

Contractor's and Supply House's Protections for Payment - Looking Forward to the Route 81 Reconstruction Plans and Other Public Projects

By: Douglas J. Mahr

Contractors and supply houses may be looking forward to the reconstruction project planned for the Syracuse, New York corridor of Route 81. The cost to pay for the reconstruction work is estimated in the millions. No doubt it will be a source of significant work and opportunity.

If you provide labor or materials to a public project, and you run into trouble getting paid, you may have the ability to protect yourself by making a claim against a labor and material payment bond provided as part of the project, or by filing a public improvement mechanic's lien. The key is to know your rights and acting promptly.

Right now we do not know how all of the work for such a large project as the Route 81 Reconstruction will be paid for, but we can anticipate that there will be contracts through New York State, and there may be Federal contracts.

A payment bond is a surety bond posted by a contractor that can provide payment to contractors and material suppliers if the contractor is in breach or defaults. New York State Finance Law provides for when a payment bond is required on a public contract. When it is, under State Finance Law §137, a person who has furnished labor or materials to the contractor or to a subcontractor of the contractor in the prosecution of the work provided for in the public contract and who has not been paid in full therefor before the expiration of 90 days after the day on which the last of the labor was performed or material was furnished may have the right to sue on a payment bond. If you have a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship with the contractor you must give written notice to the contractor about what is due to you as required in §137 within 120 days from the date on which the last of the labor was performed or the last of the material was furnished, or risk that your claim will be denied. There is also a one year statute of limitations to sue, so you should speak with an attorney very early on before you get close to any of these deadlines to make sure that your rights are protected.

Under New York's Lien Law, you may also have the right to file a public improvement mechanic's lien to try to get paid. A person performing work for or furnishing materials to a contractor or his subcontractor may file a notice of lien with the head of the department or bureau having charge of such construction or demolition and with the comptroller of the state or with the financial officer of the public corporation, or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made. These rights can expire, however, and there are strict time limits for

when you can file a mechanic's lien on a project, so you do not want to delay investigating your rights and filing a timely mechanic's lien. Filing both a mechanic's lien and making your claim against a payment bond may increase your ability to get paid.

Should any contracts be by the Federal government, the rules are again different. Federal projects usually provide for only a payment bond called a "Miller Act Bond" and you typically cannot file a mechanic's lien against a Federally-owned project. The rules for complying with this statute can be complicated, so again, you should speak with an attorney about your particular situation early on to make sure that your rights are protected. In general, a person that has furnished labor or materials in carrying out work provided for in a contract for which a payment bond is furnished [on a Federal contract] that has not been paid in full within 90 days after the day on which they did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond. A person having a direct contractual relationship with a subcontractor but no contractual relationship with the contractor furnishing the payment bond must give written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made, or your claim could be denied. A suit to collect under a Federal Miller Act payment bond must be brought no later than one year after the day on which the last of the labor was performed or material was supplied by you.

Filing a mechanic's lien or making a claim against a payment bond is not a guaranty you will get paid of course. There are exceptions to the rules about providing bonds on public projects that could affect any project you work on, and who can file mechanic's liens, and deadlines for when those rights expire if they are available. You must have also performed your contract properly. In some cases, the recovery that you can receive under a mechanic's lien will be limited to what remains due on the contract from the public entity, and if multiple mechanic's liens are filed, you might only receive a pro-rata share of what's left with other subcontractors and suppliers. It is also possible that the payment bond can be exhausted, leaving people unpaid.

If you are bidding on or considering public work, determining who you are contracting with and what position you are in under that contract is extremely important. You should be very cautious and learn what your rights are before you bid on the work or extend any credit for materials. Whether the main contract is a N.Y. State or Federal contract in advance can narrow down how you may have to react if you are faced with a situation where you have to seek help to get paid. You can usually find out in advance if a bond is required and has been provided as part of your due diligence before you bid or enter any agreement, especially if you plan on advancing any significant amount of work or materials that could put your business in jeopardy. More remote subcontractors and material suppliers than those having a direct contract with the contractor that has the public contract or provided the payment bond could be completely closed out from filing a mechanic's lien or making a claim under a payment bond. You may want to know this before you bid on any work or contract to provide labor or materials.

If you want to learn more about what rights and options you may have in a particular situation, contact Douglas J. Mahr, Esq. at Scolaro, Fetter, Grizanti, McGough & King, P.C. at 315-477-6264.

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