



**American Subcontractors Association, Inc.
Leadership Planning Series**

**Strengthening Subcontractor Rights
under Statutory Payment Bonds:
A Checklist
for Subcontractor Advocates**

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Background

Typically, subcontractors furnishing labor and materials to construction projects are afforded some security for payment under the state mechanics lien statute. However, in most jurisdictions, such mechanics liens cannot be asserted against public property. Consequently, on federal, state and local construction projects, subcontractors and suppliers must look elsewhere for protection.

In virtually all jurisdictions, the principal form of protection for those supplying construction labor and materials and services on a public work project arises under the public work bonding statutes. These statutes generally require the prime contractor to post performance and payment bonds relative to its work on the project. On federal projects, this bonding requirement arises under statute known as the Miller Act. Consequently, state public work statutes generally have become known as “Little Miller Acts,” although the uniform description belies the fact that there may be significant differences among and between the public work bonding statutes in the various states. For information on each state’s Little Miller Act, see the Foundation of ASA’s [Lien & Bond Claims in the 50 States](#).

Of particular concern to subcontractors and suppliers, of course, is the statutory payment bond requirement which is intended to benefit those who supply labor, material and services on the construction of public work. There are many potential areas of concern in examining the suitability of a particular state’s statute to determine if it should be modified or amended to make it “better” from the perspective of the subcontractor or supplier performing construction services on public work projects.

A subcontractor advocate considering ways to improve his/her state’s Little Miller Act should start with a review of the law itself. You may have to look in several places in your state laws to find all applicable or related sections. Keep in mind that, in most jurisdictions, the statutory provisions regarding such public work bonding requirements, terms and procedures will supersede any conflicting language in the contract documents or bond form itself.

Furthermore, such statutory provisions and the bonds issued pursuant to such requirements generally are liberally construed in favor of the intended beneficiaries – the subcontractors and suppliers providing labor, material and services to constructing the public work project.

As noted above, there is significant diversity among the various states in the level of protection afforded and the complexity of procedures involved. The federal Miller Act is relatively simple and straightforward and provides a good prototype, both as a starting point and for comparative purposes. Furthermore, while some Little Miller Act statutes are virtually identical to the federal prototype, other states have adopted significantly more complicated and restrictive approaches to their public work payment bond laws.

The following checklist provides a comprehensive review of the most critical aspects for consideration in assessing whether and to what degree your state's statute effectively serves the interests of subcontractors. Once you answer the questions, determine what would be the optimal response to each question in your construction market. Your answers will provide the outline of a bill to reform the Little Miller Act in your state.

Then use ASA's [*Guide to Establishing and Maintaining a Government Advocacy Program in Your ASA Chapter*](#) to develop a plan to enact your bill.

A Subcontractor's Advocate's Checklist for a State "Little Miller Act"

1. How does the statute (or judicial determinations of it) define "public work" for purposes of application of the payment bond requirement? Do the statutory protections extend to state, county and local authorities? Do they extend to "boards" (e.g., boards of education), authorities (e.g., transportation), or public-private partnerships (e.g., public property developed by private firms, such as highways, prisons, community centers, dormitories, etc.)?
2. Does the statute require a bond on all public work projects regardless of value or is there a dollar or other threshold defining which projects require such bonds and which ones do not? Is the threshold too high to cover some significant construction projects?
3. Does the statute permit a single payment and performance bond in one penal sum, or require two separate bonds with two separate and independent penal sums?
4. Does the statute specify bonds in the full contract amount or in some proportion thereof? If the latter, is the proportion reasonable under the circumstances? Does the statute allow the public owner to accept a smaller dollar value or alternate form of security?
5. Is there any recourse available to claimants if/when:
 - No bond has been posted?
 - The posted bond provides insufficient in quality?
 - The posted bond becomes worthless by failure of the surety?
6. Are there reasonable, uniform and objective criteria for use in evaluating the suitability of a proposed surety (e.g., use of such criteria such as certification with state insurance commission; listed on the U.S. Treasury Department's List of Acceptable Sureties) and within any listed underwriting limits (e.g., Best Key Manual or other industry standard rating requirements)? Who makes the decision and what are the consequences of a negligent or improper decision?
7. Does the statute permit individual sureties, letters of credit, parental guarantees or other alternatives to corporate sureties for posting such bonds? If so, what investigative and reporting requirements and protections are prescribed to assure that the protection purportedly existing does in fact exist at the outset and that it will remain through the duration of the project?
8. Is the prospective waiver of bond rights permitted or precluded?
9. Does the statute affirmatively require the owner and/or prime contractor to provide claimants or potential claimants with copies of the payment bond, the surety's

name and address and other pertinent information? Can this information be acquired prior to contracting? Is this information maintained and available to the public on a government-operated website? If the state has an online mechanics lien registry, does it allow or require the posting of payment bonds?

10. How far down the subcontracting chain does the protection under the prime contractor's payment bond extend? In other words, is coverage limited to the second tier (as in the federal Miller Act) or does it extend to some lower tiers or to subcontractors and suppliers at any tier?
11. Regarding notices:
 - Is notice required?
 - Who must give notice (i.e., first tier, second tier, etc.)?
 - To whom must notice be given (i.e., owner, prime contractor, surety)?
 - Must notice be given (e.g., certified mail, return receipt requested; registered mail, return receipt requested; any method by which delivery can be proven)?
 - Within what time limits must notice be given?
 - When does the time for issuing notice commence to run (e.g., last labor or materials furnished, extra work, punchlist, replacement work, voluntary work)?
 - When is notice considered to have been given – upon transmittal by the claimant or upon actual receipt by the contractor or surety?
 - Are there multiple levels of notice, including preliminary notice required, as a condition precedent to pursuit of rights under the bond?
 - Is such notice given before completion of the work of the claimant premature and ineffectual?
12. Enforcement actions:
 - Where can or must enforcement actions be brought (e.g., which court? which jurisdiction)?
 - When can suit first be brought?
 - What is the time limit within which suit must be brought?
 - When does the time limit commence running (e.g., last labor or material supplied by claimant; substantial completion of the claimant's work; substantial completion of the project; final completion; final payment)?
13. What is required to establish the provision or incorporation of labor or materials into the project? Is proof of incorporation required? Is there a presumption? Is it rebuttable?
14. Does the statute provide for any type of penalty or sanction against a surety which refuses in bad faith or without substantial reason to deny coverage and force commencement and prosecution of an enforcement action?
15. Is there any provision for recovery of prejudgment interest under the bond?

16. Does the statute provide for recovery of attorney fees in favor of the prevailing party in any enforcement action against the bond?
17. What types of costs or damages incurred by the claimant can be recovered under the payment bond (e.g., rental costs, increased costs due to delay or disruption or performance, cost of capital consumed, cost of consumables, cost of owned equipment, standby costs, management, general and administrative costs)?
18. Does the statute allow the surety to assert the contractor's contract defenses including "pay-if-paid" or "pay-when-paid" clauses?
19. Does the statute allow a contractor to add conditions precedent to claims on the payment bond (e.g., dispute resolution with the owner)?

ASA Policy on Subcontractor Protections under Statutory Payment Bonds

The payment bonds, under the federal Miller Act and state and local Little Miller Acts, are the primary payment protection for subcontractors and suppliers on public construction. ASA believes these laws should:

- Restrict the use of inappropriate alternatives to surety bonds.
- Regulate the use of individual surety bonds.
- Require that the payment bond be for the total amount of the contract but, in any event, no less than the performance bond.
- Require that there are separate performance and payment bonds with stated penal amounts.
- Place an affirmative obligation on the government to assure that the prime contractor provides an appropriate bond.
- Prohibit the contractual waiver of rights.
- Define the notice requirements and filing periods.
- Provide for the payment of reasonable attorney fees and interest.
- Extend the protections to progress payments.
- Extend the protections to all on-site subcontractors and to the suppliers to such on-site subcontractors.
- Allow notices to be sent by any method that provides sufficient proof of receipt.
- Require a prime contractor to provide a copy of its payment bond to prospective subcontractors and suppliers upon request and to attach a copy of its bond to its subcontracts. Alternatively, make a copy of a prime contractor's payment bond available on a government-maintained Web site.
- Require the threshold for such bonds to be no higher than \$100,000, unless other payment protections are in place.