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

<table>
<thead>
<tr>
<th>Contract Note</th>
<th>Personal Guaranty Bond</th>
<th>Mortgage Mechanic’s Lien</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signed by Contract Debtor</td>
<td>Signed by 2\textsuperscript{nd} DR, Bonding Co., Bonding Principal</td>
<td>Signed by Property Owner, Legislature</td>
</tr>
<tr>
<td>Allows CR to sue DR and obtain judgment</td>
<td>Allows CR to sue 2\textsuperscript{nd} DR and obtain judgment</td>
<td></td>
</tr>
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</table>

**Legislature Bonding Co., Bonding Principal**
Federal Miller Act

- 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

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:

- 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  212-553-0377
- Standard & Poor’s
  www.ratings.com  212-438-2400
- Best’s
  www.ambest.com  908-439-2200
- Financial Management Services/US Department of the Treasury
  www.fms.treas.gov/c570  202-874-6850

Surety & Fidelity Association of America
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

Surety = Bonding Co.

Federal Government = Owner, Obligee

Prime Contractor = Principal, Obligor

Supplier

Subcontractor

Supplier

Supplier

Second Tier Subcontractor or Supplier

Third Tier Subcontractor or Supplier

Above the shaded bars ( ), parties are protected by a Miller Act payment bond. Those below the bars are not protected.

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<table>
<thead>
<tr>
<th>Surety</th>
<th>Bond Co.</th>
<th>Guarantor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal</td>
<td>Obligor</td>
<td>GC</td>
</tr>
<tr>
<td>Obligee</td>
<td>Owner</td>
<td>Sub/Supp</td>
</tr>
<tr>
<td>Beneficiary</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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

- 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
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

- Multiple Notices
- Multiple Methods
- Multiple Addresses
- Multiple Recipients
- Freeze $
Delivery of Notice

• 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

- 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

• 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

- Only Surety required (Federal Miller Act)
- Can sue Contract Debtor and/or Bond Principal
  - Strategic issues: bankruptcy
How to motivate a Surety to pay?

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

- 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
Private Bonds

- 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\textsuperscript{st} Tier claimants and 2\textsuperscript{nd} Tier claimants only
  • Maryland = 3\textsuperscript{rd} 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\textsuperscript{nd} Tier subcontractors (suppliers) have no bond rights after the General Contractor has paid subcontractor in full
# Payment Bond Deadline Summary

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Bond Claim Notice</th>
<th>Lawsuit to Enforce</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal Government Project</strong></td>
<td>Notice must be received by bond principal (general contractor) delivered by third party with verification of delivery within 90 days of claimant’s last work.</td>
<td>Must be filed more than 90 days after claimant’s last work, but within one year of claimant’s last work.</td>
</tr>
<tr>
<td><strong>Virginia Public Project</strong></td>
<td>Notice must be received 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).</td>
<td>Must be filed more than 90 days after claimant’s last work, but within one year of claimant’s last work.</td>
</tr>
<tr>
<td><strong>Maryland Public Project</strong></td>
<td>Notice must be received by bond principal (general contractor) by certified mail within 90 days of claimants last work.</td>
<td>Must be filed more than 90 days after claimant’s last work, but within one year after government accepts completed project from general contractor.</td>
</tr>
<tr>
<td><strong>District of Columbia Public Project</strong></td>
<td>Must be received by bond principal (general contractor) by certified or registered mail within 90 days of claimant’s last work.</td>
<td>Must be filed more than 90 days after claimant’s last work, but within one year of claimant’s last work.</td>
</tr>
<tr>
<td><strong>Pennsylvania Public Project</strong></td>
<td>Must be received by bond principal (general contractor) by certified mail within 90 days of claimant’s last work.</td>
<td>Must be filed more than 90 days after claimant’s last work, but within one year of claimant’s last work.</td>
</tr>
<tr>
<td></td>
<td>No bond rights once the GC has paid subs in full.</td>
<td>There is a Defense of Payment under the bond.</td>
</tr>
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*Construction Law Survival Manual – Appendix 30*
Lien (and Bond) Waivers

- 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
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
Have Your Own Waiver
Forms Available

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 us 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: _____________________
www.FullertonLaw.Com

JFullerton@FullertonLaw.com

703-818-2600

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And at
www.FullertonLaw.Com