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Payment Bond Claim Review, article by Andrew Richards, Esq. published in Legal Log, Subcontractors Trade Association, 4-2024

Payment bonds are the best security that a subcontractor, sub-subcontractor or materialman could ask for.

There is no defense to the bond claim that there is no fund due and owing by the owner to the general contractor to which the lien can a ach on the ground that the owner paid the general contractor all of the monies owed. The payment bond is an independent contract between the surety and general contractor and the claimants under the bond are third-party beneficiaries of the bond's covenants.

It is very important to comply with the terms of the bond which generally incorporate the terms of Article IX, sec on 137 of the New York State Finance Law. A payment bond issued pursuant to said statute can provide broader conditions to maintain a claim under the bond in favor of the claimant but cannot make the conditions of a claim stricter.

A claimant under the payment bond must wait 90 days from the last day of performance to bring a lawsuit under the bond. More importantly, a sub-subcontractor or materialman to a subcontractor must provide notice of its claim to the general contractor within 120 days from the last day of performance to bring a lawsuit under the bond. This notice is a strict condition precedent to the claim and many companies do not know of this requirement.

The last day to bring a claim under the bond is the date when the public improvement has been completed and accepted by the public owner. The substantial completion date is not relevant to the bringing of the claim. Since public owners generally do not accept a project for years and do not release retainage, it is extremely hard to miss this limitations date. However, the best practice is to bring the claim when the claimant believes that it has performed all of its work or when the retainage release starts to drag on.

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