for the particular government

---

[343] *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999); *District of Columbia v. Campbell*, 580 A.2d 1295 (D.C.App. 1990); *Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287, 1289-90 (7th Cir. 1984).

[344] *Coleman Floor Co. v. Certified Surety Management* (E.D.Va. 1990).

[345] As discussed above, there is a defense of payment on Pennsylvania Little Miller Act public projects. *See* 62 Pa.C.S. §3939(b); *Trumble Corporation v. Boss Construction, Inc., et al.*, 768 A.2d 368 (2001). As discussed below, there can be a defense of payment on any private project.

[346] *United States ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC*, 2011 U.S. Dist. LEXIS 46044 (E.D. Va. Apr. 27, 2011).

[347] *Thomas Somerville Co. v. Broyhill*, 200 Va. 358, 105 S.E.2d 824 (1958); *R.C. Stanhope, Inc. v. Roanoke Constr. Co.*, 539 F.2d 992 (4th Cir. 1976).

entity involved should also be reviewed. These legal requirements are reviewed in earlier sections of this book. The following are general considerations for contractors on all government projects.

No Bond Required

Bonds are not required on every public project. Accordingly, contractors should make a practice of obtaining a copy of the bond on the project in their initial credit evaluation of the project and customer. On federal projects, for example, bonds or alternative security are required only for construction contracts exceeding $25,000. In Virginia, the minimum contract is $100,000 for payment bond requirements. Payment bonds are usually required for *construction projects* but less often required for "commercial items"[348] or other types of public procurement. Some contractors supply labor or materials that could be part of a "construction contract" or could be part of other types of procurement, such as a maintenance contract for cleaning services or replacement of HVAC equipment.

Multiple general contracts can eliminate the payment bond requirement on larger projects. The government may elect to act as its own general contractor or may hire a construction manager. The trade contractor, who would usually be a subcontractor, now has a contract directly with the government. Any of these contracts that do not meet the minimum dollar amount will have no payment bond requirement. Government agencies may employ this approach to lower costs to the government, sometimes purposefully relieving contractors of payment bond premiums to reduce the bids received from contractors. This may, however, leave subcontractors and suppliers unprotected.

The government contracting officer *may* require performance and payment bonds for contracts even if not required by law.[349] Payment bond claimants should always check the bonding requirements with the owner or contracting officer, especially once payment problems exist. A payment bond may exist on unexpected projects.

The government contracting officer *may* also waive the requirement of a bond in some instances.[350] The surety and prime contractor will not be liable for the unpaid claims of a sub-subcontractor when the contracting officer has waived a payment bond.[351] The surety and prime contractor will also not be liable for materials delivered after the expiration date stated in the bond accepted by the contracting officer.[352] Even if prime contractor had improperly failed to furnish the payment bond, it would not be liable to the sub-subcontractor when it had no contractual relations with the sub-subcontractor.[353]

It is also possible for a contracting officer to fail to confirm that the general contractor has provided a bond required by law. A sub-subcontractor would have no remedy in this instance either. The claimant cannot sue the government, because of sovereign immunity.[354] The claimant also could not sue the general contractor, since no right of action

---

348 *K-Con, Inc. v. Sec'y of the Army,* 908 F.3d 719 (Fed. Cir. 2018) [Neither solicitation included an express requirement that the Prime Contractor provide performance and payment bonds and did not include FAR clause 52.228-15, Performance and Payment Bonds. The solicitations were patently ambiguous, putting the burden on the Prime to inquire. The statement of work included many construction-related tasks and required compliance with FAR Regulations applicable only to construction Contracts].

349 40 U.S.C.A. §3131(e).

350 40 U.S.C.A. §3131(d) stating that a contracting officer may waive the requirement of a performance bond and payment bond for work under a contract that is to be performed in a foreign country if the officer finds that it is impracticable for the contractor to furnish the bonds. The president may also bond requirements under the War Powers Act. *Gallaher & Speck, Inc. v. Ford Motor Co*., 226 F.2d 728, 730 (7th Cir. Ill. 1955).

351 *Faerber Elec. Co. v. Atlanta Tri-Com, Inc*., 795 F. Supp. 240, 244 (N.D. Ill. 1992).

352 Whether the bond principal failed to comply with the contract requirement to obtain a new bond upon contract extension is wholly irrelevant to liability of the surety. Both the language of the bond and the language of the underlying contract indicate that the bond only provides protection for subcontractors who performed work during the base year and that a new payment bond would be required for subsequent years if the Army exercised its option to extend the Contract. "It is elementary that surety on a bond is bound only to the extent and under the circumstances stipulated in the obligation...The liability of a surety is not to be extended, by implication, beyond the terms of his contract." *United States ex rel. Modern Elec. v. Ideal Elec. Sec. Co.,* 868 F. Supp. 10, 14 (D.D.C. 1994); *United States Go"t ex rel. Russel Sigler, Inc. v. Associated Mech., Inc.,* 2010 U.S. Dist. LEXIS 129834, 9-10 (D. Nev. Dec. 7, 2010).

353 *Harry F. Ortlip Co. of Pa. v. Alvey Ferguson Co*., 223 F.Supp. 893 (D.Pa 1963*); See also Univs. Research As"n v. Coutu*, 450 U.S. 754, 777 n. 28 (U.S. 1981).

354 *Arvanis v. Noslo Engineering Consultants, Inc*., 739 F.2d 1287, 1290 (7th Cir. Ill. 1984). The statute places no affirmative obligation on the government, and says absolutely nothing about what happens when the contractor fails to furnish the bond. The Act grants a very narrow and specific right to those in appellants' position: the right to sue on the bond (if there happens to be one) "in the name of the United States for the use of the person suing." There is clearly no waiver of sovereign immunity here. There does seem to be a gap in the statute; there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement. However, this is not a gap that we can fill with a remedy—especially in view of the very narrow remedy actually granted by the statute.

exists for a sub-subcontractor against a general contractor under the statute in the absence of the bond, creating that obligation.[355] In other words, the Miller Act does not create that obligation independently of the bond contract.

PITFALLS FOR GENERAL CONTRACTORS

Bond principals must be mindful that both the surety *and* the bond principal (general contractor) usually sign and are "jointly and severally" liable under the bond. Usually a claimant will elect to sue both the surety and the bond principal at the same time. Claimants have the choice of suing just the surety or just the bond principal.[356] This can be important if the bond principal is in bankruptcy, for example. The bond form is a separate contractual undertaking that may provide more or different rights than the general contract or subcontract. The bond form may give a claimant more rights and the bond principal more liability than the contract. If the bond principal wants the advantage of a "pay when paid" clause, for example, this restriction must be written into the bond form.[357]

There is no "defense of payment" on most public payment bonds.[358] In other words, the general contractor can be required to pay twice for labor or materials supplied if the general contractor pays all of its subcontractors in full, but some of those subcontractors do not pay their bills.[359] The burden is on the general contractor to make sure that all lower tier claimants are paid.[360]

The most common protection is to require each subcontractor to produce releases from all of their sub-subcontractors and suppliers. Such releases can be required for all progress payments or just for the final payment. However, it is often difficult for a general contractor to know whether it has received releases from all sub-subcontractors and suppliers. It is a good idea to require each subcontractor to provide a list of all sub-subcontractors and suppliers before the project begins. Subcontractors should also be required to update this list if any new sub-subcontractors are used later in the project. Subcontracts should prohibit the use of unauthorized sub-subcontractors.

General contractor superintendents and project managers also must keep a watchful eye for unauthorized sub-subcontractors and suppliers. Trucks appearing on the site and material shipments should be checked against the list of approved sub-subcontractors and suppliers. These are potential claimants on the payment bond. The office staff will not know to require releases from these unauthorized suppliers unless informed by the field personnel.

General contractors can obtain their greatest protection by requiring all subcontractors to provide subcontractor payment bonds. This will protect the general contractor from all downstream claimants. The subcontractor bond will pay any claims as long as the general contractor makes payments to all of its subcontractors. The subcontractor will, of course, have to pay bond premiums. This will add to the cost of the contract for the subcontractor and will result in higher bids to the general contractor. This is one disadvantage.

There also are many subcontractors who cannot qualify for a surety bond even though they are honest, do good work and are capable of completing the project. The subcontractor may have insufficient net worth or may have been

---

[355] *Faerber Elec. Co. v. Atlanta Tri-Com, Inc*., 795 F. Supp. 240, 244 (N.D. Ill. 1992). There can, however, still be a common law third-party beneficiary claim if the federal agency has not expressly waived the bond requirement and a promise to provide a bond exists in the general contract. The Miller Act is also not a sub-subcontractor's only remedy. It may also pursue any common law or equitable remedy against the prime contractor that may exist independent of the existence of a bond, such as the *quantum meruit* and equitable lien claims, *citing United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc*., 834 F.2d 1533, 1539 (10th Cir. 1987); *United States ex rel. Sunworks Division of Sun Collector Corp. v. Insurance Co. of North America*, 695 F.2d 455, 458 (10th Cir. 1982); *but see Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt*., 283 Va. 787, 795, 725 S.E.2d 550, 550 (2012) [sub-subcontractor not a third-party beneficiary of prime contract provisions requiring payment bonds, but is a third party beneficiary of the payment bond and could sue the principal on the bond].

[356] *Faerber Elec. Co. v. Atlanta Tri-Com, Inc*., 795 F. Supp. 240, 243-244 (N.D. Ill. 1992), *citing United States ex rel. S.C.I. Construction Co. v. Gajic*, 684 F. Supp. 190, 191 (N.D. Ill. 1988). Where a bond exists, sub-subcontractors can sue the prime contractor directly. They are not limited to proceeding against the surety only.

[357] *See* section above**,** Pay When Paid Clauses. Moore Bros. Co. v. Brown & Root, Inc., 207 F.3d 717, 723 (4th Cir. Va. 2000).

[358] As discussed above, there is a defense of payment on Pennsylvania Little Miller Act public projects. *See* 62 Pa.C.S. §3939(b); *Trumble Corporation v. Boss Construction, Inc., et al.*, 768 A.2d 368 (2001). As discussed below, there can be a defense of payment on any private project.

[359] *M&T Elec. Contrs., Inc. v. Capital Lighting & Supply, Inc. (In re M&T Elec. Contrs., Inc.),* 267 B.R. 434, 468 (Bankr. D.D.C. 2001), *citing Vulcan Materials Company v. Betts,* 315 F.Supp. 1049, 1053 (W.D. Va. 1970) [under Virginia law a general contractor that has paid its subcontractor the amount due under the contract is not relieved of its liability to the subcontractor's unpaid supplier under a surety bond]. *See also Noland Co. v. West End Realty Corp.,* 147 S.E.2d 105, 110 (Va. 1966) ["payments by a general contractor operated to discharge only the liability to its subcontractors and not the liability to pay for all labor and materials incurred under the prime contract and the bond"].

[360] *Mai Steel Service, Inc. v. Blake Constr. Co.,* 981 F.2d 414, 419 (9th Cir. Cal. 1992)*; Thomas Somerville Co. v. Broyhill*, 200 Va. 358, 105 S.E.2d 824 (1958); *R.C. Stanhope, Inc. v. Roanoke Constr. Co.,* 539 F.2d 992 (4th Cir. 1976).

in business for a short time. Accordingly, the general contractor may increase its subcontract costs and cut itself off from many good subcontractors by requiring the subcontractor to provide a bond.

Some government agencies require subcontractor bonds in addition to a general contractor bond. The general contractor must consider the increased subcontract costs when bidding such a project. Many general contractors believe that the government should allow them to decide whether to take this risk. The general contractor's bond will still cover the claims of most lower tier contractors even if no subcontractor bonds are required. A subcontractor bond requirement will only increase the cost of the project to taxpayers. The general contractor is in the best position to assess the credit worthiness of its subcontractors. Larger subcontractors will have less competition from smaller companies if subcontractor bonds are required.

Bond principals should also make sure that they are not taking on unnecessary liability because of the bond form used. Bond claimants have two places they can look to determine whether they have payment bond rights: the bond statute *and* the bond forms actually used. The bond statute provides *minimum* requirements. The government must require, and the general contractor must provide, a bond that complies with the bond statute. However, a bond can provide claimants *greater* protection than these minimum requirements. This can be a source of unnecessary and unintended liability on the part of bond principals.[361]

PRIVATE BONDS

Private owners may require bid, performance or payment bonds on any project. Such owners often require bonds for the same protective reasons behind public bonding statutes. Bid bonds will ensure that only serious bidders participate in the bidding process and protect owners from the costs associated with bidders who cannot enter a contract in accordance with their bid. Performance bonds will ensure that the project is completed in a timely and workmanlike manner. Private owners, who do not have the public property shield from mechanic's liens, desire payment bonds for protection from mechanic's liens.

Some of these concerns are shared by all owners, public and private. Public and private owners, however, do not necessarily have the same objectives in a construction project. Private owners are more concerned with economics and less with public policy. It is a mistake, therefore, for private owners to blindly adopt the bonding policies and bond forms of public entities.

There are no legal requirements as to the bond terms used in a private project. Private owners and general contractors are free to negotiate whatever bond terms will provide sufficient protection to the owner and which the contractor is willing to purchase. Contractors do not want to have unnecessary liabilities and should take the opportunity to negotiate a bond form with fewer risks than the required public bond forms. Owners do not want to pay for protection they do not need as a private owner. Owners and contractors should take care to use a bond form containing terms tailored to their private project.[362]

If a bond form happens to use language derived from a public bonding statute, the courts can look to public bond case law for interpretation of the words used in the bond. Since there are no controlling statutes, however, private bonds are considered contracts to be interpreted by the courts like any other contract.

Subcontractors and suppliers should not make any assumptions when dealing with private projects. First, they should always determine whether a project is bonded. This is sometimes the most expensive question never asked. Many claims that would be covered by a payment bond remain uncollected because the claimant did not know that the bond existed. Owners and general contractors are not required to advertise the fact that the project is bonded. This is a matter that is privately negotiated between the parties for the protection of the owner. The general contractor may not want potential claimants to know there is a payment bond since bond claims increase their exposure. Subcontractors should contact the owner or architect when payment problems occur and make it clear that a mechanic's lien will be filed unless the job is bonded and a copy of the bond is provided.

Once subcontractors determine that a job is bonded, they cannot make any assumptions about the terms of the bond. Private bonds are freely negotiated and can contain extra "hurdles" for a claimant. Notice may be required within 60 days of last work instead of 90 days. Notice may have to go to the general contractor *and* the bonding company.[363] On the other hand, private bonds may have less requirements to preserve rights. The bond form may not

---

[361] *See* section below, Bond Forms.

[362] *See* section below, Bond Forms.

[363] *Conesco Industries, Ltd. v. Conforti & Eisele, Inc., D. C.*, 627 F.2d 312 (D.C. Cir. 1980).

require notice of default at all[364] or may not require a lawsuit within one year of last work.[365] Potential claimants must obtain an actual copy of the bond and read it or send it to counsel for review in order to determine the most effective procedure to preserve rights.

Subcontractor Bonds

Any prime contractor *may* require payment bonds from their subcontractors. These subcontractor bonds are not required by statute, so the coverage required by the bond is not dictated by law. On a federal project, the general contractor's bond is a Miller Act bond. However, a subcontractor bond is not a Miller Act bond on a federal project. It is a private bond.[366] As discussed below in the subsection on Bond Forms, a claimant cannot make any assumptions regarding the protection provided by the bond or procedure to follow. Whatever the general contractor, subcontractor and surety can agree to will be the rules or the "law" establishing claimants' rights. On the other hand, if the subcontractor and surety were not careful in writing the bond form, a claimant could benefit from very favorable coverage and the subcontractor could agree to much more liability than necessary. Fullerton & Knowles has also developed bond forms for subcontractors and sureties.

A lower tier claimant can usually make a claim against any subcontractor bond *and* the general contractor's bond.[367] This can be a tremendous advantage to a claimant, by providing additional security for the same debt and multiple options for enforcement.

BOND FORMS

Nobody pays enough attention to the bond forms used on a bonded project. Failure to review the actual bond forms for a project can result in the following: government entities inadvertently exposing general contractors to more risk than is required by the bonding statute; private owners exposing general contractors to risks that do not aid the owner in any way; general contractors exposing themselves to liabilities they could have avoided; and subcontractors and suppliers failing to preserve rights they may not know they even have.

The American Institute of Architects, the Associated General Contractors and other groups have developed bond forms for use nationwide. Bonding companies, and therefore contractors, tend to use the same bond forms whether the project is public or private, federal or state, Virginia or Maryland. This is administratively easier but leaves contractors and bonding companies with greater exposure than necessary.

Fullerton & Knowles has developed bond forms for owners, general contractors and sureties. These custom forms meet all public contract requirements and provide protection to subcontractors, without creating unnecessary liability to general contractors and sureties.

Bond Forms on Public Projects

The various Miller Acts describe a *minimum* amount of protection required. The courts have held, however, that there is no reason a contractor or bonding company cannot provide *greater* protection than required by the statutes.[368]

---

[364] *See e.g,. Phoenix Ins. Co. v. Lester Bros., Inc*., 203 Va. 802, 127 S.E.2d 432 (1962).

[365] This would mean the claimant would only have to file suit within the normal statute of limitations for a written contract under seal, which could be years after last work.

[366] *United States v. United States Fidelity and Guar. Co.,* 959 F. Supp. 345, 347 (E.D. La. 1996), *United States v. Mattingly Bridge Co.,* 344 F. Supp. 459, 461 (W.D. Ky. 1972).

The fact that subcontractor bonds are not considered Miller Act bonds has two major effects. First, the Federal Courts do not have subject matter jurisdiction over claims made only on subcontractor payment bonds. *United States v. United States Fidelity and Guar. Co.,* 959 F. Supp. 345, 347 (E.D. La. 1996). There may be appurtenant jurisdiction if the claimant is also suing on the Miller Act general contractor payment bond. There may also be subject matter jurisdiction based on diversity. *J.W. Carruth v. Standard Accident Ins. Co.,* 329 F.2d 690 (5th Cir. 1964).

There is also a circuit split on whether federal or state law applies to claims made under subcontractor payment bonds. For example, the Fourth Circuit has concluded that federal law controls both Miller Act bond claims and the subcontractor bond claims. *U.S. for Use of Coastal Steel Erectors v. Algernon Blair, Inc.*, 479 F.2d 638, 640, n.2 (4th Cir. 1973). The Ninth Circuit has held that state law applies to interpret claims against a subcontractor bond. *U.S. for Use of Building Rental Corp. v. Western Cas. and Sur. Co.,* 498 F.2d 335, 338 n.4 C.A. Cal. (1974).

[367] *Mai Steel Service, Inc. v. Blake Constr. Co.,* 981 F.2d 414, 417-21 (9th Cir. Cal. 1992).

[368] *Reliance Ins. Co. v. Trane Co.*, 212 Va. 394, 184 S.E.2d 817 (1971); *State Highway Admin. v. Transamerica Ins. Co.*, 278 Md. 690, 367 A.2d 509 (1976); *Can-Tex Industries v. Safeco Ins. Co. of America*, 460 F. Supp. 1022 (W.D.Pa. 1978); *Lite-Air Products, Inc. v. Fidelity & Deposit Co. of Maryland*, 437 F. Supp. 801 (DC Pa. 1977); *Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc.*, 580 A.2d 853, 398

The Miller Acts vary from state to state. If a uniform form is used in all jurisdictions, then the form will be below the minimum in some cases and above the minimum in others. Many public entities have a required bond form. Many public entities require the use of an AIA bond form or another standard form. The federal Miller Act does not require a certain form for the performance or payment bonds, but the Code of Federal Regulations does "prescribe" standard forms.[369] Those "prescribed" forms are apparently not required, but are usually used.

If the form is below the minimum, a court will say that the bonding company is still bound to give the minimum protection.[370] If a form is above the minimum, however, the court may say that the bonding company has simply volunteered to provide greater protection than was required by the Miller Act.[371] There is uncertainty and some inconsistency in the courts concerning when the statute can supplement bond forms and when a surety has waived allowed statutory protection.

An example of the problem arises out of a 1971 Virginia Supreme Court case (*Reliance Ins. Co. v. Trane Co.*) that held that if a general contractor wants the protection provided in the Virginia Little Miller Act, then that general contractor must make sure the protective provisions are included in the bond form.[372] The Virginia Little Miller Act allows a general contractor to require a payment bond from its subcontractors. At the time the case was decided (under a prior statute), the lower tier suppliers had to sue on the subcontractor bond and were prohibited from suing on the general contractor's bond if a subcontractor's bond was required.

In the *Trane* case, the general contractor had required a subcontractor payment bond. However, the general contractor's bond form did not repeat the protective words in the statute that required the supplier to sue on the subcontractor bond instead of the general contractor bond. The Virginia Supreme Court held that the supplier could sue on the general contractor's bond, stating that if the general contractor wanted the restrictive protection provided by the statute, the restrictive language must be repeated in the general contractor's bond form.

It would seem that a court could reach the same decision today if a bond failed to include other restrictive protection allowed by the statute. We cannot be certain in any particular case, however, because courts have reached results that seem inconsistent. In another case, for example, the Virginia Supreme Court held that a claimant was still required to file suit within one year of its last work even though this restriction did not appear in the bond form.[373] The bond explicitly identified a longer statute of limitations, but the court ruled that the Little Miller Act prohibited this term. Claimants should still argue that a bond form provides more protection than that required by statute. Bond principals should still be careful to avoid unnecessary exposure.

General contractors may want to avoid signing the bond form at all. It is not clear that the various Miller Acts require that the general contractor sign or be "jointly and severally" liable on the bond, even though commonly used bond forms usually state that both the surety *and* the bond principal (general contractor) are "jointly and severally" liable.[374] If the general contractor fulfills all statutory and contractual obligations by supplying a surety bond, but general contractor does not execute the bond and the bond surety proves to be insolvent, remote sub-subcontractor claimants may not have recourse against the general contractor.

Most Miller Acts state that a supplier without a contract directly with the general contractor must provide notice of its claim within 90 days after the last supply of labor or material to the general contractor. Some bond forms do

---

Pa.Super 86, (1990), appeal dismissed as improvidently granted 601 A.2d 806, 529 Pa. 62; *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co., Inc.*, 454 A.2d 39, 38 Pa.Super. 98 (1982).

[369] 48 CFR §53.228 (b) & (c).

[370] *Commercial Construction Specialties, Inc. v. ACM Construction Management Corp.*, 242 Va. 102, 405 S.E.2d 852 (1991); *Westinghouse Electric Corp. v. Minnix*, 259 Md. 305, 311-316, 269 A.2d 580, 585-86 (1970).

[371] *Reliance Ins. Co. v. Trane Co.*, 212 Va. 394, 184 S.E.2d 817 (1971). *But see Mayor of Baltimore v. Fidelity & Deposit Co.*, 282 Md. 431, 386 A.2d 749 (1978); *Thomas Somerville Co. v. Broyhill*, 200 Va. 358, 105 S.E.2d 824 (1958).

[372] *Reliance Ins. Co. v. Trane Co.*, 212 Va. 394, 184 S.E.2d 817 (1971). *But see APAC-Atlantic, Inc. v. General Insurance Company of America*, 273 Va. 682, 643 S.E.2d 483 (2007). This Virginia Supreme Court opinion also states that disputes arising under the bond were subject to the limitations period contained in the Virginia Public Procurement Act "unless the parties specifically contract for a different time limitation." Accordingly, the question still remains whether it is possible to contractually agree to a longer statute of limitations for a bond claim on a Virginia public project.

[373] *Hughes & Co. v. Robinson Corp.*, 211 Va. 4, 175 S.E.2d 413 (1970)); *but see Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 171-72, 366 S.E.2d 104, 108-09 (1988).

[374] *Faerber Elec. Co. v. Atlanta Tri-Com, Inc*., 795 F. Supp. 240, 244 (N.D. Ill. 1992). There can, however, still be a common law third-party beneficiary claim if the federal agency has not expressly waived the bond requirement and a promise to provide a bond exists in the general contract; *but see Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt*., 283 Va. 787, 725 S.E.2d 550 (2012) [sub-subcontractor not a third-party beneficiary of prime contract provisions requiring payment bonds, but had recourse against the bond principal where the bond principal executed the bond form stating that "joint and several" liability].

not discuss notice at all. A court could decide that no notice was necessary under such a bond form. The statute also extends protection only to "first and second tier" subcontractors. If these protective restrictions are not included in the bond form itself, a court may hold that a third or fourth tier supplier could sue on a general contractor's bond. Some bond forms state that they are for the protection of "*any person supplying labor or materials to the project,*" without any restriction to those supplying the prime contractor and its subcontractors.

If the general contractor does not have the statutory protection written into the bond form, he could be placed in the position of paying a material supplier's claim where: (1) he has already paid the subcontractor for the materials; (2) the subcontractor has paid the sub-subcontractor; (3) the general contractor has required a subcontractor payment bond; (4) the general contractor has never heard of the materials supplier; and (5) the materials supplier has not provided any notice of its claim until a full year after the materials were supplied.

Bonding companies and general contractors should use a different bond form for each jurisdiction. Each bond form should provide for the minimum protection required and no more. Indeed, it is a good practice to use a very short and simple bond form that states that the bond "provides the minimum protection required by statue and no more." It is also very important that the general contractor's bond form contains any protective wording of the statute.

On a public project, subcontractors and suppliers should *always* get a copy of the actual bond. The bond may provide for a greater period of time for notice, a longer statute of limitations or some other protection. Subcontractors may still have bond rights when they think they do not or when no bond coverage was required by statute.

It is sometimes necessary to convince a local municipality that its standard bond form unintentionally exposes general contractors to greater liability than is required by the applicable Miller Act. There is no doubt that the Act's payment bond provisions are intended to protect those who supply labor and materials to public projects, even if a general contractor has to pay for the same labor and materials twice. While this possibility exists as a matter of public policy, the statutes also clearly intend to place some limits on this potential liability and provide the general contractor with some methods to protect itself.

Fullerton & Knowles has developed bond forms for owners, general contractors and sureties. These custom forms meet all public contract requirements and provide protection to subcontractors, without creating unnecessary liability to general contractors and sureties.

Bond Forms on Private Projects

Contractors and bonding companies have an even greater opportunity to protect themselves on private projects. There is no law requiring any particular bond form. A general contractor is free to negotiate any bond form acceptable to the owner. Again, however, bonding companies and general contractors tend to use the same form that is used for all public projects. This exposes the bonding company and the general contractor to considerably more risk than necessary.

On private projects, provisions can be added that create extra "hurdles" for any potential claimant, including a shortened time for notice, requirements for dual notice to the principal *and* the bonding company,[375] and a short statute of limitations for filing suit.[376] This will reduce claims on the bond. Claimants, on the other hand, must get a copy of the bond on private projects, read it and make sure they follow the procedures to preserve rights.

Private owners are usually concerned only with exposure to mechanic's liens and lawsuits. As long as an owner is indemnified against these risks, the owner usually doesn't care how much protection is provided to lower tier subcontractors. The Virginia Mechanic's Lien Law has a defense of payment provision where the general contractor only has to pay once for the project. Thus, if the general contractor can show that it has paid its subcontractors in full, then anyone claiming through that subcontractor will not be able to enforce a mechanic's lien. The Miller Act payment bonds, however, do not have a defense of payment provision. A general contractor can be required to pay for the project more than once. There may be public policy reasons for this in the case of a Miller Act payment bond, but there is no reason for an owner or general contractor to pay twice on a private project. A private owner may be satisfied if a payment bond stated only that the surety and prime contractor would be liable if any claim was successfully brought against the property or the owner.

A general contractor will want a private payment bond to have a defense of payment provision. The owner may be satisfied if he is indemnified against mechanic's lien rights or any other claim against the property or owner.

---

[375] *Conesco Industries, Ltd. v. Conforti & Eisele, Inc., D. C.*, 627 F.2d 312 (D.C. Cir. 1980).

[376] *In re 1616 Reminc Ltd. Partnership*, 9 B.R. 679, 682 (Bankr. E.D. Va. 1981) *citing 3A Michie's Jur., Building Contracts*, §22 (1976 Replacement).

On a *public* job, a claimant needs a copy of the actual bond to see if the bond form provides *even more* protection than that required by statute. However, it is even more critical for a claimant to get a copy of the actual bond on a *private* job. A claimant has no idea what protection is provided by a private bond and has no idea the procedure to preserve rights, without reviewing a copy of the actual bond on a private job.

On the other hand, if the general contractor and surety were not careful in writing the bond form, a claimant could benefit from very favorable coverage. If the bond form did not discuss notice at all, then a court could decide that no notice was necessary under the bond.[377] If the bond form states that the bond is for the protection of "any person supplying labor or materials to the project," it probably provides rights to any subcontractor or supplier, no matter how far removed from the general contractor or whether they are a supplier to a supplier.

Many bond forms are silent as to the time limit for filing suit. In Virginia, the five-year statute of limitations on a written contract would apply.[378] In Maryland a 12-year statute of limitations applies to private payment and performance bonds that do not contain a specific shorter deadline.[379]

Fullerton & Knowles has also developed bond forms for owners, general contractors and sureties on private projects.

James D. Fullerton, Esq. • Clifton, VA • 703-818-2600 • www.FullertonLaw.com

[377] *See e.g., Phoenix Ins. Co. v. Lester Bros., Inc.*, 203 Va. 802, 127 S.E.2d 432 (1962).

[378] Va. Code Anno. §8.01-246(2).

[379] Md. Courts and Judicial Proceedings Code Ann. §5-102(a)(2).