Surety Bonds for Federal and Oklahoma Public Works Projects

Charles W. Adams

SURETY BONDS FOR FEDERAL AND OKLAHOMA PUBLIC WORKS PROJECTS*

by
Charles W. Adams†

I. INTRODUCTION

Persons supplying labor and materials for construction projects generally are allowed to claim mechanic's liens on the property they improve in order to ensure payment for their labor and materials. The mechanic's lien remedies are not available on public projects, however, because property owned by the federal government, and by most state governments, is not subject to mechanic's liens. Instead, labor and material suppliers have to look to the surety bonds that are provided by contractors on public works projects for payment.[1] Contractors on federal public projects are required to provide surety bonds under the Miller Act,[2] and contractors on Oklahoma state public projects are required to provide

---

* This Article is based on Chapter VI in C. ADAMS, OKLAHOMA LIEN LAWS (1990). Reprinted by permission of the publisher.

† Professor of Law, The University of Tulsa College of Law.

1. The United States Supreme Court explained the rationale for requiring payment bonds for federal public works projects in F. D. Rich Co. v. United States *ex rel.* Industrial Lumber, Inc., 417 U.S. 116, 121-22 (1974) as follows:

> Section 270a (a)(2) of the Miller Act establishes the general requirement of a payment bond to protect those who supply labor or materials to a contractor on a federal project. Ordinarily, a supplier of labor or materials on a private construction project can secure a mechanic's lien against the improved property under state law. But a lien cannot attach to Government property, see *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 380 (1917), so suppliers on Government projects are deprived of their usual security interest. The Miller Act was intended to provide an alternative remedy to protect the rights of these suppliers.

The Oklahoma Supreme Court expressed a similar purpose for requiring payment bonds on state public works projects in Oklahoma in Richards & Conover Steel Co. v. Nielsons, Inc., 755 P.2d 644, 649: "Inasmuch as a private party may not obtain a lien against public property, the payment bond provides alternate routes of satisfaction for services rendered on the public works project." *See also* Donaldson & Yahn v. Benight, 105 Okla. 108, 110, 232 P. 116, 118 (1924) ("As the law denies to such claimants the right of a mechanic's lien against public improvements and buildings, it was evidently the purpose of the Legislature for the bond to take the place of the lien.").

2. 40 U.S.C. §§ 270a-270f (1988).

surety bonds or letters of credit under the Miller Act's Oklahoma counterpart.[3]

The beneficiaries of a payment bond on a public works project are the lower tier suppliers of labor and materials, rather than the contractor who furnishes the bond. Having contracted directly with the government agency, a contractor may enforce its contract rights against the agency. Lacking privity with the government agency, though, subcontractors are not able to enforce claims against the government agency, but instead are limited to either seeking relief from that person with whom they have dealt, or else obtaining recovery under the contractor's payment bond. Although the surety on a payment bond is directly responsible for satisfying claims based on it, the surety may enforce its rights of subrogation against the contractor.[4] Thus, the contractor is ultimately responsible for satisfying claims for furnishing labor and materials on a public works project.

This Article examines the bonding requirements for both federal and Oklahoma state public works projects and the remedies available to subcontractors and suppliers on both types of projects. Although there are many similarities between the Miller Act and its Oklahoma counterpart, there are also significant differences, which will be highlighted in this discussion.

II. FEDERAL PUBLIC WORKS PROJECTS

A. *Bonding Requirements Under the Miller Act*

The Miller Act provides as follows regarding contractors providing performance and payment bonds on federal public works projects:[5]

> Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":
> (1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

3. OKLA. STAT. tit. 61, §§ 1-2 (1981 & Supp. 1990).
4. *Cf.* OKLA. STAT. tit. 15, § 382 (1981) ("A surety, upon satisfying the obligations of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended.").
5. 40 U.S.C. § 270a (a) (1988).

> (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.[6]

The distinction between performance and payment bonds was explained in *American Casualty Co. v. Town of Shattuck*,[7] as follows:

> The obligation of a surety on a performance bond, upon default of the principal or contractor, is to perform or finish the work agreed upon or pay the owner the cost of performing or finishing the work. The obligation of a Surety on a payment bond is not to perform or finish the work or pay the cost of performing or finishing the work but is to pay any unpaid bills of the contractor or principal relating to the job.[8]

Forms for performance and payment bonds on federal projects are prescribed in the Code of Federal Regulations;[9] they are known as Standard Forms 25 and 25A, respectively. Even if the terms of the payment bond that is actually used deviate from the terms in Standard Form 25A, the statutory payment bond obligations will be read into the payment bond.[10] Persons furnishing labor or materials on a federal public works project are entitled to obtain a copy of the contractor's performance and payment bonds from the contracting agency under section 270c, or they may request one from the contractor.

Section 270a (c) provides that a contracting officer may require additional bonds from the general contractor besides the performance and payment bonds specified by section 270a (a). Projects which require performance and payment bonds also require bid guarantees to provide assurance that the bidder will both provide the necessary bonds if the bid is

6. *Id.*
7. 228 F. Supp. 834 (W.D. Okla. 1964).
8. *Id.* at 838.
9. 48 C.F.R. §§ 28.106, 53.301 (1989).
10. *See* United States *ex rel.* Sherman v. Carter, 353 U.S. 210, 215-16 (1957) ("The surety's liability on a Miller Act bond must be at least coextensive with the obligations imposed by the Act if the bond is to have its intended effect."); United States *ex rel.* Hillsdale Rock Co. v. Cortelyou & Cole, Inc., 581 F.2d 239, 242-43 (9th Cir. 1978) (payment bond deviated from Standard Form 25A but the materials supplier was allowed to recover on it under the Miller Act).

accepted, and will not withdraw the bid during the specified period.[11] The bond requirements may be waived in certain circumstances under section 270a (b) (for work to be performed in foreign countries if obtaining bonds is impracticable); section 270e (cost plus contracts with the military); and section 270f (contracts for construction, alteration, or repair of vessels).

Payment and performance bonds are required under section 270a (a) only in connection with "the construction, alteration, or repair of any public building or public work of the United States." The demolition of public buildings does not appear to be covered by the Miller Act, unless the demolition contract also calls for some type of construction or repair.[12] Identifying a public building or public work for purposes of the Miller Act is normally a straightforward matter, but two cases from the Tenth Circuit Court of Appeals illustrate that there may be ambiguities in this task under particular circumstances. The Tenth Circuit decided in *United States ex rel. Empire Plastics Corp. v. Western Casualty & Surety Co.*,[13] that performance and payment bonds were required under section 270a (a) for the renovation of an Air Force Base Exchange building, because title to the building was held by the United States, even though the building was used for a non-appropriated fund activity. In contrast, the court ruled in *United States ex rel. Miles Lumber Co. v. Harrison & Grimshaw Construction Co.*,[14] that the Miller Act was not applicable to the construction of housing at a military base under the Capehart Housing Act.[15] Although title to the land was in the United States government, the construction was financed by private funds secured by mortgages covering the housing to be constructed. Under the Capehart Housing Act, title to the housing was to be transferred to the Secretary of Defense once each unit was completed, but until this transfer occurred, suppliers of labor and materials could assert mechanic's liens under state law against the property. The Tenth Circuit concluded that until the government took control, the housing construction was of a private nature and, therefore not subject to the Miller Act.[16]

11. *See* 48 C.F.R. §§ 28.001, 28.101-1 (1989).

12. Chicago Rigging Co. v. Uniroyal Chem. Co., 718 F. Supp. 696, 700-01 (N.D. Ill. 1989) (no coverage under Miller Act even though demolition contract required removal of asbestos).

13. 429 F.2d 905, 906 (10th Cir. 1970).

14. 305 F.2d 363 (10th Cir.), *cert. denied*, 371 U.S. 920 (1962).

15. 42 U.S.C. § 1594(a)-1594f (1988).

16. 305 F.2d at 368-69. *See also* United States *ex rel.* Motta v. Able Bituminous Contractors, Inc., 640 F. Supp. 69 (D. Mass. 1986) (the construction of an interstate highway was covered by the Miller Act); United States *ex rel.* Tom P. McDermott, Inc. v. Woods Constr. Co., 224 F. Supp. 406

If no payment bond is furnished, a supplier of labor or materials will have to look for alternative sources of payment. For example, there was no payment bond furnished by the contractor in *Empire Plastics*,[17] and a supplier of materials was allowed to recover from the surety who provided a bid bond for the contractor. The Tenth Circuit reasoned that when the contractor's bid was accepted, the promises of the contractor and its surety on the bid bond to provide performance and payment bonds became enforceable; and accordingly, the surety was liable on account of the contractor's failure to obtain a payment bond.[18]

Kennedy Electric Co. v. United States Postal Service,[19] was another case where the contractor did not furnish a payment bond as required by the Miller Act. After the government agency discovered that the contractor failed to provide performance and payment bonds, it terminated the contract. The contractor later went into bankruptcy, and it never paid a subcontractor, who sought recovery from the government agency that had failed to comply with the Miller Act by requiring a payment bond from the contractor. The Tenth Circuit awarded the subcontractor an equitable lien not only on the portion of the appropriation for the construction that remained in the hands of the government agency, but also on funds that the agency paid to the contractor's assignee after the agency had notice of the subcontractor's claim.[20]

Although a subcontractor may be allowed to enforce an equitable lien against funds retained by a government agency, the agency will not be liable to the subcontractor under the Federal Tort Claims Act for its failure to require a payment bond from the contractor. Thus, in dismissing an action filed by a subcontractor against the government for lack of subject matter jurisdiction, the Tenth Circuit ruled: "Federal district courts have no jurisdiction under the Federal Torts Claims Act over subcontractor suits alleging negligent failure of the federal government or its officers to require a prime contractor to post a Miller Act bond."[21]

A supplier of labor or materials can always seek recovery from the

(N.D. Okla. 1963) (the Miller Act applied to the construction of a state highway); Annotation, *What Constitutes "Public Work" Within Statute Relating to Contractor's Bond*, 48 A.L.R. 4th 1170 (1976).

17. 429 F.2d 905 (10th Cir. 1970).

18. *Id.* at 907.

19. 508 F.2d 954 (10th Cir. 1974), *reh'g denied* (1975).

20. *Id.* at 960. *See also* Active Fire Sprinkler Corp. v. United States Postal Serv., 811 F.2d 747, 754 (2d Cir. 1987) (because of a waiver of sovereign immunity a subcontractor was allowed to assert equitable lien claim against the Postal Service).

21. McMann v. Northern Pueblos Enters., Inc., 594 F.2d 784, 785 (10th Cir. 1979).

contractor or other person with whom they have dealt. Instead of seeking recovery under a payment bond, they may pursue a claim for breach of contract or quantum meruit against the person to whom the labor or materials were supplied.[22]

B. *Claims Covered by Payment Bonds*

1. Types of Claims for Labor and Materials

Under section 270b (a), the claims covered under a payment bond extend to any "labor or material [furnished] in the prosecution of the work" on a federal public works project. Federal courts have interpreted this language broadly for both labor and material claims.

The United States Supreme Court considered the scope of section 270b with respect to claims for labor in *United States ex rel. Sherman v. Carter.*[23] In *Sherman,* the Court held that a surety on a payment bond was liable for payments that a contractor was required to make to a health and welfare fund for construction workers under a collective bargaining agreement. The surety argued that employer contributions to a health and welfare fund should not be considered for purposes of a payment bond, because they did not constitute "wages" owed to the employees who furnished labor on the construction project. The Court held, however, that the Miller Act was not limited to wages, and that the contributions to the fund were covered by the payment bond because they were part of the consideration the contractor agreed to pay for the services of the construction workers on the project.[24]

The scope of coverage for materials extends not only to materials that are incorporated into an improvement constructed on a federal project, but also to materials that are consumed in the course of the construction. For example, in *United States ex rel. Tom P. McDermott, Inc.*

---

22. *See* United States *ex rel.* Sunworks Div. of Sun Collector Corp. v. Insurance Co. of N. Am., 695 F.2d 455, 458 (10th Cir. 1982) ("Where neither a valid Miller Act nor mechanic's lien claim exists, other statutory or common law remedies may be available to an unpaid supplier."). *See also* K-W Industries v. National Sur. Corp., 855 F.2d 640, 643 (9th Cir. 1988) (Miller Act did not preclude supplier from suing surety for bad faith insurance practices); Bernard Lumber Co., Inc. v. Lanier-Gervais Corp., 560 So. 2d 465, 467 (La. Ct. App. 1990) ("While the Miller Act is not the exclusive remedy available to suppliers in some cases, it is the exclusive remedy available to a supplier against a surety (or the surety's guarantor in this case) on a Miller Act payment bond.").

23. 353 U.S. 210 (1957).

24. *Id.* at 217-18. *See also* J. W. Bateson Co. v. United States *ex rel.* Board of Trustees, 434 U.S. 586, 587 (1978) (recovery under payment bond sought for amounts withheld from wages for union dues and vacation savings and for contributions to union's welfare, pension, and educational trust funds that were required under a collective bargaining agreement).

v. Woods Construction Co.,[25] the court held that a surety was liable for such items as tires, tubes, oil, and tire repairs that were substantially consumed in the course of construction of a public highway, although they never became a part of the finished highway.[26] Moreover, a supplier of these kinds of materials did not need to show that they had actually been consumed on the project, because the supplier could not supervise their use after they were furnished on the project. The court said that instead:

> [T]he proper test to be applied is whether or not in a particular case and bonded project there is a reasonable and good faith expectation by the supplier at the time of delivery that the materials under all the circumstances would be substantially used up in the project under way. If so, the surety is liable.[27]

The Tenth Circuit has held that the rental of equipment furnished on a federal project also comes within the scope of a payment bond under the Miller Act in *United States ex rel. Eddies Sales & Leasing, Inc. v. Federal Insurance Co.*[28] The court stated: "A fair rental charge for the use of earth-moving equipment at a federal channel improvement project is within the purview of the Miller Act bond because the value of the lease payment is substantially consumed in the project."[29] On the other hand, a capital expenditure for equipment that is not substantially consumed on the project would not be covered by the payment bond.[30]

A claimant may also recover on a payment bond on a quantum meruit theory as well as for breach of contract. Thus, if a contract with a

---

25. 224 F. Supp. 406 (N.D. Okla. 1963).

26. *Id.* at 409.

27. *Id. See also* United States *ex rel.* Balzer Pac. Equip. Co. v. Fidelity & Deposit Co., 895 F.2d 546, 550 (9th Cir. 1990) (materials supplied to two or more jobs could come with the coverage of a Miller Act bond if there were "(1) a reasonable belief on the part of the materialman that the supplies for which he seeks payment will have been consumed on the work of the bonded contracts as a group and (2) a reasonable belief that the amount allocated by him to each contract is a proper amount."); United States *ex rel.* Sunbelt Pipe Corp. v. United States Fidelity & Guar. Co., 785 F.2d 468, 470-71 (4th Cir. 1986) (supplier of pipe was not covered under the Miller Act because supplier "had no reasonable expectation that the pipe would be consumed in the performance of the contract").

28. 634 F.2d 1050 (10th Cir. 1980).

29. *Id.* at 1052 (citation omitted). *See also* Continental Casualty Co. v. Clarence L. Boyd Co., 140 F.2d 115, 116 (10th Cir. 1944) ("Rental for equipment used in the performance of the work provided for in the contract, parts, equipment, and appliances which are necessary to, and are wholly consumed in, the performance of such work, and current repairs of an incidental and comparatively inexpensive character which do not add substantially to the value of the equipment and compensate only for ordinary wear and tear, are within the coverage of the payment bond."); United States ex rel. Carlisle Constr. Co. v. Coastal Structures, Inc., 689 F. Supp. 1092, 1096-99 (M.D. Fla. 1988) (lessor of crane allowed to recover rental, transportation, and assembly charges).

30. United States *ex rel.* Eddies Sales & Leasing, Inc. v. Federal Ins. Co., 634 F.2d 1050, 1052 (10th Cir. 1980) (the court looked to economic realities to determine that a transaction that was structured as a lease was actually an installment sale, and thus not covered by the Miller Act).

subcontractor is terminated by the contractor's breach, the surety will be liable for the reasonable value of the labor or materials that the subcontractor provided up to the time of the breach.[31] In addition, a "subcontractor may recover in quantum meruit where it has performed work outside the terms of the contract that benefits the prime contractor."[32]

2. Limitation to Persons Dealing With the Contractor and Subcontractors

Unlike its predecessor, the Heard Act, the Miller Act limits its coverage to persons having a direct relationship with either the contractor or a subcontractor. Section 270b (a) provides in pertinent part:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That *any person having direct contractual relationship with a subcontractor* but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.[33]

The United States Supreme Court interpreted this language in *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*,[34]

31. United States *ex rel.* C.J.C., Inc. v. Western States Mechanical Contractors, Inc., 834 F.2d 1533, 1539 (10th Cir. 1987) ("It is well established that an action in quantum meruit is available to a subcontractor to recover from a breaching contractor under the Miller Act. [Citations omitted.]. Recovery in quantum meruit is measured by the reasonable value of the subcontractor's performance."); United States *ex rel.* John D. Ahern Co. v. J. F. White Contracting Co., 649 F.2d 29, 32 (1st Cir. 1981) ("[I]t is well-settled that one may recover the reasonable value of labor and materials furnished in Miller Act cases."); Southern Painting Co. v. United States *ex rel.* E. M. Silver, 222 F.2d 431, 433 (10th Cir. 1955) ("That quantum meruit may be asserted under the Miller Act where there is a breach of the contract seems to be clear.").

32. United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc., 834 F.2d 1533, 1550 (10th Cir. 1987).

33. 40 U.S.C. 270b (a) (1988) (second emphasis supplied)

34. 322 U.S. 102 (1944).

stating:

> The proviso of § 2 (a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and the expressed will of the framers of the Act. (Footnote omitted). Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants.[35]

The claimant in *MacEvoy* sold building materials to a company that in turn sold them to the contractor on a government housing project. The contractor paid the company with whom it dealt for the materials, but that company did not pay the original supplier, who sought recovery under the contractor's payment bond. Recognizing that the claimant's recovery turned on whether the company to which the claimant had sold the building materials was a "subcontractor" under section 270b, rather than merely a materialman, the Court examined the Miller Act's legislative history. The Court noted that participants in the hearings that led to the Act's adoption had made a clear distinction between subcontractors and materialmen. They also pointed out that there were practical reasons, relating to a contractor's need to limit liability under Miller Act payment bonds, for distinguishing subcontractors from materialmen. Generally, only a small number of subcontractors are given responsibility for performing a part of the original contract on a public works project, and accordingly it is feasible for the prime contractor to require them to provide bonds to assure that they will pay their suppliers of labor and materials.

The situation is different for the large number of materialmen who supply materials on a federal project, and who may deal with many submaterialmen and laborers. The Court decided that it would not be practical for all of a federal contractor's materialmen to provide bonds assuring payment of all their suppliers. The Supreme Court concluded that imposing unlimited liability under payment bonds for a materialman's

35. *Id.* at 107-08.

sub-materialmen and laborers would create too large of a risk for contractors and sureties.[36] Applying this analysis to the facts of the *MacEvoy* case, the Court held that the company that stood between the contractor and the claimant was a materialman, rather than a subcontractor, under section 270b. Accordingly, the claimant was not allowed to recover under the payment bond, because it did not have a "direct contractual relationship with a subcontractor."[37]

MacEvoy was distinguished in *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*,[38] where a claimant was allowed to recover on a payment bond for lumber that had been supplied to a company that in turn supplied materials to the contractor for use on a federal housing project. Again, the claimant's recovery turned on whether the company to which it had supplied the lumber was a subcontractor, as opposed to a materialman. Taking what it termed "a functional rather than a technical" approach to defining what a subcontractor was, the Court focused on "the substantiality and importance of [the company's] relationship with the prime contractor."[39] The Court emphasized the practical considerations that it had referred to in *MacEvoy*, involving the feasibility of a contractor's requiring bonds from the small number of subcontractors with whom it deals, as opposed to the difficulty of requiring bonds from the large number of materialmen who furnish supplies for use on its project. The Court said that it was therefore appropriate to look at the "total relationship" between the contractor and the company that the claimant had dealt with in deciding whether that company was a subcontractor or a materialman. Using this approach, the Court classified the company as a subcontractor. The Court pointed out that the company was closely intertwined with the contractor, since the contractor's principals had a substantial voting interest in the company's stock, provided a major share of its working capital, and were well acquainted with its operations and financial condition. Additionally, the company had not only supplied lumber to the contractor, but had another contract with the contractor for the selection and installation of millwork, and the company took over a substantial part of the prime contract. The court held that because of its close relationship with the contractor, the company was a subcontractor under section 270b, and accordingly, the

36. *Id.* at 110-11.

37. *Id.* at 107. *See also* United States *ex rel.* Clark v. Lloyd T. Moon, Inc., 698 F. Supp. 665, 666-68 (S.D. Miss. 1988) (following *MacEvoy*).

38. 417 U.S. 116 (1974).

39. *Id.* at 123.

claimant could recover under the payment bond since it had dealt directly with a subcontractor.[40]

In its next Miller Act case, *J. W. Bateson Co. v. United States ex rel. Board of Trustees*,[41] the United States Supreme Court held that the term "subcontractor," as it was used in section 270b, was restricted to companies that had dealt directly with the prime contractor. The contractor in the *Bateson* case had subcontracted part of its original contract for an addition to a hospital to a subcontractor, and the subcontractor had subcontracted with a sub-subcontractor for the installation of a sprinkler system. When the sub-subcontractor failed to make payments to a union for union dues and vacation savings and also to contribute to the union's welfare, pension, and educational trust funds, as required under a collective bargaining agreement, the union and the trustees of the funds sought payment under the contractor's payment bond. To determine whether a sub-subcontractor should be considered a subcontractor under the Miller Act, the Supreme Court examined the Act's legislative history. Finding that the Committee Reports drew a line between subcontractors and sub-subcontractors, the Court concluded "that the word 'subcontractor' must be limited in meaning to one who contracts with a prime contractor."[42] Since the union and the trustees had dealt with a sub-subcontractor rather than a subcontractor, they were denied recovery under the contractor's payment bond.

The Tenth Circuit, in *Glens Falls Insurance Co. v. Newton Lumber & Manufacturing Co.*,[43] indicated that it will look through form to substance in deciding whether an entity is a subcontractor or a sub-subcontractor. The contractor in the *Glen Falls* case purported to subcontract a portion of the prime contract to a subcontractor, who in turn subcontracted virtually all the work in the subcontract to another subcontractor. The trial court found that the subcontracts were a sham to insulate the contractor from liability for materials supplied to the housing project, and the Tenth Circuit ruled that this finding was warranted by the evidence. In allowing materials suppliers to recover under the contractor's payment bond, the Tenth Circuit said that it was proper for the trial court to consider the substance of the transactions in order to prevent the Miller Act from being "defeated by setting up by formal contract a straw man as a subcontractor between the prime contractor and one who in

40. *Id.* at 124.
41. 434 U.S. 586 (1978).
42. *Id.* at 594.
43. 388 F.2d 66 (10th Cir. 1967).

substance and intent is the actual subcontractor."[44]

In summary, whether a claimant may recover on a payment bond depends on the status of the person with whom it has dealt. Recovery is allowed if the claimant has dealt with either the contractor or a subcontractor that dealt directly with the contractor. Recovery will be denied, however, if the claimant dealt with a materialman, or a subcontractor who did not deal directly with the contractor. Accordingly, claimants who furnish labor or materials for a federal project who want to rely on the contractor's payment bond should ascertain the status of the person with whom they are dealing.

It should also be noted that claims under payment bonds may be asserted by assignees as well as by those who furnish the labor or materials themselves. The Supreme Court discussed this issue in *United States ex rel. Sherman v. Carter*,[45] where the trustees of a health and welfare fund asserted claims against the contractor's payment bond for employer contributions that were required under a collective bargaining agreement. The surety argued that the trustees were not entitled to recover the bond, because they did not furnish labor or materials on the public works project. Rejecting this argument, the Supreme Court pointed out that assignees had long been allowed to assert claims under payment bonds, even though they did not provide labor or materials. It also noted that the trustees were not asserting the claims for their own benefit, but rather for the beneficiaries of the trust funds, who were the construction workers who performed the labor on the project. Thus, the trustees stood in the shoes of the persons who actually provided the labor.[46] On the other hand, the Eighth Circuit, in *United States ex rel. First Continental National Bank & Trust Co. v. Western Contracting Corp.*,[47] held that a bank was not entitled to recover under a Miller Act performance bond for paying checks that were issued by a subcontractor but were

44. *Id.* at 69-70. *See also* United States *ex rel.* Hillsdale Rock Co. v. Cortelyou & Cole, Inc., 581 F.2d 239 (9th Cir. 1978) (although it was nominally a contractor, Stanford University actually acted as the agent of the United States in contracting for construction work, and thus the claimant could recover on a payment bond for materials supplied to a subcontractor who had contracted with Stanford's contractor); United States *ex rel.* Light & Power Utils. Corp. v. L. B. Samford, Inc., 423 F.2d 1028 (5th Cir. 1970) (supplier that provided materials to a subcontractor through a distributor was allowed to recover under a payment bond, where the supplier handled all the negotiations with the subcontractor). *But see* United States *ex rel.* Gold Bond Bldg. Prods. v. Blake Constr. Co., 820 F.2d 139, 141-42 (5th Cir. 1987) (supplier of materials to subcontractor's subsidiary was not covered under the Miller Act).

45. 353 U.S. 210 (1957).

46. *Id.* at 220.

47. 341 F.2d 383 (8th Cir. 1965).

later dishonored. The court decided that even if the bank had been subrogated to the rights of the laborers and materialmen whose claims were paid by the checks, the bank could not recover on the bond, because there had been no assignment of the claims of the laborers and materialmen.[48]

C. *The Notice Requirement for Lower Tier Claimants*

1. Introduction

If a claimant has not dealt directly with the contractor, written notice of the claim must be given to the contractor within ninety days after the claimant last furnished labor or materials to the project. Section 270b (a) provides as follows for this notification:

> [A]ny person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.[49]

If the contractor pays a subcontractor before this ninety day period has expired, it is possible that persons who furnished the labor and materials to the subcontractor, but who were not paid by the subcontractor, may assert their claims against the payment bond. Once the bond's surety satisfies these claims, the surety may seek subrogation from the contractor, resulting in the contractor having to pay twice for the labor and materials. The ninety day cutoff in the notice requirement of section 270b enables the contractor to avoid exposure to double liability by waiting ninety days after labor and materials have been furnished on the project before paying the appropriate subcontractor. In *United States ex rel.*

48. *Id.* at 385-87. *See also* United States *ex rel.* Wulff v. CMA, Inc., 890 F.2d 1070, 1072 (9th Cir. 1989) ("[C]ourts have established that a creditor of a contractor who has not received an assignment cannot bring suit under the Miller Act.").
49. 40 U.S.C. § 270b (a) (1988).

J. A. Edwards & Co. v. Thompson Construction Corp.,[50] the Second Circuit Court of Appeals expounded on the purpose for the ninety day cutoff:

> The reason why the Miller Act conditions the rights of a person having "no contractual relationship express or implied with the contractor furnishing said payment bond" upon the giving of proper notice within ninety days from the date "on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made," is readily understandable. It was assumed that such third parties will first endeavor to collect from the subcontractor with whom they have a contract relation. During a reasonable period, while these efforts are going forward, the contractor withholds the payments due the subcontractor. If he receives a third party claim within ninety days, he reserves appropriate amounts from monies otherwise owing to the subcontractor. But, once ninety days have elapsed without such notice, he is free to pay the subcontractor for the latter's work without risk of liability under his bond to laborers and materialmen whose sole contractual relation is with the subcontractor. A statute which gave rights on the contractor's bond to laborers and materialmen having no contractual relations with him but which did not require timely and adequate notice to him, would lead either to double payments or to interminable delay in settlements between contractors and subcontractors to guard against these,—in either case with attendant prejudice to all concerned.[51]

Where a claimant has dealt directly with the contractor, there is no need for the claimant to give them notice of the claim, since the contractor is already aware of the claim's existence and the need to allocate funds for its payment. Thus, the notice requirement in section 270b is applicable only when there is "no contractual relationship express or implied with the contractor."[52] For other claimants, giving notice to the

---

50. 273 F.2d 873 (2d Cir. 1959), *cert. denied*, 362 U.S. 951 (1960).

51. *Id.* at 875-76. *See also* United States *ex rel.* Light & Power Utils. Corp. v. Liles Constr. Co., 440 F.2d 474, 478 (5th Cir. 1971) ("The reason for the [90 day] limitation is obvious. Contractors should not be compelled to wait around with their liabilities unknown or unsettled for an indefinite length of time, at the convenience of those who may wish to give notice of a claim.").

52. American Cas. Co. v. Southern Materials Co., 261 F.2d 197, 199-200 (4th Cir. 1958) ("[A]ny person, such as a materialman, having direct contractual relationship with a subcontractor *and also* contractual relationship express or implied with the contractor furnishing said payment bond (prime contractor), has the right to sue upon the payment bond without being required to give written notice to the prime contractor within the ninety-day period mentioned in the statute.") (emphasis in original); United States *ex rel.* Keener Gravel Co. v. Thacker Constr. Co., 478 F. Supp. 299, 302 (E.D. Mo. 1979) (dictum). *Cf.* United States *ex rel.* State Elec. Supply Co. v. Hesselden Constr. Co., 404 F.2d 774, 777 (10th Cir. 1968) (direct contractual relationship with contractor would have obviated need for written notice).

contractor[53] within the ninety days is a prerequisite to recovery under a Miller Act payment bond.[54]

A contractor's filing of bankruptcy may affect the sending of the notice of the claim to the contractor. Arguably, sending the notice would violate the automatic stay provision of the Bankruptcy Code[55]; therefore, a claimant should go to the bankruptcy court to seek relief from the stay before sending out the notice.[56]

2. Sufficiency of the Notice

Section 270b requires the ninety day notice to state "with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." It also provides:

> Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

Giving a very liberal interpretation to these provisions, the United States Supreme Court, in *Fleisher Co. v. United States ex rel. Hallenback*,[57] upheld a notice that was sent by ordinary mail and addressed to the project engineer, but which eventually reached one of the two contractors on the project. The Supreme Court elaborated on the service of notice provision quoted above:

> We think that the purpose of this provision as to manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a

53. Pittsburgh Builders Supply Co. v. Westmoreland Constr. Co., 702 F. Supp. 106, 109 (W.D. Pa. 1989) (service of the 90 day notice on the surety, rather than the contractor, was not effective).

54. *See* Frank Briscoe Co. v. United States *ex rel.* Western States Mach. Co., 396 F.2d 847, 849 (10th Cir. 1968) ("The ninety-day notice is a condition precedent to suit on a claim and serves to protect the prime contractor in the typical situation where he has no contractual relationship with the supplier.").

55. 11 U.S.C. § 362 (1988).

56. For a discussion of this, as well as other issues involving bankruptcy, *see* Keyes, *The Bankruptcy of Public Works Contractors—What Recourse for Laborers, Subcontractors, and Materialmen?*, 21 IDAHO L. REV. 561 (1985).

57. 311 U.S. 15 (1940).

method which would afford sufficient proof of service when receipt of the required written notice was not shown.[58]

Similarly, the Tenth Circuit held that a notice sent by ordinary mail was sufficient in *United States ex rel. Moody v. American Insurance Co.*,[59] saying:

> This circuit, as have other circuits, has liberally construed notices as sufficient under the Miller Act where the contractor has actual knowledge of the claim against him, regardless of the technical compliance with the statutory requirements.
>
> . . . Although notice was given through several documents which individually may not have been sufficient, they were sufficient in combination because the contractor had actual notice of the amount due for the additional work, the party liable for payment and the name of the contractor.[60]

On the other hand, in *Bowden v. United States ex rel. Malloy*,[61] the Ninth Circuit refused to allow a supplier to recover on the contractor's payment bond, finding that a letter from a subcontractor requesting the contractor to issue a check payable jointly to the subcontractor and the supplier was not sufficient notice under section 270b. The Ninth Circuit did indicate in *Bowden*, however, that a brief letter from the supplier to the contractor would have been sufficient notice.[62]

3. The Ninety Day Limit

Section 270b (a) requires the written notice to be sent to the contractor "within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made." This provision contemplates that labor or materials may be furnished over an extended period of time, and when this occurs, the ninety day period for giving notice will not begin to run until the furnishing of the last of the labor or materials for

---

58. *Id.* at 19.

59. 835 F.2d 745 (10th Cir. 1987).

60. *Id.* at 748. *See also* United States v. American Mfrs. Mut. Casualty Co., 901 F.2d 370, 374 (4th Cir. 1990) ("The fact that the timely notice contains certain factual errors and imperfections does not relieve a surety from its legal obligation to perform."); McWaters & Bartlett v. United States *ex rel.* Wilson, 272 F.2d 291, 294-95 (10th Cir. 1959) (showing an itemized statement to the contractor was sufficient notice under section 270b); United States *ex rel.* Pool Constr. Co. v. Smith Road Constr. Co., 227 F. Supp. 315, 318 (N.D. Okla. 1964) (notice was sufficient "notwithstanding the omission from the notice of the exact dollars and cents due").

61. 239 F.2d 572, 577 (9th Cir. 1956), *cert. denied*, 353 U.S. 957 (1957).

62. *Id.* at 578. *See also* Chicago Rigging Co. v. Uniroyal Chem. Co., 718 F. Supp. 696, 702 (N.D. Ill. 1989) ("[A] writing of some kind appears to be a requirement of the Act.").

which the claim is made.[63] The time for sending the notice is not extended by repairs, or by correcting defects in materials that were previously supplied.[64]

In addition, the Tenth Circuit, in *United States ex rel. Olmsted Electric, Inc. v. Neosho Construction Co.*,[65] emphasized that the time for sending the notice is not extended by the furnishing of materials that are not part of the claim, since the claimant has already received payment for them. The reason is that the ninety day period in section 270b (a) begins to run when the last labor or materials are furnished "for which such claim is made." In *Olmsted*, the claimant sent the contractor a written notice on September 24, 1975, for materials which were last furnished on April 18, 1975, more than ninety days prior to the giving of the notice to the contractor. The trial court found that the ninety day period for sending the notice to the contractor had been extended by the delivery of materials to the subcontractor on August 13, 1975, but the appellate court reversed. The Tenth Circuit decided that the materials delivered on August 13 were not a part of the claim, since the subcontractor had paid the claimant for them. The court reasoned that the last materials which were a part of the claim were furnished on April 18; since the notice was not given within ninety days after these materials were furnished, it was ineffective.[66]

Although section 270b provides for the giving of the notice "within ninety days from the date" the last labor or materials were furnished, the notice may be given before the project is completed.[67] Where the claim is

63. *See* United States *ex rel.* A & M Petroleum, Inc. v. Santa Fe Eng'rs, Inc., 822 F.2d 547, 548 (5th Cir. 1987) ("[N]otice need only be given within 90 days of the last delivery of materials or rendition of services."); Noland Co. v. Allied Contractors, Inc., 273 F.2d 917, 920 (4th Cir. 1959) ("[I]f all the goods in a series of deliveries by the materialman to a subcontractor are used on the same government project, the notice is in time as to all of the deliveries if it is given within ninety days from the last delivery."). *But cf.* United States *ex rel.* Balzer Pac. Equip. Co. v. Fidelity & Deposit Co., 895 F.2d 546, 550-51 (9th Cir. 1990) (where materials were delivered to multiple bonded projects, delivery of materials to one project did not prevent running of one year limitations period on another project).

64. *See* United States *ex rel.* State Elec. Supply Co. v. Hesselden Constr. Co., 404 F.2d 774, 776 (10th Cir. 1968) ("[An] accurate statement of the test to be applied is whether the work was performed and the material supplied as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.") (quoting from United States *ex rel.* Austin v. Western Elec. Co., Inc., 337 F.2d 568, 572-73 (9th Cir. 1964)).

65. 599 F.2d 930 (10th Cir. 1979).

66. *Id.* at 934. See also United States *ex rel.* DuKane Corp. v. United States Fidelity & Guar. Co., 422 F.2d 597, 600 (4th Cir. 1970) (materials that were paid for on delivery "were not part of the materials *for which claim is made* within the terms and provisions of the Miller Act") (emphasis in original).

67. *See* United States *ex rel.* Moody v. American Ins. Co., 835 F.2d 745, 748 (10th Cir. 1987) ("[E]ven though subcontractor's notice was given prior to completion of the project, it was timely

for the rental of equipment on a federal project, the ninety days for sending the notice begins to run from the date of termination of the rental contract, rather than from the time when the equipment is physically removed from the job site.[68]

D. *Action on the Bond*

Section 270b (b) provides as follows for claimants to bring actions to enforce a payment bond:

> Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.[69]

Prior to an amendment to this Section in 1959, the one year limitation period ran from the date of final settlement of the contract with the government agency.[70] Following this amendment, the one year limitation period now runs from the date that the claimant last furnished labor or materials.[71]

---

under the Miller Act."); United States *ex rel.* Pool Constr. Co. v. Smith Road Constr. Co., Inc., 227 F. Supp. 315, 319 (N.D. Okla. 1964) ("[The] notice was also timely as to any rock material thereafter supplied by Pool to Smith Road, inasmuch as said notice alerted Woods to the fact that its subcontractor was delinquent and that Pool was looking to it for payment and said notice afforded Woods the ability to thereafter protect itself in making payments to and settling up with Smith Road, its subcontractor."). *See also* United States *ex rel.* Honeywell, Inc. v. A & L Mechanical Contractors, Inc., 677 F.2d 383 (4th Cir. 1982) (notices given before completion of project were effective with respect to labor and materials furnished before the date of the notices); United States *ex rel.* Laborers' Pension Trust Fund v. Safeco Ins. Co. of Am., 707 F. Supp. 286, 289 (E.D. Mich. 1988); Annotation, *Timeliness of Notice to Public Works Contractor on Federal Project, of Indebtedness for Labor or Materials Furnished*, 69 A.L.R. Fed. 600 (1984).

68. Frank Briscoe Co., Inc. v. United States *ex rel.* Western States Mach. Co., 396 F.2d 847, 849 (10th Cir. 1968) ("[T]he notice period began when the contractor with whom plaintiff had its rental agreement, and the only one to whom it furnished the equipment, was no longer connected with the work."); United States *ex rel.* SGB Universal Builders Supply, Inc. v. Fidelity & Deposit Co. of Maryland, 475 F. Supp. 672, 674 (E.D.N.Y. 1979) ("[T]he notice period commences when, as here, the subcontractor abandons the work and no longer is using or has use for the equipment in the prosecution of the work.").

69. 40 U.S.C. § 270b (b) 1988.

70. *See* United States *ex rel.* Texas Bitulithic Co. v. Fidelity & Deposit Co., 813 F.2d 697, 699 (5th Cir. 1987); Act of Aug. 4, 1959, Pub. L. No. 86-135, 73 Stat. 279 (1959).

71. *See* United States *ex rel.* Trane Co. v. Raymar Contracting Corp., 406 F.2d 280, 282 (2d Cir. 1968) (action that was commenced more than one year after the last delivery of equipment by the claimant, but less than one year after the delivery of equipment by another supplier, was untimely), *cert. denied*, 394 U.S. 975 (1969); Bailey v. Faux, 704 F. Supp. 1051 (D. Utah 1989) (one

Section 270b (a) also provides that an action on a payment bond should not be brought until ninety days after the furnishing of the last labor or materials for which the claim is made. In particular, a subcontractor cannot bring an action on a payment bond until the ninety day notice period for his suppliers of labor and materials has expired. In *Security Insurance Co. v. United States ex rel. Haydis*,[72] the Ninth Circuit held that an action was premature under this provision, but the court allowed this defect to be cured by the filing of a supplemental complaint. Although the supplemental complaint was filed after the expiration of the one year limitation period in section 270b (b), the relation back doctrine was applied to avoid dismissal of the action.[73] In contrast, the Ninth Circuit, in *United States ex rel. Wulff v. CMA, Inc.*,[74] held that a supplemental complaint, involving a party seeking to recover on an assignment of a claim arising from a different transaction than their original claim, did not relate back to the filing of the original complaint.

As with the time requirement for sending the notice to the contractor, the one year period for filing an action under a Miller Act payment bond is not extended by the correction of defects in, or the making of repairs to, materials or labor supplied under the original contract.[75] In contrast to the ninety day period for sending the notice to the contractor, however, the one year limitation period is extended by the furnishing of additional labor or materials that have been paid for, and thus are not part of the claim. Under section 270b (a), a claimant has ninety days from the date labor or materials were last furnished "for which such claim is made" in which to send written notice to the contractor; however, the time limitation in section 270b (b) of one year after the last furnishing of labor or materials is not qualified by this phrase."[76] The

---

year period in the Miller Act commences on day after last day that labor or materials were supplied and ends in the next calendar year one day before the starting date).

72. 338 F.2d 444 (9th Cir. 1964).

73. *Id.* at 449.

74. 890 F.2d 1070, 1073-74 (9th Cir. 1989).

75. *See* United States ex rel. Magna Masonry, Inc. v. R.T. Woodfield, Inc., 709 F.2d 249, 251 (4th Cir. 1983) ("Finding no work done after July 23, 1979, that can be characterized as anything other than the making of repairs or the correcting of defects, we conclude that the filing of this action on July 24, 1980, was barred by the one year limitations period of 40 U.S.C. § 270b(b)."); United States *ex rel.* Circle-L-Electric Co. v. Hyde Constr. Co., 255 F. Supp. 335, 341-42 (N.D. Okla. 1966).

76. *See* United States *ex rel.* Aetna Drywall Contractors, Inc. v. Aetna Casualty & Surety Co., 725 F.2d 650, 651 (11th Cir. 1984) ("[T]he date of the last furnishing is the appropriate date whether or not that furnishing is at issue in the suit."); General Elec. Co. v. Southern Constr. Co., 383 F.2d 135, 138 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). *But see* United States *ex rel.* Balzer Pac. Equip. Co. v. Fidelity & Deposit Co., 895 F.2d 546, 550-51 (9th Cir. 1990) (where materials were delivered to multiple bonded projects, delivery of materials to one project did not prevent running of

one year limitation period may be subject to the doctrine of equitable estoppel, which can prevent a surety from relying on it as an affirmative defense if the surety has caused a claimant to delay bringing suit on a payment bond.[77]

Besides the one year limitation period in section 270b (b), a suit on a payment bond may also be subject to limitations provisions in the bond itself. As long as they are reasonable, provisions in bonds limiting the time for bringing actions to enforce them may be enforceable.[78]

Section 270b (b) provides that an action to enforce a payment bond must be brought in the federal district court "for any district in which the contract was to be performed and not elsewhere." The United States Supreme Court said in *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*,[79] that this provision was "merely a venue requirement." However, in *United States ex rel. Coffey v. William R. Austin Construction Co.*,[80] the court apparently interpreted it as going to the district court's subject matter jurisdiction. Even though both parties desired to have the Miller Act suit tried in the Western District of Oklahoma, the Judge ordered it transferred to the Western District of Arkansas, where the government contract was performed.[81] The general rule, however, is that a district court "may never dismiss a case on its own motion for improper venue."[82]

Section 270b (b) also requires the action to "be brought in the name of the United States for the use of the person suing."[83] Section 270b (b)

---

one year limitations period on another project); United States *ex rel.* McGrath v. Travelers Indem. Co., 253 F. Supp. 330 (D. Ariz. 1966) (reading the phrase "for which claim is made" from Section 270b (a) into the one year limitation period in Section 270b (b)); United States *ex rel.* First Nat'l Bank v. United States Fidelity & Guar. Co., 240 F. Supp. 316, 321 (N.D. Okla. 1965) (not allowing the time for filing the action to be extended by an invoice for a small amount for which no claim was made).

77. United States *ex rel.* Bernard Lumber Co. v. Lanier-Gervais Corp., 896 F.2d 162, 164, 168-69 (5th Cir. 1990) (discussing standards for equitable estoppel); United States *ex rel.* Texas Bitulithic Co. v. Fidelity & Deposit Co., 813 F.2d 697, 700 (5th Cir. 1987) ("We hold . . . that the defendants may be estopped from relying on the Act's one-year limitation period if sufficient equitable considerations exist to warrant [the claimant's] claim of estoppel."); United States *ex rel.* Nelson v. Reliance Ins. Co., 436 F.2d 1366, 1370 (10th Cir. 1971) ("[A] debtor who induces his creditor to defer action by means of a request for delay, and by assurances that the debt would be paid or settled, should not be able to deny liability by deferring legal action beyond the effective statute of limitations.").

78. McWaters & Bartlett v. United States *ex rel.* Wilson, 272 F.2d 291, 297 (10th Cir. 1959).

79. 417 U.S. 116, 125 (1974).

80. 436 F. Supp. 626 (W.D. Okla. 1977).

81. *Id.* at 628.

82. Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir. 1986) (dictum).

83. United States *ex rel.* Romero v. Douglas Constr. Co., 531 F.2d 478, 480-81 (10th Cir. 1976) (*quoting* from § 270b(b) of the Miller Act) (since the United States was a party to the Miller Act suit, a notice of appeal could be filed 60 days after the entry of judgment, rather than the normal 30 days).

further provides that the United States cannot be held liable in the action, and there is no requirement for giving the government notice of a Miller Act suit. Accordingly, the Fifth Circuit has ruled that the United States is only a nominal party, and "[t]he failure to bring the action in the name of the United States is a mere technical defect that does not affect jurisdiction and that may be corrected by a later amendment."[84] Although the contractor may have provided the payment bond on which a suit under the Miller Act is based, there is no requirement for the claimant to name the contractor as a party in an action against the surety.[85]

In *United States ex rel. Martin Steel Constructors, Inc. v. Avanti Constructors, Inc.*,[86] the Ninth Circuit listed the following as the four elements that a materials supplier needs to prove in a Miller Act case:

> (1) the materials were supplied in prosecution of the work provided for in the contract;
> (2) lack of payment;
> (3) a good faith belief that the materials were intended for the specified work; and
> (4) satisfaction of the jurisdictional requisites.[87]

In appropriate circumstances, a surety may assert estoppel as an affirmative defense against a claimant under a Miller Act payment bond.[88] For an estoppel defense to succeed, there must be a showing of false representations by the claimant and also detrimental reliance by the contractor on the representations.[89]

In *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*,[90] the United States Supreme Court decided that whether a prevailing party

---

84. United States *ex rel.* Canion v. Randall & Blake, 817 F.2d 1188, 1191-92 (5th Cir. 1987) (footnote omitted). *See also* Blanchard v. Terry & Wright, Inc., 331 F.2d 467, 469 (6th Cir. 1964) (failure to name the United States was at most a formal irregularity that was cured by amendment), *cert. denied*, 379 U.S. 831 (1964); Westerchil Constr. Co. v. United States, 16 Cl. Ct. 727, 732-33 (1989) (collateral estoppel did not apply against the United States on account of a prior suit under the Miller Act because the United States was only a nominal party to the Miller Act suit).

85. United States *ex rel.* Way Panama, S.A. v. Uhlhorn Int'l, S.A., 238 F. Supp. 887, 891 (D.C.Z. 1965).

86. 750 F.2d 759 (9th Cir. 1984).

87. *Id.* at 761 (citation omitted). *See also* United States *ex rel.* Krupp Steel Prods., Inc. v. Aetna Ins. Co., 831 F.2d 978, 980 (11th Cir. 1987) (listing four elements); United States *ex rel.* Canion v. Randall & Blake, 817 F.2d 1188 (5th Cir. 1987) (listing three substantive elements of a Miller Act claim in a complaint).

88. *See* United States *ex rel.* Aurora Painting, Inc. v. Fireman's Fund Ins. Co., 832 F.2d 1150, 1154 (9th Cir. 1987); Graybar Elec. Co. v. John A. Volpe Constr. Co., 387 F.2d 55, 58-59 (5th Cir. 1967).

89. United States *ex rel.* Aurora Painting, Inc. v. Fireman's Fund Ins. Co., 832 F.2d 1150, 1154 (9th Cir. 1987).

90. 417 U.S. 116 (1974).

in a Miller Act case was entitled to attorney's fees should be determined by federal rather than state law. Finding no express provision in the Miller Act authorizing an award of attorney's fees, the Court reversed a Ninth Circuit decision which had held that attorney's fees were required under state law.[91] Attorney's fees may be allowed, however, if they are authorized by contract.[92]

The Tenth Circuit has also indicated that, depending on the applicable state law, prejudgment interest may be awarded in Miller Act cases.[93] While the *Rich* case requires federal law to control on the issue of prejudgment interest, this generally leads back to state law, since there is no federal standard governing the award of prejudgment interest.[94] Prejudgment interest is allowed in Oklahoma if the amount of damages is certain, or capable of being made certain by calculation.[95] The legal rate of interest in Oklahoma, where no other rate is specified by contract, is six percent.[96]

III. State Public Works

A. *Background*

The Oklahoma Statutes provisions[97] requiring a statutory bond for state public works are similar to the Miller Act. Section 1 requires a contractor to furnish a bond or irrevocable letter of credit in an amount not less than the amount of the contract prior to the award of any contract exceeding $7500 that involves public improvements or the construction or repair of any public building. The bond or irrevocable letter of credit is to ensure the performance of the contract as well as the payment

---

91. *Id.* at 126-31.

92. United States *ex rel.* C.J.C., Inc. v. Western States Mechanical Contractors, Inc., 834 F.2d 1533, 1548 (10th Cir. 1987) ("When the agreement between the contractor and the subcontractor provides for attorney's fees, the subcontractor may recover from the contractor and its Miller Act surety consistent with the terms of that agreement."); United States *ex rel.* L.K.L. Assocs. v. Crockett & Wells Constr., Inc., 730 F. Supp. 1066, 1068 (D. Utah 1990) ("This court interprets *C.J.C., Inc.* as holding that the attorney's fees provision must be included in either the *general* contract or the payment bond.") (emphasis in original).

93. United States *ex rel.* C.J.C., Inc. v. Western States Mechanical Contractors, Inc., 834 F.2d 1533, 1543-44 (10th Cir. 1987) (discussing the award of prejudgment interest under New Mexico law on a quantum meruit claim).

94. *See* United States v. American Mfrs. Mut. Casualty Co., 901 F.2d 370, 372-73 (4th Cir. 1990) ("If, however, neither the Miller Act nor any other applicable federal provision provides any explicit standards for the allowance of pre-judgment interest, it is treated as incorporating the applicable state law on this issue.").

95. OKLA. STAT. tit. 23, § 6 (1981).

96. OKLA. STAT. tit. 15, § 266 (1981).

97. OKLA. STAT. tit. 61, §§ 1-2 (1981 & Supp. 1990).

of claims of all subcontractors and materialmen, including claims for repair of and parts of equipment consumed on the project. For contracts of $7500 or less, the contractor is required to submit an affidavit showing payment of the claims of all subcontractors and materialmen involved in performing the contract. Section 1.1 provides that an irrevocable letter of credit may not be used in connection with state public works contracts in excess of $100,000. Section 2 requires the bond to be filed in the office of the governmental entity that contracted for the work, and any person claiming rights under the bond may obtain a copy of it. This section also provides that any person with a claim for labor, material or repair to machinery or equipment may file an action on the bond within one year of the last day that the labor or materials were furnished for which the claim is made. Any person who does not have a direct contractual relationship with the contractor must also give the contractor written notice of the claim within ninety days from the last day that the labor or materials were furnished for which the claim is made.

Section 1 governs a surety's obligations under a state public works bond, whether or not the bond's terms reflect those of the statute. In *Lum v. Lee Way Motor Freight, Inc.*,[98] the Oklahoma Supreme Court set out the following principles pertaining to statutory bonds:

> The surety on a statutory bond is liable in accordance with the terms of the statute. A statutory bond must be construed and enforced in conformity to the terms of the statute. *If the provisions of the applicable statute are broader than the undertaking, the former prevails over the latter.* When the statute requires a bond to be given and a surety undertakes to furnish it, *the obligation* imposed by the statute *is read into the terms of the bond.* Any terms which are contrary to the policy of the law are to be disregarded as surplusage. If the terms of the bond are broader than those imposed by the statute, excess liability may be enforced if it does not offend public policy and was voluntarily assumed. The general rule is that a bond entered into voluntarily and for a lawful consideration is valid as a common-law contractual obligation. If such bond is not repugnant to law or to its policy, the bond is enforced according to its terms.[99]

98. 757 P.2d 810 (Okla. 1987).

99. *Id.* at 816-17 n.22 (emphasis in original, citations omitted). *See also* Tom P. McDermott, Inc. v. Bennett, 395 P.2d 566, 570 (Okla. 1964) (coverage prescribed by statute controlled over more restricted coverage in bond); New York Casualty Co. v. Wallace & Tiernan, 174 Okla. 278, 280, 50 P.2d 176, 178 (1935) ("[T]he terms of . . . the statute become a part of the bond."); American Casualty Co. v. Board of Educ. of Indep. School Dist., No. 2, 228 F. Supp. 843, 850 (W.D. Okla. 1964) ("[A] statutory payment bond required under 61 O.S.A. § 1, may not be added to or subtracted from and . . . anything added may be rejected as surplusage and anything deducted is supplied by operation of law or by the statute.").

The statutes found at sections 1-2 have been amended frequently,[100] making it hazardous to rely on cases that have been decided under prior versions of the statutes.[101] Instead, one must concentrate on the relatively few recent decisions, which are discussed below. The present version of the statutes resembles the Miller Act, but the Oklahoma Supreme Court has counselled the use of caution in relying on federal authority from Miller Act cases in interpreting Oklahoma's statutory bond requirements.[102] Accordingly, close attention must be paid to the particular language in sections 1-2, as well as the policy behind these provisions.

B. *Claims Covered by Bonds*

1. Types of Claims

Section 1 provides for the scope of claims under a state public works bond as follows:

> The bond or irrevocable letter of credit shall ensure the proper and prompt completion of the work in accordance with the contract and shall ensure that the contractor shall pay all indebtedness incurred by said contractor, his subcontractors, and all materialmen for such labor, material, rental of machinery or equipment, and repair of and parts for equipment as are used or consumed in the performance of said contract. Provided, notice in writing by certified mail must be given to the general contractor where rental of equipment is to be furnished to his subcontractor. The notice shall include the beginning date, the location where the equipment is to be used, the description of said equipment, the terms of said rental and be mailed so as to be received by the general contractor within ten (10) days of the effective date of said rental.[103]

The Oklahoma Supreme Court has long recognized that cases dealing with the types of labor or materials that give rise to mechanic's liens for private construction are not controlling with respect to the coverage of state public works bonds.[104] Thus, in *Eagle Oil Co. v. Altman*,[105] the

100. *See* 1951 Okla. Sess. Laws 168; 1955 Okla. Sess. Laws 335; 1961 Okla. Sess. Laws 459; 1965 Okla. Sess. Laws 1072-73; 1968 Okla. Sess. Laws 104-05; 1980 Okla. Sess. Laws 125; 1983 Okla. Sess. Laws 355-56; 1986 Okla. Sess. Laws 283-84; 1989 Okla. Sess. Laws 883.

101. For an earlier discussion of Oklahoma statutory bonds, see Note, *Suretyship and Guaranty: Coverage of Oklahoma Public Works Bonds*, 15 OKLA. L. REV. 205 (1962).

102. *See* Richards & Conover Steel Co. v. Nielsons, Inc., 755 P.2d 644, 649 (Okla. 1988) ("[A]ny presumption that the adopted language brings with it prior judicial gloss is weak indeed.").

103. OKLA. STAT., tit. 61, § 1 (Supp. 1989).

104. *See* National Auto. & Casualty Ins. Co. v. Adair, 292 P.2d 403, 404 (Okla. 1955) ("We have held that the provisions for liability under the bond is broader than liability under mechanic's lien statutes."); United States Fidelity & Guar. Co. v. Cagg, 181 Okla. 569, 569, 75 P.2d 412, 414 (1937) (citation omitted) ("The liability of the principal and surety under a bond given pursuant to

Supreme Court stated:

> There is a decided relationship between the law governing the establishment of a mechanics' and materialman's lien, and the law fixing liability on a bond of a contractor engaged in a public work, or constructing a public improvement; but the statutes have different objects, and cases involving mechanics' and materialmen's liens do not afford an unfailing criterion. In other words, liability on a bond of a contractor engaged in constructing a public improvement pursuant to [the predecessor to section 1], is not limited to labor and material furnished which would be lienable under the materialmen's and mechanics' lien law.[106]

Mechanic's liens are limited to labor and materials that have been incorporated into an improvement on the property of the owner. However, a surety's liability on a state public works bond extends to materials that were consumed in the course of construction, but did not actually find their way into the improvement.[107]

Prior to 1951, state public works bonds in Oklahoma included only "labor or material" furnished for public works, and they did not cover rental or repairs to equipment.[108] Then, in 1951, section 1 was amended to cover "labor or material or rental of machinery or equipment."[109] In 1955, sections 1 and 2 were again amended to extend the coverage of statutory bonds to "labor, material, rental or repair of machinery or equipment."[110] Coverage was narrowed in 1961 to "labor, materials, and/or repairs."[111] A 1965 amendment to section 1 extended coverage

---

the aforesaid statute is not confined to labor and materials for which a lien ordinarily could be claimed."); Note, *supra* note 101, at 206 (footnote omitted) ("Oklahoma has held that [the statutory bond] provisions for liability are broader than liability under the mechanic's lien statute.").

105. 129 Okla. 98, 263 P. 666 (1928).

106. *Id.* at 100, 263 P. at 668 (citation omitted) (quote above is taken from the official reporter; language in unofficial reporter is slightly different).

107. *Compare* Bank of Earlsboro v. J. E. Crosbie, Inc., 182 Okla. 327, 329, 77 P.2d 547, 551 (1938) (no mechanic's lien allowed for feed sold to the contractor for teams of horses working on the construction of a plant) *with* Standard Accident Ins. Co. v. Deep Rock Oil Corp., 180 Okla. 260, 261, 68 P.2d 808, 809 (1937) (citation omitted) ("This court is committed to the rule that the surety on the bond of the general contractor is liable for gasoline and oil furnished to a subcontractor and consumed in making the public improvement.") *and* Hyde Constr. Co. v. Frickenschmidt, 140 Okla. 290, 284 P. 34 (1929) (oats furnished to subcontractor for feeding teams of horses used in paving a state highway came within a state public works bond).

108. *See* United States Fidelity & Guar. Co. v. Cagg, 181 Okla. at 570, 75 P.2d at 414 (surety not liable for repairs to trucks used by contractor in constructing a bridge).

109. 1951 Okla. Sess. Laws 168.

110. 1955 Okla. Sess. Laws 335.

111. 1961 Okla. Sess. Laws 459. *See* Tom P. McDermott, Inc. v. Bennett, 395 P.2d 566, 569 (Okla. 1964) (discussing legislative history through 1961). The following explanation for the 1961 amendment is found in Note, *supra* note 101, at 205-06:

> It is understood that the 1961 amendment was enacted for the sole purpose of alleviating a

to "such repairs to and rental of machinery and equipment as may be furnished by a subcontractor," but an amendment to section 2, made at the same time, excluded rental of or repairs to machinery or equipment furnished by entities whose "principal business is selling, exchanging, buying, renting or repairing machinery or equipment."[112] In 1968, sections 1 and 2 were rewritten, and the coverage of statutory bonds was changed to "labor and materials and repairs to and parts for equipment used and consumed in the performance of said contract"; also, the amendment removed the exclusion for repairs made by persons in the business of selling, renting, or repairing equipment in section 2.[113] A relatively minor amendment affecting the coverage of statutory bonds was made in 1983.[114] In 1989, section 1 was amended to explicitly include within its scope the rental of machinery and equipment, and to require the giving of written notice to the general contractor when equipment is rented by a subcontractor.[115] With the 1989 amendment it is now clear that the rental of equipment used in the course of construction is covered under state public works bonds.[116]

In order for the furnishing of materials to come under a statutory bond, they must be "used or consumed" in the course of construction.[117] Because it is usually difficult for a supplier to show that materials were actually used in the construction, the Oklahoma Supreme Court recognizes a presumption that materials delivered to a job site are consumed there.[118] Use of materials at the job site may also be inferred from other circumstances.[119]

> situation which existed in the construction business. Equipment rental companies were quick to rent their goods to anyone having a bonded job. For this reason, new, untrained, ill-advised, and sometimes completely inexperienced contractors had the opportunity to unreasonably underbid the more experienced and reliable companies since expensive equipment was so easily obtainable. This situation resulted in many contract defaults, bankruptcies, and in general, chaos. It also denied competent contractors, with more reasonable bids, the opportunity of obtaining a public works contract and completing it at a profit. The new amendment will remove most of the possibilities leading to such unfortunate experiences on the part of the inexperienced, marginal contractor as well as his bonding company.

Id.

112. 1965 Okla. Sess. Laws 1072-73.

113. 1968 Okla. Sess. Laws 104-05.

114. *See* 1983 Okla. Sess. Laws 355-56.

115. 1989 Okla. Sess. Laws 883.

116. Similarly, rental charges for equipment are covered for federal public works under the Miller Act. *See supra* text accompanying notes 28-30.

117. Mid-Continent Casualty Co. v. P & H Supply, Inc., 490 P.2d 1358, 1362 (Okla. 1971) ("Liability under the bond does not attach for any material not consumed in the construction of said public building.").

118. *Id.*

119. *Id.* at 1362-63 (where contractor testified that certain of the materials listed on an invoice

2. Remote Suppliers

The following sentence was added section 2 in 1968:

> Provided, however, that any person having direct contractual relationship with a subcontractor performing work on said contract, but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond only upon giving written notice to said contractor and surety on said payment bond within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or parts for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material or parts were furnished or supplied or for whom the labor was done or performed.[120]

Although this sentence was copied almost verbatim from the Miller Act, the Oklahoma Supreme Court and the United States District Court for the Western District of Oklahoma have interpreted it quite differently than the United States Supreme Court did in *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*,[121] and *J. W. Bateson Co. v. United States ex rel. Board of Trustees.*[122] As discussed earlier,[123] the United States Supreme Court has interpreted this sentence as limiting coverage under a Miller Act payment bond to bond claimants having a direct contractual relationship with second tier subcontractors that have dealt directly with the contractor. In *MacEvoy*, a claimant that had sold materials to a supplier (as opposed to a subcontractor) of the contractor was not allowed to recover under the Miller Act, and in *Bateson*, claimants that had dealt with a third tier subcontractor (i.e., a sub-subcontractor), rather than a second tier subcontractor contracting directly with the contractor, were excluded from coverage from the Miller Act. In contrast, both types of claimants are allowed to recover under the statutory bond required by section 1 for state public works in Oklahoma.

In *Richards & Conover Steel Co. v. Nielsons, Inc.*,[124] the plaintiff had supplied steel to a third tier subcontractor for a waste water pollution control facility. When the plaintiff sought payment from the surety under a state public works bond, the Oklahoma Supreme Court was

---

were returned to the supplier, it was presumed that the remainder of the materials were used at the job site).

120. OKLA. STAT. tit. 61, § 2 (1981).

121. 322 U.S. 102 (1944).

122. 434 U.S. 586 (1978).

123. *See supra* text accompanying notes 33-42.

124. 755 P.2d 644 (Okla. 1988).

presented with the following question: "[I]s bond coverage limited to only those contractors who have a direct contractual relationship with the prime contractor, or does the coverage extend down to every party who supplies labor or materials on a public works project?"[125] The surety argued that the Supreme Court should follow federal decisions that had construed the above-quoted provision that was incorporated from the Miller Act into the Oklahoma statute in 1968. Under these decisions, the surety would not be liable to remote suppliers, such as the plaintiff. However, the Oklahoma Supreme Court decided that this particular provision was only a minor component of both the Oklahoma and federal statutes, and there was no indication of legislative intent to adopt the federal court interpretations of it. The Supreme Court also determined that the interpretation urged by the surety would conflict with the state's policy of providing suppliers of labor and materials on state public works projects with an alternate source of payment for projects where they could not obtain mechanic's liens. In addition, the Supreme Court pointed to language (that appears to be dictum) in several earlier decisions saying that remote suppliers should be allowed to recover under state public works bonds. The opinion concludes: "The purpose of 61 O.S. 1971 §§ 1 and 2 can be served only by allowing a remote materialman to recover on this bond if the notice provision of the statute is met and the action is timely brought."[126]

A similar issue was presented to the United States District Court for the Western District of Oklahoma in *Yellow Pine Lumber Co. v. Insurance Co. of North America*.[127] The plaintiff sold lumber to another lumber company, which furnished it to the contractor on a public works project for the City of Edmond. The surety contended that it was not liable on the statutory bond, basing its argument on *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*,[128] which had held that a supplier of materials to another supplier could not recover under the Miller Act. While the court agreed with the surety that the language of section 2 tracked the language of the Miller Act closely, they found that the fact that certain language that was added to section 1 in 1983 which was not part of the Miller Act showed an intent to include materialmen within the coverage of state public works bonds. The language added in 1983 was such that the bond:

125. *Id.* at 645.
126. *Id.* at 650.
127. 687 F. Supp. 545 (W.D. Okla. 1988), *aff'd*, 882 F.2d 470 (10th Cir. 1989).
128. 322 U.S. 102 (1944).

> shall ensure the proper and prompt completion of the work in accordance with the contract and shall ensure that the contractor shall pay all indebtedness incurred by said contractor, his subcontractors, and *all materialmen* for such labor, material, and repair of and parts for equipment as are used and consumed in the performance of said contract.[129]

The court also noted that in *Standard Accident Insurance Co. v. Basolo*,[130] decided under an earlier version of the bond statutes, the Oklahoma Supreme Court had held that a materialman could be a subcontractor. Thus, they concluded that Oklahoma's bond statutes should be interpreted broadly so that suppliers to suppliers could recover, rather than narrowly, as under the Miller Act, which limited recovery to suppliers of subcontractors. Finding that this decision was supported by *Richards & Conover Steel Co.*, the Tenth Circuit affirmed.[131]

As a result of the *Richards & Conover Steel Co.* and *Yellow Pine* decisions, it is now clear that the coverage of statutory bonds for Oklahoma public works is substantially broader than the coverage of Miller Act bonds for federal public works.

C. *The Notice Requirement for Lower Tier Claimants*

To recover under a state public works bond a person having no direct contractual relationship with the contractor must send a written notice to the contractor and the surety within ninety days after it last furnished the labor or materials for which the claim is made. This requirement is found in the second paragraph of section 2, which states:

> Provided, however, that any person having direct contractual relationship with a subcontractor performing work on said contract, but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond only upon giving written notice to said contractor and surety on said payment bond within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or parts for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material or parts were furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, together with a

129. 687 F. Supp. at 546-47 (citations omitted, emphasis supplied).
130. 180 Okla. 261, 68 P.2d 804 (1937).
131. Yellow Pine Lumber Co. v. Insurance Company of N. Am., 882 F.2d 470 (10th Cir. 1989).

copy thereof to the surety or sureties on said payment bond.[132]

The Oklahoma Supreme Court, in *G. A. Mosites Co. v. Aetna Casualty & Surety Co.*,[133] ruled that the action on a statutory bond brought by a claimant that had contracted with a subcontractor on a public water works improvement for the City of Tulsa was "barred by [its] failure to give the required ninety days notice" under this section.[134] The court also held that the claimant had no cause of action as a third party beneficiary of the contract between the city and the prime contractor, or under a Tulsa City Ordinance, which required contractors to furnish payment bonds but had no notice provision.[135] The court acknowledged, however, that it would have reached a different result if the contract with the city had expressly provided for the contractor to satisfy all claims of persons furnishing labor and materials on the project.[136]

The notice provision in section 2 is very similar to the notice provision in the Miller Act, and accordingly, the Miller Act cases that were discussed earlier[137] may be helpful in interpreting it. One should bear in mind, though, that the Oklahoma Supreme Court will not necessarily follow federal authority, if, as in *Richards & Conover Steel Co. v. Nielsons, Inc.*,[138] it finds good reason not to do so.

The purpose of the ninety day limit for the giving of notice would appear to be so that the contractor can pay the subcontractors with whom it has dealt ninety days after the labor or materials were provided, without having to fear being required to pay their suppliers as well.[139] Notice is not required for persons dealing directly with the contractor, because the contractor would know about their claims and therefore could allocate funds to pay them.[140]

In contrast to the Miller Act, section 2 requires the notice to be sent

---

132. OKLA. STAT. tit. 61, § 2 (1981).

133. 545 P.2d 746 (Okla. 1976).

134. *Id.* at 749.

135. *Id.* at 749-51.

136. *Id.* at 750, 752. *See also* Mid-Continent Casualty Co. v. W. S. Dickey Clay Mfg. Co., 474 P.2d 647, 649-50 (Okla. 1970) (supplier was allowed to recover as a third party beneficiary of a construction contract signed by the surety); United States Fidelity & Guar. Co. v. Star Brick Co., 54 Okla. 103, 153 P. 1122 (1915) (construction contract had express provision for payment of laborers and materialmen).

137. *See supra* text accompanying notes 121-123.

138. 755 P.2d 644 (Okla. 1988).

139. *See* United States *ex rel.* J. A. Edwards & Co. v. Thompson Constr. Corp., 273 F.2d 873, 875-76 (2d Cir. 1959), *cert. denied*, 362 U.S. 951 (1960).

140. *See* American Casualty Co. v. Southern Materials Co., 261 F.2d 197 (4th Cir. 1958).

to the surety, and not only to the contractor. Although section 2 requires the notice to be sent by registered or certified mail, the Oklahoma courts should follow the federal courts in finding that service by other means is sufficient, as long as the contractor and surety received actual notice of the claim.[141] Even so, a prudent claimant should comply with the terms of the statute by using registered or certified mail.

The ninety day deadline for sending the notice begins to run from the last date the labor or materials for which the claim is made were furnished. As under the Miller Act, this provision contemplates that the labor or materials may be furnished over an extended period of time, and if so, the deadline for sending the notice will not begin to run until the last of them is furnished.[142] Repairs or correcting defects in materials or labor previously furnished should not extend the time for sending the notice.[143] Also, the time for sending the notice will not be extended by the furnishing of labor or materials that are not part of the claim, since the statute requires notice to be given within ninety days after the last furnishing of labor or materials " 'for which claim is made.' "[144]

D. *The Stop Notice*

In 1969 the Oklahoma Legislature added the following stop notice provision:

> Any person furnishing labor or materials for a public work who has not been paid therefor may file at any time prior to the expiration of twenty (20) days following the completion of a contract for public work a stop notice with the public agency concerned and thereby cause the withholding of payment to the contractor for the public work the amount claimed by such person. Any public agency receiving such notice shall mail a copy of this statute requiring action within twenty (20) days to the party making such claim. Any such person having no direct contractual relationship with the contractor, other than a person who performed actual labor for wages, may file such a notice, but no payment shall be withheld from any such contractor after the expiration of said twenty (20) days, unless the party making a claim shall have served the public agency with proof that he has instituted a legal action within such time to effectuate collection. Upon the filing of a

141. *See* Fleisher Eng'g and Constr. Co. v. United States *ex rel.* Hallenback, 311 U.S. 15, 19 (1940); United States *ex rel.* Moody v. American Ins. Co., 835 F.2d 745, 748 (10th Cir. 1987).

142. *See* Noland Co. v. Allied Contractors, Inc., 273 F.2d 917, 920 (4th Cir. 1959).

143. *See* United States *ex rel.* State Elec. Supply Co. v. Hesselden Constr. Co., 404 F.2d 774 (10th Cir. 1968).

144. United States *ex rel.* Olmsted Elec., Inc. v. Neosho Constr. Co., 599 F.2d 930, 933 (10th Cir. 1979) (citation omitted).

> legal action, the public agency shall withhold the amount claimed in the action, and pay the balance to the contractor. Failure by the claimant to comply with the requirements set out in this act and to post statutory guarantees shall release the public agency from the obligations imposed by the act.[145]

This provision would have given an unpaid supplier of labor or materials on a public work project a powerful remedy. By sending a stop notice to the public agency, a claimant could cause the agency to withhold payment from the contractor for the amount of the claim. The Oklahoma Attorney General issued an opinion in 1977 that the stop notice provision in Section 16 was constitutional.[146] However, the Oklahoma Supreme Court declared the stop notice provision unconstitutional in *Guy H. James Construction Co. v. State ex rel. Oklahoma Department of Transportation*,[147] because Section 16 did not require notice and a hearing before the government agency withheld the amount of the claim from the contractor. Thus, the stop notice provision is no longer available to claimants on public works projects.

E. *Action on the Bond*

Section 2 provides as follows for the bringing of an action against the surety to enforce the bond:

> Any person to whom there is due any sum for labor, material or repair to machinery or equipment, furnished as stated in the preceding section, his heirs or assigns, may bring an action on said bond for the recovery of said indebtedness, provided that no action shall be brought on said bond after one (1) year from the day on which the last of the labor was performed or material or parts furnished for which such claim is made.[148]

In 1965 the time limit for bringing an action on a state public works bond was changed from six months to one year "from the completion of [the] public improvements or public buildings."[149] Then, in 1968, the present limitation of one year "from the day on which the last of the labor was performed or material or parts furnished for which such claim is made" was adopted.[150] The Miller Act also has a one year limitation period, but it runs from the "day on which the last of the labor was

145. OKLA. STAT. tit. 61, § 16 (1981).
146. Okla. Op. Att'y Gen. No. 76-309 (Mar. 1, 1977).
147. 655 P.2d 553 (Okla. 1982).
148. OKLA. STAT. tit. 61, § 2 (1981).
149. *See* 1965 Okla. Sess. Laws 1073; 1961 Okla. Sess. Laws 459.
150. 1968 Okla. Sess. Laws 105.

performed or material was supplied" by the claimant, rather than from the last furnishing of labor or materials "for which such claim is made." Thus, unlike the Miller Act, the time for bringing an action on a state public works bond under section 2 will not be extended by the furnishing of labor or materials that is not part of the claim.[151]

The Oklahoma Supreme Court, in *Phillips Petroleum Co. v. United States Fidelity & Guaranty Co.*,[152] held that the limitation period in section 2 was an ordinary statute of limitations, and that a defendant can waive it, or in appropriate circumstances, be estopped from asserting it as an affirmative defense.[153] The surety's agent in *Phillips Petroleum* admitted that they had told the plaintiff's agent that if the contractor owed a bill for which the surety was liable and had no defenses, the surety would pay it.[154] The court decided that the surety may have been estopped from asserting the statute of limitations if the claimant had reasonably relied on the statements of the surety's agent in failing to bring suit within the limitation period. Accordingly, the case was remanded for a new trial.[155]

A successful claimant on a public works bond is also entitled to an award of attorney's fees.[156] In addition, prejudgment interest may be allowed by statute, if the amount of the claim is certain, or capable of being made certain by calculation.[157] Where no other rate is specified by contract, the legal rate of interest imposed is six percent.[158]

---

151. *Compare* United States *ex rel.* Olmsted Elec., Inc. v. Neosho Constr. Co., 599 F.2d 930, 934 (10th Cir. 1979) (90 day period in the Miller Act for giving notice to the contractor is not extended by the furnishing of labor or materials which are not part of the claim) with United States *ex rel.* Aetna Drywall Contractors, Inc. v. Aetna Casualty & Surety Co., 725 F.2d 650, 651 (11th Cir. 1984) ("[T]he date of the last furnishing is the appropriate date [for beginning the one year limitation period under the Miller Act] whether or not that furnishing is at issue in the suit.").

152. 442 P.2d 303 (Okla. 1968).

153. *Id.* at 306-07. *See also* Gasteam Radiator Co. v. United States Fidelity & Guar. Co., 471 P.2d 883 (Okla. 1970) (the limitation period was an ordinary statute of limitations rather than a part of the state public works bond; thus, when the period was changed from six months to one year, the new limitation period applied to actions filed after it went into effect that were not already barred).

154. 442 P.2d at 307.

155. *Id.* at 309. *See also* Hart v. Bridges, 591 P.2d 1172, 1174 (Okla. 1979) ("Plaintiff must show he relied on the settlement negotiations and that such reliance was reasonable under the facts of this case, thus inducing him to delay filing suit.").

156. OKLA. STAT. tit. 12, § 936 (1981) (allowing recovery of reasonable attorney's fees as costs in a civil action on a "contract relating to the purchase or sale of goods, wares, or merchandise or for labor or services").

157. OKLA. STAT. tit. 23, § 6 (1981).

158. OKLA. STAT. tit. 15, § 266 (1981).

F. *Claims Against Funds Held by the Government Agency*

Besides having a claim against the contractor or other person with whom it has dealt, a supplier of labor or materials may have a claim against funds owed to the contractor that are in the hands of the government agency which ordered the construction.[159] In *Stroud Oil Reclaiming Co. v. Community State Bank*,[160] subcontractors were allowed to enforce an equitable lien on funds that were held by a city and due to the contractor, where the contractor had not furnished a payment bond as required by sections 1-2. The contractor's other creditors argued that the lien should not be allowed, since the construction contract did not provide for retention of funds by the city, but the court could see no reason for limiting the equitable lien of the subcontractors to amounts that were authorized by contract to be retained. The court concluded: "[T]hose persons who contributed their labor or materials to the performance of a public contract have an equitable right in the funds allocated to pay for the public work and this right is prior and superior to the claims of the contractor's general creditors or assigns."[161] The equitable lien is limited to the funds held by the government agency, and, in the absence of any retained funds, a supplier has no claim against the agency.[162]

The surety of a state public works bond may also assert a subrogation claim against the construction contract proceeds that are retained by the government agency, after it has paid the claims of lower tier suppliers of labor or materials. A surety that pays the claims of suppliers is entitled to reimbursement from the contractor, and is also subrogated to whatever rights the suppliers may have had against the construction contract proceeds.

In Oklahoma, a surety's right of reimbursement from its principal is provided for as follows:

159. Fidelity Nat'l Bank v. United States Casualty Co., 191 Okla. 496, 498, 131 P.2d 75, 77 (1942) ("There is a recognized equitable right of unpaid furnishers of labor or materials to such part of the contract price as may remain in the possession of the government after the completion of the work by the contractor.") (*quoting* Martin v. National Sur. Co., 85 F.2d 135, 139 (8th Cir. 1936)).

160. 475 P.2d 819 (Okla. 1970).

161. *Id.* at 822. *See also* Kennedy Elec. Co. v. United States Postal Serv., 508 F.2d 954, 960 (10th Cir. 1974) (equitable lien was awarded to a subcontractor on a federal project because the contractor did not obtain a Miller Act bond); City of Purcell v. Merco Mfg., Inc., 324 F. Supp. 210 (W.D. Okla. 1971) (supplier was entitled to satisfaction of its claims from funds interpleaded by city that had been withheld from the prime contractor).

162. *See* Electric Supply Co. v. City of Muskogee, 171 Okla. 130, 42 P.2d 140 (1935); Frensley Bros. Lumber Co. v. Scott, 117 Okla. 133, 245 P. 615 (1926); Bushnell v. Haynes, 56 Okla. 592, 156 P. 343 (1916).

> If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by this act, except as prescribed by the next section.[163]

The next section provides as follows for the surety's right of subrogation:

> A surety, upon satisfying the obligations of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended; and also to require all his cosureties to contribute thereto, without regard to the order of time in which they became such.[164]

A surety's rights of subrogation are illustrated by *Fidelity National Bank v. United States Casualty Co.*,[165] where a surety was allowed to claim an equitable lien on undisbursed loan proceeds from a state public works project. After completion of the project, the plaintiff, as surety on a payment bond and a performance bond, paid certain claims for materials used in the construction, and received assignments from the subcontractors. The project had been financed by a loan from the defendant bank to the contractor, and the loan agreement included an assignment of the amounts owed to the contractor by the Highway Commission. The dispute concerned whether funds still held by the Highway Commission after the construction was completed should be paid to the bank under its assignment from the contractor, or to the surety under its assignment from the subcontractors. The Oklahoma Supreme Court held for the surety. It reasoned that the defendant bank should have been aware of the terms of the construction contract authorizing the Highway Commission to withhold funds from the contractor until all claims for labor and material had been paid.[166] The court also distinguished a prior case, *Metropolitan Casualty Insurance Co. v. United Brick & Tile Co.*,[167] in which the city that had contracted for the project had paid the entire

---

163. OKLA. STAT. tit. 15, § 381 (1981). *See also* American Casualty Co. v. Town of Shattuck, 228 F. Supp. 834, 842 (W.D. Okla. 1964) ("The statutes of Oklahoma provide that if a surety satisfies the principal obligation, the principal is bound to reimburse the . . . surety").

164. OKLA. STAT. tit. 15, § 382 (1982). *See* Smiley v. Wheeler, 602 P.2d 209, 212 (Okla. 1979) ("If a surety pays the debt of the principal debtor, he becomes subrogated to the rights of the creditor and may proceed against the principal debtor and the collateral."); *In re* Hill, 7 Bankr. 433, 436 (Bankr. W.D. Okla. 1980) ("A surety may enforce every remedy which the creditor has against the principal upon the surety's 'satisfying the obligations of the principal.' ").

165. 191 Okla. 496, 131 P.2d 75 (1942).

166. *Id.* at 498, 131 P.2d at 78.

167. 167 Okla. 402, 29 P.2d 771 (1934).

contract price to the contractor. There was no fund in the hands of the city to which an equitable lien of the surety could attach in the *Metropolitan Casualty Insurance Co.* case, but there was such a fund in *Fidelity National Bank.*[168] *Fidelity National Bank* was followed in *Standard Accident Insurance Co. v. United States Casualty Co.*,[169] another case involving a surety on state public works projects. Similarly, in *National Bank of Commerce v. ABC Construction Co.*,[170] a surety of a subcontractor was given priority over a lender that had received an assignment of the proceeds from the subcontractor.

Where funds retained have not been by the government agency from the proceeds owed to the contractor, neither the contractor's suppliers nor the surety on a state public works bond may recover from the government agency. In *American Casualty Co. v. Town of Shattuck*,[171] a surety on a state public works bond sought subrogation against a town for the amounts that they had paid laborers and materialmen on a municipal sewer construction project. The court held that the surety's subrogation rights were limited to the capture of construction funds in the hands of the town. In contrast, that same day, in *American Casualty Co. v. Board of Education*,[172] the court held that the surety was entitled to reimbursement from the contractor.[173]

IV. CONCLUSION

The Miller Act and its Oklahoma counterpart provide important protection for suppliers of labor and materials on public works projects. Both require contractors on public works projects to furnish surety bonds for the benefit of the government and their suppliers of labor and materials. Although the Oklahoma statutory language tracks the Miller Act closely, recent decisions have construed the Oklahoma law to give protection to more remote suppliers than those protected under the Miller Act. It is anticipated that other provisions of the Oklahoma law

168. 191 Okla. 496, 499, 131 P.2d 75, 78.

169. 199 Okla. 530, 188 P.2d 204 (1947).

170. 442 P.2d 269 (Okla. 1966).

171. 228 F. Supp. 834, 841 (W.D. Okla. 1964).

172. 228 F. Supp. 843 (W.D. Okla. 1964).

173. *Id.* at 852. For an extensive discussion of these cases by the successful attorneys for the Town of Shattuck, *see* Merrill & Klem, *American Casualty Company Versus Town of Shattuck, A Statutory Payment Bond Problem and Speculations Engendered Thereby*, 20 OKLA. L. REV. 135 (1967).

will be interpreted generously, in order to fulfill the objective of providing a means for persons to obtain payment for the labor and materials they furnish on public works projects.