

# Payment Bonds

Presented by James D. Fullerton

# **Construction Law Survival Manual**

By James D. Fullerton

# Construction Law Survival Manual

- Credit Management
  - Fair Credit Reporting Act
  - Equal Credit Opportunity Act
- Contracts and Preserving Rights
  - Drafting Credit Applications, Quotes, Guarantees, Joint Check Agreements
  - Reviewing and Revising Contracts
- UCC Sale of Goods
- UCC Security Agreements
- Default & Termination

- Mechanic's Lien General Principles
- Mechanic's Liens in Virginia, Maryland, Pennsylvania and District of Columbia
- Payment Bonds
- Trust Fund Laws and Agreements
- Enforcement of Judgments
- Bankruptcy Primer for Creditors
  - What to do when your debtor files bankruptcy
  - Defending preference claims

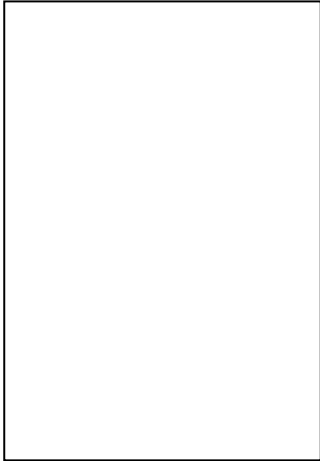
Construction Law Survival Manual is  
available

in NACM Bookstore

in NACM Reference Library

At [www.FullertonLaw.Com](http://www.FullertonLaw.Com)

Contract  
Note



Signed by  
Contract Debtor

Allows CR to sue  
DR and obtain  
judgment

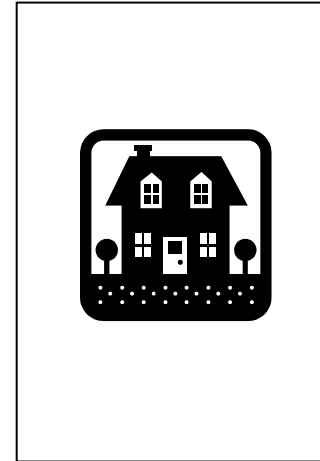
Personal Guaranty  
Bond



Signed by 2<sup>nd</sup> DR,  
Bonding Co.,  
Bonding Principal

Allows CR to sue  
2<sup>nd</sup> DR and obtain  
judgment

Mortgage  
Mechanic's Lien



Signed by  
Property  
Owner

Legislature



# Federal Miller Act

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- Mother of all bonding statutes
- General Contractor on new construction projects must provide Payment Bond

# Types of Bonds

Performance Bond

Bid Bond

Mechanic's Lien Bond

Payment Bond – for payment to  
subcontractors and suppliers



# Sovereign Immunity

- You cannot file a mechanic's lien on public property
- You have something better  
= payment bond
- No defense of payment
- Enforcing bond rights is cheaper and easier than mechanic's lien rights

Federal → Miller Act



State  
County  
Agencies  
School Board → Little Miller Act

Patterned after Federal Miller Act, but sometimes have differences

Private Bonds → Open season

Anything Owner, Surety, and GC agree to



# Most Gov't Jobs Provide Bond Protection . . . . Except:

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- Small government job
  - Under 100k (federal)
  - Large job broken into number of smaller jobs
  - Maintenance Contract, not “Construction Contract”
- Quasi-governmental job
  - FNMA, Sallie Mae, WMATA act like government, but
  - Government = tenant
- Insolvent surety or private surety
- Get a copy of the Bond early

Form may give you more rights than statute

■ Check the rating of the bonding company.

– Moody's

[www.moodys.com](http://www.moodys.com)

212-553-0377

– Standard & Poor's

[www.ratings.com](http://www.ratings.com)

212-438-2400

– Best's

[www.ambest.com](http://www.ambest.com)

908-439-2200

– Financial Management Services/US Department  
of the Treasury

[www.fms.treas.gov/c570](http://www.fms.treas.gov/c570)

202-874-6850

Surety & Fidelity Association of America

[www.surety.org](http://www.surety.org)

202-463-0600

**Problems with Sham Sureties & Private Sureties**

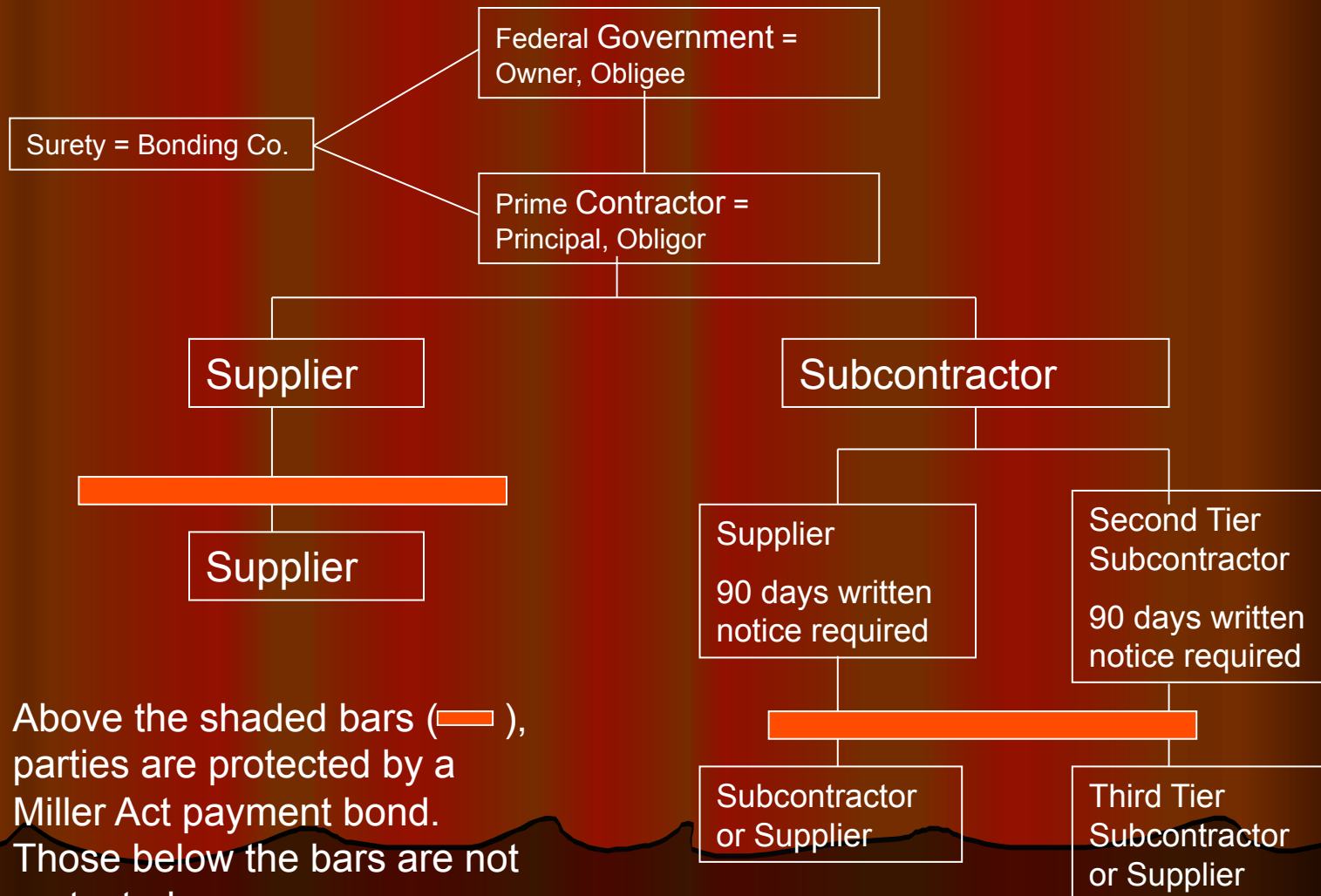


# How to Get a Copy of the Bond

- At bid stage
  - Ability to get a better price
- After problem occurs
  - Contact Owner
  - Threaten Mechanic's Lien
- Better to get Copy of Bond early
  - Harder to get after problem occurs

# Parties Protected by a Miller Act Bond

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Surety

Bond Co.

Guarantor

Principal

Obligor

GC

Obligee

Owner

Beneficiary

Sub/Supp

# Material Not Actually Used

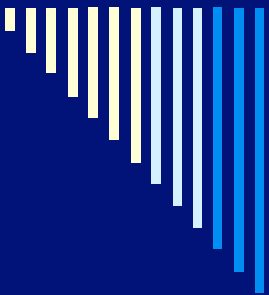
- Labor or Material furnished for performance of General Contract – still have bond rights
- Good faith/reasonable belief rule
  - Even if materials moved or not incorporated
  - This is different from Mechanic's Liens



## Interest and Attorney's Fees in Federal Miller Act Bonds

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- Security for “amount unpaid” claimant (New Language 1999)
- Formerly “sums justly due”
- Focuses on what is contractually “due to claimant”
  - If 18% interest + attorney’s fees “due to Claimant, Bond will cover
  - Must have Contract calling for 18% interest + attorney’s fees



US Government

GC

Sub

Supplier



# Form of Notice

- Not necessary if dealing with Bond Principal
- Subs must state with “Substantial accuracy the amount claimed and the name of the party to whom the Labor and Materials were furnished”
  - make clear it is a bond claim
  - And you are looking to GC for payment
- Form at Appendix
  - Multiple recipients
  - Add invoices, delivery tickets
  - Communication is the objective

**BOND CLAIM NOTICE**

General Contractor: \_\_\_\_\_  
By Certified Mail: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Owner: \_\_\_\_\_  
By Certified Mail: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Surety: \_\_\_\_\_  
By Certified Mail: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The undersigned \_\_\_\_\_ (“Claimant”) has a contract with  
\_\_\_\_\_ (“Customer”) for the supply of \_\_\_\_\_  
\_\_\_\_\_  
(describe labor and or materials furnished)  
furnished to the project known as \_\_\_\_\_  
\_\_\_\_\_  
(describe project)

Contractor is now indebted to Claimant in the amount of \$\_\_\_\_\_. Please accept this as notice  
of a claim on any payment bond for the referenced project. Please also send a copy of the payment bond  
to the undersigned and inform us about the status of your accounts with our customer.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
(Signature)

on behalf of \_\_\_\_\_  
(Claimant)

Claimant: \_\_\_\_\_  
Company Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Phone Number: \_\_\_\_\_  
Fax Number: \_\_\_\_\_



# Notice

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- Multiple Notices
- Multiple Methods
- Multiple Addresses
- Multiple Recipients
- Freeze \$



## Delivery of Notice

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- Any means that provides written, third party verification of delivery (federal)
- CRRR (most state Little Miller Acts)
  - Actual notice
    - Multiple recipients
- Written Notice Required
- If too late, informal notices sent may work



## Timing

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- Fullerton's Rule – Federal Miller Act = 90 days from last work
- GC must receive within 90 days of last supply for which such claim is made
- Paid deliveries do not extend time
- Leave time for delivery of mail

**Trivial work/Repair work/  
Warranty work may not extend  
bond rights**

# Enforcement of Bond Claims with Lawsuit

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- First deadline if dealing with Bond Principal
- Time Limits
  - 90 day nuisance rule
    - You may need to refuse additional deliveries
    - You can sue on Contract
- S/L 1 year after last labor or materials supplied to project = Fullerton's Rule
- Paid or unpaid – supplied to anyone
- Each Contract = separate deadline
- Proof of Claim is insufficient





# Parties

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- Only Surety required (Federal Miller Act)
- Can sue Contract Debtor and/or Bond Principal
  - Strategic issues: bankruptcy



## □ How to motivate a Surety to pay?

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- Provide Complete information
- Provide Complete Proof of Claim
  - Will not pay without proof
  - Surety can obtain information in Discovery
- File suit

# Bond Forms

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- Public Projects
  - Statute = floor
    - If form says notice within 60 days, court should allow notice within 90 days
  - Statute does not = ceiling
    - Form may give you more rights than statute
    - Ex: if form uses “sums justly due” or “amount unpaid claimant” language
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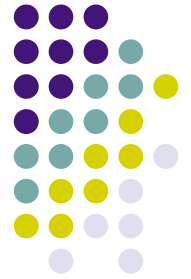
# [ Private Bonds ]

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- Open Season
- Owner, GC and Surety can agree to any rules they want
  - If a form says notice within 60 days, you are stuck with it
- AIA Form – notice to 2 of 3 following:
  - Owner, General Contractor, Surety
- You must get and read the form
  - No requirement to supply copy
  - GC may hide the existence of the bond

# Virginia Public Projects

- Notice within 180 days of last work
- Even this deadline not applicable to
  - retention
  - and \$ held because of pay when paid clause
- Waiver must be after supply of L&M



# Maryland Public Projects

- Who can claim:
- Federal = 1<sup>st</sup> Tier claimants and 2<sup>nd</sup> Tier claimants only
- Maryland = 3<sup>rd</sup> Tier subcontractor
- S/L to enforce
  - Within one year after government accepts project
- Waiver cannot be in contract
- Pay if paid clause does not defeat bond rights

# District of Columbia Public Projects

- Same as Federal requirements

# Pennsylvania Public Projects

- Same as Federal requirements
- EXCEPT:
  - There is a Defense of Payment under Bond
  - 2<sup>nd</sup> Tier subcontractors (suppliers) have no bond rights after the General Contractor has paid subcontractor in full



# Payment Bond Deadline Summary

Jurisdiction	Bond Claim Notice	Lawsuit to Enforce
<b>Federal Government Project</b>	Notice must be <u>received</u> by bond principal (general contractor) delivered by third party with verification of delivery within 90 days of claimant's last work.	Must be filed more than 90 days after claimant's last work, but within one year of claimant's last work.
<b>Virginia Public Project</b>	Notice must be <u>received</u> by bond principal by certified or registered Mail within 180 days of claimant's last work (does not apply to retention of funds held under Pay When Paid contract).	Must be filed more than 90 days after claimant's last work, but within one year of claimant's last work.
<b>Maryland Public Project</b>	Notice must be <u>received</u> by bond principal (general contractor) by certified mail within 90 days of claimants last work.	Must be filed more than 90 days after claimant's last work, but within one year after <u>government accepts</u> completed project from general contractor.
<b>District of Columbia Public Project</b>	Must be <u>received</u> by bond principal (general contractor) by certified or registered mail within 90 days of claimant's last work.	Must be filed more than 90 days after claimant's last work, but within one year of claimant's last work.
<b>Pennsylvania Public Project</b>	Must be <u>received</u> by bond principal (general contractor) by certified mail within 90 days of claimant's last work.  No bond rights once the GC has paid subs in full.	Must be filed more than 90 days after claimant's last work, but within one year of claimant's last work.  There is a Defense of Payment under the bond.

# Lien (and Bond) Waivers

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- Waiver in contract
  - Effective in some states & private projects
  - CRS Must delete waiver in all contracts
- Waiver in separate document after work
  - Is effective in all states
- Progress Payment Waivers

# Progress Payment Waiver

In consideration of the sum of \$ \_\_\_\_\_ paid on account of labor and materials supplied through the day of \_\_\_\_\_, 20\_\_\_\_, and the receipt of which is hereby acknowledged, and other benefits accruing to us, and in favor of the general contractor and the owner of the property improved or in order to procure the making of one or more loans on said real estate, as improved, we do hereby waive, quit-claim in favor of each and every such party and his or its successors and assigns, all right that we, or any of us, may now or hereafter have to a claim on any payment bond or a lien upon the land and improvements above described, by virtue of the laws of the state wherein said land is situate, or any amendments of said laws; and we do further warrant that we have not and will not assign our claims for payments, nor our right to lien or bond rights, and that we have the right to execute this waiver and release thereof.

# Progress Payment Waiver

In consideration of the sum of  
\$ \_\_\_\_\_ the receipt of which is  
hereby acknowledged, the undersigned does  
hereby waive, release and quit-claim the  
right to any payment bond claim or lien on  
the described real estate for labor and  
materials supplied through the \_\_ day of  
\_\_\_\_\_, 20\_\_.

**Fill in the Correct Date**

# Progress Payment Waiver

In consideration of the sum of  
\$ \_\_\_\_\_ the receipt of which is  
hereby acknowledged, the undersigned  
does hereby waive, release and quit-claim  
the right to any payment bond claim or  
lien on the described real estate for labor  
and materials supplied through today.

**RETENTION**

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# Progress Payment Waiver

Make all waivers conditional:

**"This release will be effective only to the total amount of payments actually received without any bankruptcy filing for ninety days thereafter"**

Signed Supplier

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# Have Your Own Waiver Forms Available

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## WAIVER

Date \_\_\_\_\_, 20\_\_\_\_

In consideration of the receipt of the amount of \$\_\_\_\_\_, the undersigned does waive, release and quitclaim, only to the total amount of payments actually received without any bankruptcy filing for ninety days thereafter, all rights that it may have to a mechanic's lien or bond claim pursuant to the laws of any state for labor and materials furnished in and about the repair or construction of improvements to, or upon, the following described property:

The undersigned warrants that it has not and will not assign its claim for payment, nor its right to perfect a lien against said property, and that the person executing this waiver is authorized to do so.

COMPANY NAME:

\_\_\_\_\_

By \_\_\_\_\_

(Title) \_\_\_\_\_

STATE OF \_\_\_\_\_;  
COUNTY OF \_\_\_\_\_, to wit:

Subscribed and sworn to before the undersigned, a Notary Public in and for the County and State aforesaid, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

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