

**A MISSISSIPPI CONSTRUCTION MATERIALMAN SUPPLIER'S  
COLLECTION LAW TOOL KIT**

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**I. INTRODUCTION**

Selecting the right collection tools at the outset can minimize the frustration of an unpaid material man, supplier or equipment lessor on a Mississippi construction project. Beyond using the strongest credit application agreement, invoice and demand letter forms available, selecting the right legal enforcement tools will depend on: 1) whether there is a bond on the project protecting the supplier's interests; and 2) if there is no bond, where the supplier is in the chain of contracts in relation to the owner. The supplier must be aware that prompt notice of his claim may be required to preserve his legal options. Let's look at all those considerations.

## **II. GETTING THE CREDIT APPLICATION FORM RIGHT**

Here are some points to consider in putting together the strongest possible credit application agreement form:

- **Recite That the Credit Application Is a Business Account Agreement:** To avoid any assertion that the effort to collect the unpaid account is subject to the special requirements of the Fair Debt Collection Practices Act (15 U.S.C. § 1692), applicable to consumers, recite that the credit application creates a “business account” or is a “commercial credit application” for commercial purposes only, and not for personal, family or household purposes. The issue could be raised if the purchaser, although usually operating under a business d/b/a designation, simply uses his own name for the purchase as if he were just buying materials for his personal use.
- **Recite the Highest Rate of Interest for Late Payment:** In Mississippi any retail seller may contract for and receive a finance charge for credit sales of goods, services or merchandise of up to 1 3/4% per month (21% APR) applicable to the average daily balance of the account, exclusive of the finance charge itself, in each billing period. § 75-17-19(1) *Miss. Code Ann.* Notice that the merchant, to receive the higher rate of interest (versus the standard statutory legal interest of 8%) must “contract for” it, so do not leave it out of the credit application agreement. Include the rate on invoices as well.
- **Recite the Obligation to Pay Attorney’s Fees and Court Costs:** Since in Mississippi one may receive attorney’s fees only by the grace of a contract provision or statute, an attorney’s fees provision is a must for any agreement. If, by chance, there was no written contract with the debtor, only invoices, one can proceed to have the right to attorney’s fees added

to the debt by following the 30 day demand procedure of the Mississippi Open Account Statute, § 11-53-81. Since the language of the demand letter must follow the statute, an attorney should draft and send out the open account letter. However, the court will not permit attorney's fees under the open account statute where the claim is based on a written contract rather than an open account, and the written contract contains no attorney's fees provision. *C.R. Daniels, Inc. v. Yazoo Manufacturing Co.*, 641 F. Supp. 205 (S.D. Miss 1986).

- **Include a Personal Written Guaranty of the Business Principal:** To avoid the possibility of holding a debt against just a worthless corporation, consider including a guaranty provision. A guaranty provision must be in writing to meet the requirements of the Mississippi Statute of Frauds. For example, the credit application could state: "By signing below I hereby certify that I am a principal of the above business, and I do personally guarantee this account and payment of any sums due by the above-named business."
- **Include a Contract Integration Clause:** This is a must for any kind of contract period. It is designed to avoid claims that the written agreement was subject to oral side agreements.
- **Include Governing Law and Venue Provisions:** Especially if the goods are to be shipped to a job site out of state, having a clause stating that the credit agreement will be governed by the laws of the State of Mississippi, and that the buyer agrees to venue for any dispute under the agreement in Mississippi, is important for establishing jurisdiction in the state or Federal courts of Mississippi, or for a Mississippi arbitration of the dispute.
- **Include a Purchase Money Security Interest:** Including a purchase money security interest in the materials sold with a right to the return of goods not paid for, reciting

Title 9 of the Mississippi UCC, can give one the right to repossess, or, if necessary, to start a formal legal replevin action, for the repossession of the goods not yet incorporated into the work.

- **Payment and Default Provisions:** Be sure that both the payment obligation and default provisions are fully and affirmatively stated.

### **III. THE DEMAND LETTER**

Do not just haul off and sue. Have an attorney send a written demand letter as a first step every time. Although a written demand is not required in Mississippi to establish a commercial debt action (unlike some states), there is no sense on spending the money and time for filing, service of process, and the preparation of a complaint and summons, if there is any possibility that the debtor will pay up with ten days or so. Also, the debtor may assert defenses that one should know about prior to contemplating suit. While the retailer can send his own demand letter, an attorney's demand letter with the implied threat of early court action is more likely to be taken seriously. Finally, if supplier did not require a credit application, and has only invoices, a demand letter that includes an itemized statement of the account meeting the requirements of the Mississippi Open Account Statute is essential to obtain the addition of attorney's fees to the debt as permitted under §11-53-81.

### **IV. A MISSISSIPPI CONSTRUCTION SUPPLIER'S PAYMENT BOND CLAIM**

#### **A. Check First For a Payment Bond**

Rather than looking first to a lien or stop notice remedy, a supplier should first inquire *in writing* of the owner or contractor with whom one has dealt whether there is a payment bond covering the supplier's additions to the construction project. In the case of a public job for a governmental entity or public body, there is sure to be a payment bond for the job because

contractors are required to put up payment bonds for public jobs under either the Federal or State Miller Acts. 40 U.S.C. § 270a et seq.; §§ 31-5-51 to -57 *Miss. Code Ann.* By contrast, on a private job, there may or may not be a payment bond, depending on whether the owner chose to require one as a means of keeping liens and stop notices off the project. Bonds for private projects are governed in Mississippi by § 85-7-185.

At least in the case of public projects, the contractor cannot stonewall a claimant's requests for a copy of the bond. The right to examine the payment bond is protected by the Little Miller Act for, "[a]ny person supplying labor or materials for the prosecution of the work". § 31-5-55.

Moreover, even in the case of a private job, if one inquires of an owner if the prime or lower tier contractors provided payment bonds, the owner should have an incentive to see that the contractors furnish the supplier with a copy of the bond. That is because where a payment bond exists protecting the supplier, the supplier has no right to serve a lien notice or stop notice (which can lead to a lien) on the project. *Ewin Engineering Corp. v. Deposit Guaranty Bank and Trust*, 216 Miss. 410, 62 So. 2d 572, 574 (1953), citing *Dickson v. U.S.F.&G. Co.*, 117 So. 245, 248 (Miss. 1928). Accord., *Redd v. L & A Contracting Co.*, 151 So. 2d 205, 207, 246 Miss. 548 (Miss. 1963). See also, *Jesco, Inc. v. Jeffreys Steel Co., Inc.*, 571 F. Supp. 801 (N.D. Miss. 1983) ("Under *Dickson v. USF & G...*where the contractor has given bond, as here...*no* lien, either at law or equity, may be asserted against monies due a contractor under a construction contract or purchase order." Emphasis original.). So, do not spin your wheels. Find out first if there is a bond on the project covering your interest as a supplier.

## **B. Check the Bond's Coverage**

### **1. Private Project Payment Bonds**

The Mississippi Supreme Court has held that the private bond statute for private projects (§ 85-7-185) requires that the bond provide protection only to persons furnishing labor or materials to the contractor who provided the bond; it does not require protection of remote materialmen having no direct contract with the contractor who gave the bond. *United States Fidelity & Guaranty Co. v. Maryland Casualty Co.*, 191 Miss. 103, 199 So. 278, 282 (1940); *Alabama Marble Co. v. United States Fidelity & Guaranty*, 146 Miss. 414, 111 So. 573, 574 (1927). The law, though, does not preclude the general contractor's bond from affording greater protection to remote materialmen than the statute requires, so one must read the bond to learn if its scope is broader than the statute requires. Further, if the prime contractor requires a subcontractor to provide a bond, the private bond statute then requires that materialman who have dealt with the bonded subcontractor be protected under the bond.

Finding coverage under a bond on a private project for equipment rentals or repairs can be a problem unless the bond specifically covers "equipment" as well as "labor and materials". *Western Casualty & Surety Company v. Stribling Brothers Machinery Company*, 162 Miss. 581, 139 So. 838, 840-841 (1962). However, fortunately modern bond forms do usually cover equipment as well as "labor and materials".

### **2. Public Project Payment Bonds**

The Mississippi Legislature in 1980 enacted the Little Miller Act which follows closely the model of the Federal Miller Act (40 U.S.C. § 270a *et seq.*). Mississippi's Little Miller Act

appears at §§ 31-5-51 to -57 *Miss. Code Ann.* (1972).

The Little Miller Act provides that the “only persons” that a payment bond must protect on a state or local public job are: (a) first tier subcontractors and material suppliers below the prime contractor; (b) second tier sub-subcontractors and material suppliers below subcontractors who give notice of their claims within 90 days of their last addition of labor or materials; and (c) laborers with wage claims who have performed work on the project site. § 31-5-51(4). The Little Miller Act does not require protection for materialmen of materialmen, and for subs below the sub-sub level, although the bond itself may include such protection.

**C. Remote Materialmen and Suppliers Beware of the 90 Day Deadline:** One should immediately review a payment bond for the bonding company’s requirements for any deadline on presenting notice of a claim to the bonding company. Further, remote material suppliers to public jobs, that is materialmen not supplying directly to the contractor who provided the payment bond, have a special notice burden. A remote materialman must keep in mind that the Little Miller Act requires bond protection only of if the remote claimant makes his payment claims early on, in writing to the prime contractor or surety, **within 90 days of their last supply of labor or materials.** § 31-5-51(3). In other words, a remote materialman or supplier should not let his invoices go unpaid for more than 90 days without making a written demand for payment to the contractor or surety. Otherwise, the Little Miller Act flat out states that late claimants are barred from suit on the bond: “No such action [on the bond] may be maintained by any person not having a direct contractual relationship with the contractor-principal, unless the notice required by this section shall have been given.” § 31-5-51(3).

On a private job, the bond should cover a materialman if he supplied the contractor

providing the payment bond. However, the private bond statute does not require coverage of remote materialmen. § 85-7-185. One would need to check the bond on a private project carefully to check the scope of coverage and any notice deadlines, especially for a remote supplier.

**D. Start of Suit on the Public or Private Payment Bond:** The Mississippi Legislature recently amended the law to allow claimants on public and private project bonds to sue prior to the end of the project. There is a strict **one year** statute of limitations applicable to both public and private bond suits running from the claimant's **last performance of labor or supply of material**. See § 85-7-189 [private jobs]; and § 31-5-53 [public jobs, Little Miller Act].

#### **V. A MISSISSIPPI CONSTRUCTION SUPPLIER'S LIEN RIGHTS**

A Mississippi construction supplier will have a right to lien the real property and improvements of a project owner **only if the owner dealt directly with the supplier**. If the supplier had no direct contractual relationship with the owner, but is only a supplier to the prime or other contractor, he has no right to file a notice of construction lien on the project. § 85-7-135; *Brown v. Gravlee Lumber Co., Inc.*, 341 So. 2d 907, 909 (1977); *Wenger v. First National Bank*, 164 So.229 (Miss.1935). In that case, the supplier of a contractor should look to see if he has rights under the stop notice statute (discussed below).

Further, the state, as sovereign, is not subject to private liens. *Key Constructors, Inc. v. H&M Gas Company*, 537 So. 2d 1318, 1321 (Miss. 1989). Therefore on a public project a claimant would look for relief under the payment bond required by the Miller acts rather than under the Mississippi lien statutes which apply only to private projects.

If the supplier provided materials or equipment at the owner's request, and therefore has valid lien rights, the supplier must act to perfect the lien by filing a Notice of Construction Lien with the Chancery Clerk of the county where the work is located. § 85-7-133. The statute states the lien "shall not take effect unless and until some notation thereof shall be filed and recorded" in the Notice of Construction Liens book. *Id.* Indeed, a lien is ineffective and nothing more than an inchoate right until notice of the lien is filed as required by the statute, rendering the holder of an unperfected lien nothing more than a common creditor. *Wortman & Mann, Inc. v. Frierson Bldg. Supply Co.*, 184 So. 2d 857, 859-860 (Miss. 1966). In addition, the potential claimant *may*, but is not required to, record the construction contract under which he is proceeding in the land records with the Chancery Clerk. § 85-7-139. If the claimant files the contract before filing the notice of lien, the lien will be held to have been perfected at the time of the earlier filing of the contract. § 85-7-131. The filing of the contract is useful because an owner is less likely to be offended by the early filing of a contract, as opposed to the early filing of a lien.

The lien statutes provide a relatively short statute of limitations for suit. A claimant must initiate suit on the lien within twelve (12) months after the date the money claimed, "*became due and payable, and not after*". (Emphasis added). § 85-7-141. **Notice that the 12 months runs from the payment due date, not the date of the filing of the lien notice.** Thus, one must file both the notice of lien and suit within the 12 months.

Mississippi law creates a statutory presumption that material shown to have been delivered to the job was used in the job, and therefore that the project property is subject to the lien. § 85-7-131. The owner can rebut the presumption only by proof that the materials were diverted to another project.

## **VI. A MISSISSIPPI CONSTRUCTION SUPPLIER'S STOP NOTICE RIGHTS**

If the supplier dealt with the prime contractor, rather than the owner, he should look to a possible stop notice rather than a lien notice. As we have seen, only primes and others with a direct contract with the owner have lien rights under Mississippi law. The law, though, affords a remedy to subcontractors, materialmen and laborers of general contractors under the Mississippi Stop Notice statute. § 85-7-181. *Cummings v. Davis*, 751 So. 2d 1055, 1058 (Ms. App. 1999).

The Stop Notice statute, known also as the Stop Payment statute, states that an unpaid subcontractor or laborer of the prime contractor can give notice in writing to the owner of the amount due, claim the benefit of the statute, and from that time on bind an amount sufficient to cover his claim in the hands of the owner until the claim is resolved. § 85-7-181. However, to be effective and enforceable, the claimant must give the notice while the owner still owes money to the prime contractor. *Corrugated Industries v. Chattanooga Glass Company*, 317 So. 2d 43 (Miss. 1975). Further, the stop notice only requires the owner to withhold payment from the prime of, “the amount claimed in *that notice*.” (Emphasis original). *Amerihost Development, Inc. v. Bromanco, Inc.*, No. 98-CT-00762-SCT (Miss. April 12, 2001), quoting *McNair v. M.L. Virden Lumber Co.*, 193 Miss. 232, 4 So. 2d 684, 689 (1941). Therefore, “the filing of a stop-notice under § 85-7-181 benefits only the subcontractor(s) giving actual notice prior to the time the owner pays the prime contractor.” *Id.* Further, the subcontractor giving the stop notice is not required to notify other subcontractors of the stop notice (although the sub must give notice of any subsequent suit by summons at that time). *Id.*

The supplier who issues a stop notice, to ensure that the owner does not ignore it, may wish to file a lis pendens notice on the records affecting land titles of the Chancery Clerk as permitted by § 85-7-197 *Miss. Code Ann.* At the very least, the provision of the notice and the filing of the lis pendens notice may cause the general contractor to provide a payment bond for the project in order to clear the record of the stop notice.

The protection afforded by the Stop Notice statute does not extend beyond those with contracts with the prime contractor. “Subcontractors or materialmen to another subcontractor are not entitled to recovery under this statutory provision.” *Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc.*, 589 So. 2d 1245, 1247 (Miss. 1991). Such remote contractors and materialmen are mere “general creditors” of the parties with whom they have dealt. *Id.* at 1248. Accord., *Amerihost Development, Inc. v. Bromanco*, 2000 WL 137129 (Ms. Ct. App. 2/8/2000); *Cummings v. Davis*, 751 So. 2d 1055, 1058 (Ms. App. 1999).

**Rental Equipment:** The Mississippi Supreme Court has held that the term “materials” in the stop notice statute (§ 85-7-181) does not include rental equipment, just as the same term “material” in the private bond statute (§ 87-1-185) has been held not to include rental equipment. *Coatings Manufacturers, Inc. v. DPI, Inc.*, 926 F. 2d 474, 478-79 (Miss. 1991).

## **VII. A MISSISSIPPI SUPPLIER’S STATUTORY RIGHT TO INTEREST**

Prime contractors, on both private and public jobs, can become liable by statute to pay statutory interest in Mississippi for late payment to their materialmen and suppliers. There is an exception to this rule: the late payment law does not apply on private jobs to payment of suppliers for construction of single-family residences. §§ 87-7-5 [private jobs]; 31-5-27 [public jobs] *Miss. Code Ann.*

A payment to a prime's sub or supplier is considered late by statute if the payment is not made within fifteen (15) days of receipt of payment from the owner. If the prime receives only partial payment from the owner, the sub or materialman must still be paid, but *pro rata* for their part due from the owner's payment. The penalty for the prime's late payment sounds astoundingly large (1/2 of 1% *per day* from the time of the owner's payment to the prime), but is capped at 15% of the outstanding balance due to the sub or supplier. §§ 87-7-5 [private jobs]; 31-5-27 [public jobs] *Miss. Code Ann.*

## **VIII. CONCLUSION**

Mississippi construction materialmen, suppliers and equipment providers will find the frustration of unpaid claims more manageable if the right legal tools are employed on their behalf from the first demand letter forward to payment.

**For additional detail and cites, please see my article entitled: “Mississippi Construction Lien, Bond, Stop Notice, Open Account and Contractor Prompt Payment Claims” at my articles page at [www.mslawyer.com/rwise](http://www.mslawyer.com/rwise)**

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