



CONSTRUCTION LAW ALERT

April 2009

www.bergersingerman.com

Public Works Projects In Florida: Bonds And Other Considerations

by Jeffrey S. Wertman, Esq.

A private contractor who enters into a contract with the State of Florida or any county, city or other public authority in Florida, for the construction of a public building, the prosecution and completion of a public work, or repairs upon a public building or public work, is required to obtain and furnish a payment and a performance bond to the government entity.

The requirements and conditions for payment and performance bonds for state, county, and municipal governments, or any political subdivision thereof, or for other public authority projects are found in Section 255.05 of the Florida Statutes, sometimes referred to as the "Little Miller Act." This statute also provides an outline for a notice form, deadlines for action, and sets forth consequences of improper notice or the failure to act within the specified time frames.

Payment and Performance Bonds

A payment bond is a bond which guarantees the payment of money from the contractor to persons

who furnish labor, materials, equipment or supplies for use in the performance of a contract. One purpose of a payment bond is to protect subcontractors, laborers and suppliers on public construction projects. If unpaid, they cannot attempt to secure payment by filing a construction lien because construction liens cannot be filed against public property. Laborers and material suppliers who have a contract with the prime contractor or a person or entity with a direct subcontract with the prime contractor (e.g., a first tier subcontractor) are covered by a payment bond. In contrast, persons or entities that supply materials or provide labor to a material supplier are not covered by a payment bond.

Unlike a payment bond, a performance bond is a bond which guarantees that the contractor will perform the contract in accordance with its terms. The state, county, city, political subdivision, or public authority entering into the contract is protected by a contractor's performance bond. Payment and performance bonds are conditioned on the

contractor's timely and satisfactory performance of the contract and on the prompt payment to all persons whose claims derive directly or indirectly from the prosecution of the work provided for in the contract.

The requirement to provide bonds on public projects is subject to certain monetary restrictions. When work is done for the state and the contract is for \$100,000 or less, payment and performance bonds are not required. For contracts between \$100,000 and \$200,000, the bond requirement can be waived by the Secretary of the Florida Department of Management Services. When the contract is with any county, city, political subdivision or public authority, and the contract is for less than \$200,000, the official or the board awarding the contract can waive the requirement of providing any bond.

Although payment and performance bonds are required on public projects, alternative forms of security can be used, such as cash, money orders, certified checks, cashier's checks,

irrevocable letter of credits, and certain types of securities.

Statutory Bond Notice and Time Restrictions

There are specific, statutory procedures that must be followed to make claims against a payment bond. A payment bond claimant in privity of contract with the prime contractor does not have to provide any notice of its claim but does have to sue the surety and the principal of the bond within one year of the last day on which it furnished labor or materials for use in the performance of the contract.

Payment bond claimants, who are not in privity with the contractor, must meet the same one-year suit limitation and, must give proper written notice of the bond claim. A claimant, except a laborer, who is not in privity with the contractor, must furnish the contractor with written notice that claimant intends to look to the bond for protection. This notice must be furnished before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work. In addition, a claimant who is not in privity with the contractor, and who has not been paid in full for the labor, services, or materials

provided to the project, must furnish the contractor and the surety with a written notice of the performance of the labor or services or the delivery of materials and of the nonpayment. The notice of nonpayment may be served at any time during the progress of the work or thereafter but not before 45 days after the first furnishing of labor, services, or materials, and not later than 90 days after the final furnishing of the labor, services, or materials by the claimant.

Common Law Payment and Performance Bonds

In addition to the statutory construction bonds discussed above, there are common law payment and common law performance bonds. Common law bonds are surety bonds that are not required by statute and generally furnished by a subcontractor that does not have a direct contract with the owner. Bonds are also considered common law bonds if they provide coverage in excess of the minimum statutory requirements.

There are three particular provisions in a common law bond that you should look for. First,

does the bond contain a statute of limitations. This is the time period within which an action must be filed against the bond or the action will be barred. Second, are there any provisions regarding notice or conditions precedent that must be followed to perfect a claim against the bond. Finally, does the bond contain a specific venue provision. This is the geographic location where a lawsuit must be filed in an action to enforce the bond.

Conclusion

It is essential that construction participants, including contractors, subcontractors, laborers, suppliers, sureties and owners are aware of the statutory bonding requirements on public works projects. Failure to comply with the statutory requirements can be significant, particularly for subcontractors and suppliers. Because they lack lien protection and privity of contract with the owner, the bond is usually the only recourse form them to recover monies for work and materials. ■

Jeffrey S. Wertman

jwertman@bergersingerman.com
(954) 627-9912



Jeffrey S. Wertman is a member of Berger Singerman's Dispute Resolution Team and Construction Law & Design Practice Team. Jeff focuses his practice in the areas of construction law, construction litigation, construction ADR, and general civil, corporate, commercial and complex litigation in state, federal and appellate courts.

The information in this Construction Law Alert is of a general nature only and is not intended to be relied upon as, nor a substitute for, specific professional advice. No responsibility for the loss occasioned to any purpose acting on or refraining from action as a result of any material in this publication can be accepted.

The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.