Why Require Bonds?

- It’s the LAW in Florida!
- Protects tax payer dollars
- Florida Statute § 255.05 for Public Construction
- Florida Statute § 337.18 for FDOT Construction and Maintenance Contracts
- Many other license and permit bonds (see handouts)
- Requiring bid bonds in your invitations to bid brings you prequalified vendors!
A surety bond is a three-party agreement where the Surety assures the Obligee that the Principal will perform a contract.

Three parties to a bond –
1. Obligee (owner)
2. Principal (contractor)
3. Surety (insurance company)
How are bonds different from insurance?

- **Surety** is not insurance, but an extension of credit.

- **Indemnity** - If a surety must finish the contractor’s work, or pay any bills, they will look to the contractor and individual owners/spouses for reimbursement.

- **One-time premium** at the beginning of each job, versus regular monthly insurance premiums.
Bonding is not merely optional, it is required by law in some cases.

- **Section 255.05 of the Florida Statutes** – Florida’s “Little Miller Act” is based upon the federal Miller Act (40 U.S.C. §§ 3131-3134), which requires contractors on federal projects exceeding $150,000 to post performance and payment bonds. In Florida, public construction projects over $200,000 must be bonded. Fla. Stat. § 337.18 calls for bonds on FDOT projects in excess of $250,000.

- The bonds protect the state and its subdivisions from defaults of GC’s in performance of the contract and in payment of subs and suppliers.

- Public projects cannot be liened, so the bond takes the place of lien rights.

- Subs, sub-sub-subs and suppliers must give notice they intend to look to a bond for payment.
Three types of contract surety bonds

Bid Bond
Performance Bond
Payment Bond
Bid Bonds

• Provide financial assurance that the bid has been submitted in good faith and the successful bidder will enter the contract at the price bid and provide required PP bonds.

Unless......

- Overbid
- Clerical Error
- Spread >10%
- Material change in job or financial condition
Performance and Payment Bonds

- **Performance Bond** - Protects owner from financial loss if the contractor fails to perform.
- **Payment Bond** - Assures contractor will pay certain workers, subs and suppliers.
- **Bond Forms**
How does bonding protect you?

- The surety takes on the risk of prequalifying the contractor and has a vested financial interest in making sure the contractor performs and pays all subs and suppliers.

- In a claim situation, the surety has powerful tools to complete the project, it can:
  - Take over the contract and hire a replacement contractor;
  - Re-bid the contract and tender a new contractor to the obligee;
  - Give the existing contractor technical or financial support;
  - Pay the full amount of the bond to the obligee.
You may be wondering...

“. . . How do contractors qualify for one of these "Bonds?"
Three C’s of Bonding

- Character
- Capital
- Capacity
Bond Application

- Contractor Profile (Job sizes, references, ownership, suppliers.)
- Copy of current Certificate of Insurance.
- Last three years financial statements and meaningful interim in-house statement. Include bank statement and AR aging.
- Personal financial statement on owners.
- Work in progress schedule.
- Evidence of bank line of credit.
- Credit based applications for smaller contracts.
Bond Premiums

- Vary by surety company.

- Range from 1%-3% of contract.

- Rating factors include complexity of project & financial strength/presentation.
  - Industry standard rates based on final contract price are:
    * 2.5% for first $100,000
    * 1.5% for the next $400,000
    * 1% for the next $2,000,000.

- Bid bonds free except in short programs.

- Refunds in premium result from reductions in scope, not Owner Direct Purchase.
Bonding Limits

- Assuming appropriate financial results and presentation, sureties may consider single jobs 1.5-2 times largest successfully completed project.

- Aggregate limit is determined by **working capital**, **net worth** and **historical annual revenues**.

- Rule of 10
Can contractors get Prequalified without a bond need?

YES!!

We actually prefer for someone to come to us to get set up and pre-qualified BEFORE they have an urgent bond need. It makes the process easier for everyone.

- It’s Free!
- Once they are set up, we can provide them with free bondability letters for marketing or job pre-qualifications.
- Better to know *if* you qualify and *what* you qualify for before you bid on a job.
- We try to make it as easy and streamlined as possible. We are more than happy to come out to help fill out forms, etc.
How do you know if you have a valid bond?

1. **Check for the surety**
   A. To be Treasury listed
   B. To be A.M. Best Rated
   C. To be licensed in Florida

2. **Does the seal match the surety?**
   Power of Attorney?

3. **Agent to be 220 licensed in Florida.**

Life Cycle of a Bond

Bid, Results, Contract Requiring P&P Bonds, Consent of Surety to Final payment.

Handouts

- Bonding for Public Owners Article (June 2015)
- Public Construction Bond Forms
- Types of Non-Construction Bonds
- Copy of Fla. Stat. § 255.05

Questions???
The 2017 Florida Statutes

Chapter 255

PUBLIC PROPERTY AND PUBLICLY OWNED BUILDINGS

255.05 Bond of contractor constructing public buildings; form; action by claimants. —

(1) A person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority or private entity for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work or before recommencing the work after an interval of abandonment, to execute and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. A public entity may not require a contractor to surety a surety bond under this section from a specific agent or bonding company.

(a) The bond must state on its face:

1. The name, principal business address, and phone number of the contractor, the surety, the name of the property being improved, and, if different from the owner, the contracting public entity.

2. The contract number assigned by the contracting public entity.

3. The bond number assigned by the surety.

4. A description of the project sufficient to identify it, such as a legal description or address of the property being improved, and a general description of the improvement.

(b) Before commencing the work or before recommencing the work after a default or abandonment, the contractor shall provide to the public entity a certified copy of the recorded bond. Notwithstanding the terms of the contract or any other law governing prompt payment for construction services, the public entity may not make a payment to the contractor until the contractor has complied with this paragraph. This paragraph applies to contracts entered into before October 1, 2012.

(c) The bond shall be conditioned upon the contractor’s performance of the construction work in the time and manner prescribed in the contract and promptly making payments to all persons defined in s. 76.17 who furnish labor, services, or materials for the prosecution of the work provided for in the contract. A claimant may apply to the governmental entity having charge of the payment required by the contractor to enforce the bond. The claimant shall have a cause of action against the contractor and surety for the amount due her or him, including unpaid finance charges due under the claimant's contract. Such action may not involve the public authority in any expense.

(d) When the work is done for the state and the contract for $100,000 or less, no payment and performance bond shall be required. At the discretion of the officer or board awarding such contract when such work is done for any county, city, political subdivision, or public authority, a person entering into such a contract that is for $100,000 or less may be exempted from executing the payment and performance bond. When such work is done for the state, the Secretary of Management Services may delegate to state agencies the authority to exempt any person entering into such a contract amounting to more than $100,000 but less than $250,000 from executing the payment and performance bond. If an exemption is granted, the officer or official is not personally liable to persons suffering loss because of granting such exemption. The Department of Management Services shall maintain information on the number of requests by state agencies for delegation of authority to waive the bond requirements by agency and project number and whether any request for delegation was denied and the justification for the denial.

(e) Any provision in a payment bond issued on or after October 1, 2012, furnished for public work contracts provided by this subsection which further restricts the classes of persons protected by the bond, which restricts the venue of any proceeding relating to such bond, which limits or expands the effective duration of the bond, or which adds conditions precedent to the enforcement of a claim against the bond beyond those provided in this section is unenforceable.

(f) The Department of Management Services shall adopt rules with respect to all contracts for $250,000 or less, to provide:

1. Procedures for retaining up to 10 percent of each payment submitted by a contractor for and procedures for determining disbursements from the amount retained on a progress basis to laborers, materialmen, and subcontractors, as defined in s. 76.17.

2. Procedures for requiring certification from laborers, materialmen, and subcontractors, as defined in s. 76.17, before final payment to the contractor that such laborers, materialmen, and subcontractors have no claims against the contractor resulting from the completion of the work provided for in the contract.

The state is not liable to any laborer, materialman, or subcontractor for any amounts greater than the progress share as determined under this section.

1. The amount of the bond shall equal the contract price, except that for a contract in excess of $250 million, the state, county, municipality, political subdivision, or other public entity finds that a bond in the amount of the contract price is not reasonably available, the public entity shall set the amount of the bond at the largest amount reasonably available, but not less than $250 million.

2. For construction management or design build contracts, if the public owner does not include in the bond amount the cost of design or other nonconstruction services, the bond may not be conditioned on performance of such services or payment to persons furnishing such services. Notwithstanding paragraphs (c) and (e), such a bond may exclude persons furnishing services from the classes of persons protected by the bond.

(g) If a claimant is a nonlaborer, nonlabor, or nonmaterialman, and is unable to retain the services of a lawyer, and as a result, is unable to pursue a claim, the claimant may apply to the department for review of the bond.

(h) If a claimant is a nonlaborer, nonlabor, or nonmaterialman, and as a result, is unable to retain the services of a lawyer, and as a result, is unable to pursue a claim, the claimant may apply to the department for review of the bond.

The claim of a contractor upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice shall be extinguished automatically. The contractor or the contractor’s attorney shall serve a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, furnish the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials shall deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. The notice of nonpayment shall be served during the progress of the work or thereafter but may not be served earlier than 60 days after the final 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 or, with respect of rental equipment, not later than 90 days after the date that the rental equipment was last on the job site available for use. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage. An action for the labor, material, or supplies may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served, if required by this section. Notices required or permitted under this section shall be served in accordance with s. 76.17. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and for arbitration, in an amount to be determined by the court, which fee shall be in addition to the prevailing party’s fees, as allowed in equitable actions. The time periods for service of notice of nonpayment or for bringing an action against a contractor or a surety shall be measured from the last day of furnishing labor, services, or materials by the claimant and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion.

(i) When a person is required to execute a waiver of his or her right to make a claim against the payment bond in exchange for, or to induce payment of, a progress payment, the waiver may be in substantially the following form:

WAIVER OF RIGHT TO CLAIM

AGAINST THE PAYMENT BOND

PROGRESS PAYMENT

The undersigned, in consideration of the sum of $ , hereby waives its right to claim against the payment bond for labor, services, or materials furnished through , from , to , for all sums due thereon for improvements to the following described project:

(description of project)

This waiver does not cover any retention on any labor, services, or materials furnished after the date specified.

DATED .

Signed: ____________________

WAIVER OF RIGHT TO CLAIM

AGAINST THE PAYMENT BOND

FINIAL PAYMENT

The undersigned, in consideration of the final payment in the amount of $ , hereby waives its right to claim against the payment bond for labor, services, or materials furnished to , from , on the job of , for improvements to the following described project:

(description of project)
A person may not require a claimant to furnish a waiver that is different from the forms in paragraphs (b) and (c).

(9) A claimant who executes a waiver in exchange for a check may condition the waiver on payment of the check.

(c) A waiver that is not substantially similar to the forms in this subsection is enforceable in accordance with its terms.

(10) The bond required in subsection (1) may be in substantially the following form:

PUBLIC CONSTRUCTION BOND

By this bond, we, as principal and as surety, are bound to the principal and its surety, the contractor, and its surety...

1. The condition of this bond is that, if principal:
   a. Performs the contract dated , between principal and surety for construction of ..., the contract being made a part of this bond by reference, at the times and in the manner prescribed in the contract, and
   b. Promptly makes payments to all claimants, as defined in Section 395.051, Florida Statutes, supplying principal with labor, materials, or supplies, used directly or indirectly by principal in the prosecution of the work performed for the contractor.

2. The bond is enforceable to the extent that the contractor has not made a written demand on any claimant who is in default of payment to the contractor for the items of his or her work, materials, or supplies.

3. The bond is enforceable to the extent that the contractor has not made a written demand on any claimant who is in default of payment to the contractor for the items of his or her work, materials, or supplies.

4. The bond is enforceable to the extent that the contractor has not made a written demand on any claimant who is in default of payment to the contractor for the items of his or her work, materials, or supplies.

Any action instituted by a claimant under this bond for payment must be in accordance with the notice and time limitations provided in subsection 395.051, Florida Statutes. Any changes in or under the contract documents and compliance or noncompliance with any provisions contained in the contract or the changes do not affect the surety's obligation under this bond.

DATED

By:

This bond, as principal and as surety, are bound to:

1. Perform the contract dated , between principal and surety for construction of ..., the contract being made a part of this bond by reference, at the times and in the manner prescribed in the contract, and

2. Promptly make payments to all claimants, as defined in Section 395.051, Florida Statutes, supplying principal with labor, materials, or supplies, used directly or indirectly by principal in the prosecution of the work performed for the contractor.

3. Pay all loss, damages, expenses, costs, and attorney's fees, that owner sustains because of a default by principal under the contract,

4. Pay the surety any amount for all work and materials furnished under the contract for the time specified in the contract, then this bond is void; otherwise it remains in full force.

Any action instituted by a claimant under this bond for payment must be in accordance with the notice and time limitations provided in subsection 395.051, Florida Statutes. Any changes in or under the contract documents and compliance or noncompliance with any provisions contained in the contract or the changes do not affect the surety's obligation under this bond.

DATED

By:

The payment bond provisions of all bonds required by subsection (1) shall be construed and deemed statutory payment bonds furnished pursuant to this section and such bonds shall not under any circumstances be converted into common law bonds.

In addition to the provisions of Chapter 47, any action authorized by this section may be brought in the county in which the public building or public work is being constructed or repaired. This subsection shall not apply to an action instituted prior to May 17, 1971.

All payment bond forms used by a public owner and all payment bonds executed pursuant to this section by a surety shall make reference to this section by number; shall contain reference to the notice and time limitations specified in subsections (2) and (3), and shall comply with the requirements of paragraph (15).

In lieu of the bond required by this section, a contractor may file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part (c) of chapter 625. Any such alternative form of security shall be for the same purpose and be subject to the same conditions as applicable to the bond required by this section. The determination of the value of an alternative form of security shall be made by the appropriate state, county, city, or other political subdivision.

When a contractor has furnished a payment bond pursuant to this section, he or she may, when the state, county, municipality, political subdivision, or other public authority makes any payment to the contractor or directly to a claimant, serve a written demand on any claimant who is in default of payment to the contractor for the items of his or her work, materials, or supplies, used directly or indirectly by principal in the prosecution of the work performed for the contractor, and:

1. Pay the claimant any amount for all work and materials furnished under the contract for the time specified in the contract, then this bond is void; otherwise it remains in full force.

2. Pay the surety any amount for all work and materials furnished under the contract for the time specified in the contract, then this bond is void; otherwise it remains in full force.

3. Pay the surety any amount for all work and materials furnished under the contract for the time specified in the contract, then this bond is void; otherwise it remains in full force.

Any action instituted by a claimant under this bond for payment must be in accordance with the notice and time limitations provided in subsection 395.051, Florida Statutes. Any changes in or under the contract documents and compliance or noncompliance with any provisions contained in the contract or the changes do not affect the surety's obligation under this bond.
Can Public Owners be Held Liable to Subcontractors and Suppliers for Failure to Require General Contractors to Obtain Required Payment Bonds?

BY TODD REGAN

It’s a troubling scenario. After months of promises from the general contractor that payment would be issued soon, that it is about to negotiate a large change order with the owner, and that “they haven’t been paid yet either,” the subcontractor simply can’t wait any longer. The subcontractor has been financing the project for months by paying its own employees and suppliers, without receiving the continually promised progress payments. Finally, the subcontractor asks the owner’s representative for a copy of the payment bond, only to hear something it never even considered: the general contractor never posted the payment bond required by law. To make matters worse, because it’s a municipal project, it doesn’t have the right to file a mechanic’s lien; and the prime contractor is heading towards bankruptcy.

Unfortunately, subcontractors do find themselves in this predicament. Despite the requirements of the federal Miller Act, 40 U.S.C. § 3131, et seq., and the similar state laws, the statutorily required payment bonds are not always in place. Perhaps the school board failed to appreciate that the project was subject to the statutory bonding requirements. Perhaps the city council neglected to check if the prime contractor actually submitted the required bonds. Perhaps the contracting officer failed to ensure that the bond was issued by a licensed surety authorized to do business in the state. Perhaps the surety became insolvent after the project started and the owner failed to require a new bond. Regardless of the reason, subcontractors might perform work on public projects with the assumption that their right to payment is secured, only to find out too late – after the prime contractor defaults on its payment obligations – that there is no payment bond in place. What then is the unpaid subcontractor’s remedy?

Bond producers and other surety professionals should take note that, under certain circumstances, subcontractors and suppliers may have a right of recovery directly against the public owner for failing to ensure that the required payment bond is posted. Whether the subcontractor has such a right of recovery, or whether it is left out in the cold, varies widely across jurisdictions.

The issue of whether to allow a subcontractor to hold a public owner directly liable for failing to require a payment bond invokes a conflict between two fundamental principles underlying the statutory bonding requirements: protecting the payment rights of subcontractors and suppliers performing public work versus protecting the public coffers from claims for payment. A rule imposing liability on public owners for failing to ensure that the required bonding is in place has the dual benefit of protecting subcontractors and giving public
owners an added incentive to ensure compliance with the bonding requirements. Without question, it is the public owners, and not the subcontractors, that are in the best position to ensure that contractors comply with the bonding requirements. Yet, as set forth in the 50-state survey chart accompanying this article, the majority of jurisdictions do not recognize such a cause of action.

No remedy for the “hapless subcontractor” on federal projects
A subcontractor on a federal Miller Act project has no recourse against the federal government in the event that the required payment bond is not posted. In *Arvanis v. Nosal Engineering Consultants, Inc.*, 739 F.2d 1287 (7th Cir. 1984), cert. denied, 466 U.S. 191 (1985), two unpaid subcontractors brought suit against the federal government after the prime contractor, who failed to post a Miller Act payment bond, went into bankruptcy. In dismissing the subcontractors’ claims, the court ruled that the federal government has no affirmative obligation to ensure that a prime contractor obtains the payment and performance bonds required by the Miller Act. The court further held that the claims were barred by the government’s sovereign immunity. The court noted, with a tangible sense of disappointment, that it is the “hapless subcontractor” and not the federal government that is left “holding the bag” when a prime contractor fails to obtain the required bonding. Although the court recognized that the outcome was “unjust,” it noted that it was up to Congress to address the issue by amending the statute.

Significantly, although the court in *Arvanis* advises subcontractors to protect themselves by inquiring with the contracting officers to ensure that the required bonds have been posted, under the statutory language of the Miller Act, in order to obtain a certified copy of the payment bond, the subcontractor must first submit an affidavit to the government certifying that it has not been paid for its work, which may be far too late. See U.S.C. § 3133(a). However, subcontractors and suppliers should take note that the Federal Acquisition Regulations provide methods for subcontractors and prospective subcontractors to obtain information about the payment bond posted by the prime contractor as well as a copy of the bond itself prior to entering into the subcontract or performing work on the project. The regulations provide that the contracting officer must furnish this information to subcontractors or prospective subcontractors on request. FAR 28.106-6(b). The regulations similarly require a prime contractor to provide “a prospective subcontractor or supplier offering to furnish labor or material” with a copy of its payment bond upon request. FAR 52.228-12.

Accordingly, subcontractors and suppliers on federal projects are well advised to use these tools to obtain a copy of the prime contractor’s payment bond prior to executing a subcontract for the project, rather than waiting until payment disputes arise.

Differing approaches by the states
A subcontractor’s ability to assert a claim for payment directly against a public owner for failing to require the prime contractor to post a statutorily required payment bond varies widely from state to state. In a small minority of jurisdictions, a public entity’s liability for failing to require bonds is set forth expressly by statute. For example, in Connecticut, a subcontractor is expressly authorized by statute to bring suit for payment directly against a municipality (but not against the state) for failing to ensure compliance with the bonding requirement. See Conn. Gen. Stat. §§ 49-41(d). Similarly, in Idaho, a public body that fails to ensure compliance with the bonding requirement must, on demand, promptly make payment directly to unpaid subcontractors. See Idaho Code Ann. § 54-1928. The potential consequences to a municipality for failing to ensure that payment bonds are posted are even more dire in Missouri. Not only does the statute, Mo. Rev. Stat. § 107.170, create an express duty on public entities to ensure that the required bonds are in place, but also public officials may be held personally liable for the claims of unpaid subcontractors if they fail to ensure that bonds are posted. *See Union Pacific R.R. v. St. Louis Marketplace, Ltd. P’ship*, 212 F.3d 386 (8th Cir. 2000) (Mo.).

However, as noted by the Alaska Supreme Court, most courts in states that do not expressly impose liability by statute on the public owners have read the bonding statutes narrowly and have declined to impose liability by implication. *See Imperial Mfg. Ice Cold Coolers, Inc. v. Shannon*, 101 P.3d 627, 632 (Alaska 2004).

In rejecting an implied cause of action against the public entity, the court in *Imperial Mfg.* held that such a rule “would be contrary to the premise on which the Little Miller Act is based, which is that neither the government nor government property may be charged by those with whom the government has no contractual relationship. We believe that if the legislature had intended to impose government liability—indeed, as the school district puts it, to require public entities ‘to pay twice for a public project’—this intention would have been expressed because it is a significant variation from the existing norm.” *Imperial Mfg.*, 101 P.3d at 630. Other courts have refused to impose liability on public owners on the grounds that subcontractors have a means of verifying the existence of the payment bond prior to entering into a subcontract. *See Blanchard v. Burns*, 162 S.W. 63 (Ark. 1913).

In contrast, courts that have recognized an implied cause of action against public owners for failing to require bonds have focused on the importance of protecting the rights of subcontractors and suppliers that are deprived of the right to file mechanic’s liens against public property. For example, in *Walt Rankin & Associates v. City of Murrieta*, 84 Cal. App. 4th 805 (2000), the California Court of Appeals held that a municipality has a mandatory duty to ensure that payment bonds
50-State Survey on Public Owner Liability to Subcontractors and Suppliers

ALABAMA
*None

ALASKA
*None
**Imperial Mfg. Ice Cold Coolers, Inc. v. Shannon, 101 P.3d 627, 532 (Alaska 2004) (subcontractor could not sue school district for failing to ensure that bonding requirements of Little Miller Act were met).

ARIZONA
*None
**Flori Corp. v. Yellow Rose Dev. & Constr., Inc., 911 P.2d 548 (Ariz. Ct. App. 1995) (city not liable to unpaid subcontractors for failing to ensure that payment bond from viable surety remained in place for life of project).

ARKANSAS
*None
**Blanchard v. Burns, 162 S.W.3d 1 (Ark. 2012) (directors of school district could not be held liable to subcontractor for failing to require payment bond).

CALIFORNIA
*None
**Walt Rankin & Assocs., v. City of Murrieta, 84 Cal. App. 4th 605 (2000) (municipality has a mandatory duty to ensure that the payment bond posted by a prime contractor is issued by a sufficient admitted surety licensed in California and, in failing to do so, becomes liable for claims of unpaid subcontractors).

COLORADO
*None
**Newt Olson Lumber Co. v. School Dist., 83 Colo. 272 (1928) (school district not liable to subcontractor for failing to require payment bond).

CONNECTICUT
*Conn. Gen. Stat. § 49-41 (d) (political subdivision of the state liable for payment of subcontractor's claims for failure to require subcontractor to post bond; only applies to municipalities and does not apply to claims against the State).

DELAWARE
*None

FLORIDA
*None
**Palm Beach County v. Trinity Indus., 661 So. 2d 942 (Fla. Dist. Ct. App. 1995) (bonding statute interpreted to impose implied obligation on public entity to ensure compliance with contractor's bond requirement; county directly liable for payment of subcontractor due to its failure to require a bond).

GEORGIA
*Ga. Code Ann. § 13-10-61 (public entity liable for payment of unpaid subcontractors in the event that it fails to ensure that general contractor posts required bond).
**City of Atlanta v. Union Elec. Co., 414 S.E.2d 251 (Ga. Ct. App. 1991) (City of Atlanta has been held liable to an unpaid subcontractor for failing to require a payment bond from a general contractor, as provided by statute).

HAWAII
*None

IDAHO
*Idaho Code Ann. § 54-1928 (any public body subject to the act that fails or neglects to obtain the required payment bond must, upon demand, itself promptly make payment to all persons who supplied materials or performed labor in the prosecution of the work under the contract).
**H-K Contractors v. Firth, 101 Idaho 224 (1979) (court affirmed summary judgment in favor of subcontractor's claim against city for failure to require prime contractor to post payment bond).

ILLINOIS
*None

INDIANA
*None

IOWA
*None
**Star Equip., Ltd. v. State, 843 N.W.2d 446 (Iowa 2014) (when public entity waives bonding requirement for small businesses, unpaid subcontractors can, in the absence of a payment bond, recover directly against the public entity).

KANSAS
*None
**Freeman v. Chanute, 63 Kan. 573, 576 (1901) (public entity cannot be sued by unpaid subcontractor for failure to require bond).

KENTUCKY
*None

LOUISIANA
*None

MAINE
*None

MARYLAND
*None
** Bd. of Educ. v. Alerymat Corp. of America, 258 Md. 508 (1970) (school board protected by doctrine of sovereign immunity from subcontractor's suit for failure to require payment bond).

MASSACHUSETTS
*None

MICHIGAN
*None
**ABC Supply Co. v. City of River Rouge, 216 Mich. App. 396 (1996) (public entity cannot be sued by subcontractor for failing to require bond or failing to ensure bond remains in place, but if public entity furnishes subcontractor with a certified copy, it is liable to the subcontractor if the bond later is determined to be invalid).

MINNESOTA
*Minn. Stat. § 774.28 (public body liable for payment of subcontractors if it fails to require contractor to post payment bond).
**Green Elec. Sys., Inc. v. Metro. Airports Commn., 486 N.W.2d 819 (Minn. Ct. App. 1992) (Metropolitan Airport Commission liable to subcontractor for failure to require payment bond if subcontractor can establish that general contractor was insolvent and unable to pay subcontractor for its work).

MISSISSIPPI
*None
**Mississippi State Bdgl. Comm'n v. S & S Moving, Inc., 475 So. 2d 159 (Miss. 1985) (when state failed to require subcontractor to post bond as called for in contract, unpaid subcontractors could maintain action for payment directly against state when contractor became insolvent; by entering into contract the state waived sovereign immunity; but see Pidgmon Thomas Iron Co. v. Leflore County, 135 Miss. 155 (1924) (subcontractor's negligence claim against public entity for failure to require payment bond barred by the doctrine of sovereign immunity).

MISSOURI
*Mo. Rev. Stat. § 107.170 (all public entities have a duty to ensure that the required bonds are posted; permits public entities to indemnify any of its officers and employees from personal liability for failure to comply with the statute).
**Union Pac. R.R. v. St. Louis Marketplace, 212 F.3d 386 (8th Cir. 2000) (Mo. high court could not decide whether the contractor could maintain action against city and individual city officials personally for failing to require developer to post required bonds).

MONTANA
*Mont. Code Ann. § 18-2-202 (public entity liable for payment of subcontractors if it fails to ensure required payment bond are issued by a sufficient surety that is licensed in California and, in failing to do so, becomes liable for claims of unpaid subcontractors. In Rankin, a city awarded a contract for the construction of a playground to a general contractor that posted a payment bond issued by a Turks and Caicos company not licensed as a surety in California. When the general contractor defaulted on its payment obligations to a subcontractor, the subcontractor asserted a payment bond claim. Unfortunately, shortly after issuing the bond for the project, the president of the surety was indicted, the surety vacated its offices, and its assets were unknown or nonexistent at the time of the lawsuit. The subcontractor then brought suit against the city for negligently failing to require a bond posted by a sufficient surety. The court found an implied obligation on the part of the public owner to investigate and verify the sufficiency of the surety, despite the lack of an express statutory obligation to do so. In the aftermath of this decision, the legislature passed a statute, Cal. Code Civ. Proc.
Failure to Require General Contractors to Obtain Required Payment Bonds

is posted.
**None**

**NEBRASKA**
*None*

**Chicago Lumber Co. v. Sch. Dist. No. 71, 227 Neb. 355 (1988)** (subcontractor could maintain a negligence action against school district for failure to require payment bond).

**NEVADA**
*None*

**Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497 (1990) (subcontractor could sue municipality for failing to require payment bond required by municipal code).**

**NEW HAMPSHIRE**
*None*

**NEW JERSEY**
*None*

**NEW MEXICO**
*None*

**NEW YORK**
*None*

**Davidson Pipe Supply Co. v. Wyoming County Indus. Dev. Agency, 88 N.Y.2d 251 (1996)** (overturning decision of the trial court holding an industrial development agency liable to unpaid subcontractor for failure to ensure posting of bond required by Statute Law § 137, on grounds that the project was not a "public improvement" within the meaning of the bonding statute; leaves open the possibility of a private cause of action against a public owner for failure to require a bond); Murnane Assocs. v. Harrison Garage Parking Corp., 238 A.2d 882 (N.Y. App. Div. 1967) (similar holding based on finding that the project was not a public improvement; does not address trial court's finding that the statute provides an implied right of action against the public owner for failure to require bond).

**NORTH CAROLINA**
*N.C. Gen. Stat. § 44A-32 (each contracting body shall designate an official to require the bonds described by the Article. if the official designated*

**NORTH DAKOTA**
*None*

**OHIO**
*None*

**Ray v. Buel, 50 Ohio App. 525 (1935) (town board of trustees could not be held liable for failure to require payment bond); Art's Rental Equip., Inc. v. Bear Creek Constr., LLC, 2010 Ohio Misc. LEXIS 331 (Mar. 16, 2010) (Port Authority not obligated by statute to require bonds; even if statute required bonds, there would be no private right of action against a public entity for failure to comply with the statute).**

**OKLAHOMA**
*None*

**Boren v. Thompson & Assoc., 2010 OK 3 (2010)** (absent an express statutory provision, a school board cannot be held liable to an unpaid subcontractor for failure to ensure that statutorily required bonds are posted; but project architect hired by town to design the project and oversee construction can be held liable to subcontractor for approving release of progress payments to prime contractor without ensuring that required bonds had been posted).

**OREGON**
*Or. Rev. Stat. § 790C.625 (State of Oregon or the public body*

and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of the work for failure to require posting of payment bond).

**Pennsylvania**
*None*

**Cassady-Pierce Co. v. Spangnoli, 160 Pa. Commw. 666 (1993) (court will not read an implied private right of action against public entity for failure to require bond if it is not expressly stated in the statute).**

**RHODE ISLAND**
*None*

**Accent Store Design v. Marathon House, 674 A.2d 1223 (R.I. 1996) (public entity has no liability for failing to ensure that prime contractor posts bonds).**

**SOUTH CAROLINA**
*None*

**Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574 (2013) (unpaid subcontractor may sue city for failure to require payment bond under a third-party beneficiary breach of contract theory; city's liability is limited to unpaid contract balances at the time it received notice of subcontractor's claim; city's obligation is only to ensure that bond is posted; it is not obligated to ensure that a viable bond stays in place for the life of the project).**

**SOUTH DAKOTA**
*S.D. Codified Laws § 5-21-2 (public corporation liable to unpaid subcontractors if it fails to ensure that payment bond is posted).**

**Pete Lien & Sons v. City of Pierre, 577 N.W.2d 330 (S.D. 1998) (statute did not apply because the project was not public improvement within the scope of the bonding statute).**

**TENNESSEE**
*Tenn. Code Ann. § 12-4-202 (if any public officer, whose duty it is to award contracts, awards any contract without requiring payment bond in compliance with § 12-4-201, such officer commits a Class C misdemeanor).**

**TEXAS**
*Tex. Gov't Code Ann. § 2253.027 (if a governmental entity fails to obtain from a prime contractor a payment bond, the entity is subject to the same liability that a surety would incur if the surety had issued a payment bond and if the entity had obtained the bond).**

**UTAH**
*Utah Code Ann. § 14-1-19 (if the state or a political subdivision fails to obtain a payment bond, it shall, upon demand by a person who has furnished labor or supplied materials to the contractor or subcontractor for the work provided for in a contract prior to December 31, 2000, promptly make payment to that person).**

**VERMONT**
*None*

**VIRGINIA**
*None*

**WASHINGTON**
*Wash. Rev. Code § 39.08.015 (county, incorporated city or town, or other municipal corporation shall be liable to unpaid subcontractors or suppliers for failing to require the prime contractor to post bond).**

**WEST VIRGINIA**
*None*

**WISCONSIN**
*None*


**WYOMING**
*None*

*Express Statutory Liability for Failure to Require Bond **Potential Liability Addressed by Courts

§ 995.311, which creates a streamlined process for public owners to verify the status of a surety on the website of the State Department of Insurance and provides owners a safe harbor against claims for failure to verify the sufficiency of the surety. Thus, public owners now have a simple way to verify the sufficiency of sureties, and subcontractors and suppliers are protected against the posting of bonds by unlicensed fly-by-night sureties.

Although some jurisdictions have recognized an implied cause of action against public owners for failing to ensure that payment bonds are posted, most have declined to go so far as to conclude that the public owner has an obligation to ensure that a valid payment bond remains in place for the life of the project. In Flori Corp. v. Yellow Rose Development & Construction, 911 P.2d 546 (Ariz. Ct. App. 1995), the contractor's surety entered into liquidation during the project and was unable to pay the claims of subcontractors. The court rejected the subcontractors' claims Continued on page 38

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that the public owner was obligated
to not only ensure that a bond was
posted at the inception of the project,
but also to require the prime con-
tactor to post a substitute bond after its
surety became insolvent.

Similarly, in Sloan Construction Co.
164 (2011), South Carolina’s Supreme
Court declined to hold a public owner
liable for failing to ensure that a viable
payment bond remained in place for
the life of the project, after the surety
became insolvent and entered into
liquidation. The Michigan Appellate
Court came to a similar conclusion,
noting that, “it would be a herculean
task for those governmental units
which are engaged in a number of
public works projects at any given
time to continually check to ensure
that a payment bond is still in force
for each project and to determine the
identity of the various subcontractors
and suppliers and to advise them of
the status of the payment bond.”

Barnes & Sweeney Enters v. City
of Hazel Park, 425 N.W.2d 572, 575

Conclusion
Thus, although an unpaid sub-
contractor may, under certain circum-
stances, enforce its payment claims
directly against a public owner for failing
to ensure compliance with the bonding
requirements, it is extremely unlikely
that a court would find a public owner
liable for failing to ensure that a viable
bond remained in place through the
life of the project. This, of course,
poses a particular challenge to sub-
contractors and suppliers, who have
little ability to monitor the viability
of the bond during the course of the
project.

Even with a potential right of recov-
ery directly against the public owner,
a subcontractor’s best course is still
to obtain a copy of the payment bond
prior to executing the subcontract.
Depending on the jurisdiction, the
subcontractor may even have an
established right to receive a copy
of the payment bond, either from the
contracting officer or the prime con-
tactor. If the contractor fails to make
timely payments during the course of
the project, the subcontractor will be
in position to notify the surety on
the payment bond about unpaid amounts
due. Failing to be proactive about
the payment bond can leave the subcon-
tractor holding the bag.

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PUBLIC CONSTRUCTION BOND

BY THIS BOND, We, _______________________________________________,
(insert name, principal business address and telephone number of contractor)
as Principal and______________________________________________________,
(insert name principal business address and telephone number of surety)
as Surety, are bound to ____________________________________________________
(insert name, principal address and telephone number of owner of the property or contracting public entity and its contract number),
herein called the Owner, in the sum of $__________________________, for payment of which
we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly
and severally.

THE CONDITION OF THIS BOND is that if Principal:

1. Performs the contracted dated________________________, between Principal and
Owner for construction of __________________________________________
(insert legal description, street address of the property being improved, and general description of the improvement)
the contract being made a part of this bond by reference, at the times and in the manner
prescribed in the contract; and

2. Promptly makes payments to all claimants as defined in Section 255.05(1),
Florida Statutes, supplying Principal with labor, materials, or supplies, used directly or
indirectly by Principal in the prosecution of the work provided for in the contract; and

3. Pays Owner all losses, damages, expenses, costs, and attorney’s fees,
including appellate proceedings, that Owner sustains because of a default by Principal
under the contract; and

4. Performs the guarantee of all work and materials furnished under the contract
for the time specified in the contract, then this bond is void; otherwise it remains in full
force.

Any changes in or under the contract documents and compliance or noncompliance
with any formalities connected with the contract or the changes does not affect Surety’s
obligation under this bond.

DATED on______________________________.
PRINCIPAL:

By: ____________________________

Printed Name

Printed Title

SURETY:

By: ____________________________

Printed Name

Printed Title

STATE OF ________________________
COUNTY OF ______________________

The foregoing instrument was acknowledged before me this ___ day of ______________, __________, by __________________________, as __________________________(title of __________________________(name of corporation), a ________ (State) corporation, on behalf of the corporation. He/She is personally known to me, or has produced his/her driver's license or his/her __________________________(type of identification) as identification.

__________________________
(Signature)

__________________________
(Printed Name)

NOTARY PUBLIC, STATE OF ______________________

__________________________
(Commission Expiration Date)

STATE OF FLORIDA
COUNTY OF ______________________

The foregoing instrument was acknowledged before me this ___ day of ______________, __________, by __________________________, as Attorney-in-Fact (title of __________________________(name of corporation), a ________ (State) corporation, on behalf of the corporation. She is personally known to me.

__________________________
(Signature)

__________________________
(Printed Name)

NOTARY PUBLIC, STATE OF FLORIDA

__________________________
(Commission Expiration Date)
Florida Non-Construction bonds

Agricultural Dealer
Alcohol Bond
Bonded Warehouse
Citrus Fruit Dealer
Collection Agency
Code Compliance (City, County)
Construction License Bond (Adverse Selection Bonds, also called 660 bond)
Beer & Wine Distributor
Fuel Tax Bond
Health Studio Bond
Financially Responsible Officer
Mobile Home Dealer
Motor Vehicle Dealer
Mobile Home Installer
Mortgage Broker
Pawnbroker
Private Education
RV Dealer/Manufacturer
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