

**Mississippi Construction Bond, Lien, Stop Notice
and Prompt Payment Law Claims**

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I. CONTRACTOR AND SUBCONTRACTOR PAYMENT REMEDIES
MISSISSIPPI PROMPT PAYMENT LAWS AND STOPPING WORK

A. Prime Contractors' Statutory Claims for Interest

Prime contractors in Mississippi should be aware that there are statutes on the books both allowing them to receive interest from the owner in the event the owner's late payment, and creating liability to the prime contractor to pay interest to subs and suppliers in the event of the prime's late payment to a subs or suppliers. Moreover, the statutory duty to pay interest for late payment exists regardless of whether interest penalties were included in the construction contract.

Mississippi has prompt payment laws applicable to an owner's obligation to promptly pay prime contractors on private and public projects. The statutes state that if the private or public owner fails to make a partial, progress or interim payment to the prime contractor within sixty (60) days of the due date, the prime contractor is entitled to collect interest from the due date at the rate of one percent (1%) per month until paid (12% APR). § 87-7-3(a) [private jobs]; § 31-5-25(a) [public jobs] *Miss. Code Ann.* Similarly, if the owner fails to make a final payment to the prime contractor, the prime contractor may claim statutory interest of one percent (1%) per month until paid (12% APR). § 87-7-3(b) [private jobs]; § 31-5-25(a) [public jobs] *Miss. Code Ann.* Note that the 12% APR interest allowed to prime contractors is a higher rate of interest than the general legal rate of interest of 8% provided for contract generally under § 75-17-1(1).

When, though, is a final payment considered due to the prime contractor so that the 1% per month interest charges can begin? In the case of private jobs, the interest

statute provides that final payment is due upon the earliest of any of the following, provided that any surety for the contractor has first given consent in writing to the final payment:

- (i) Completion of the project, or substantial completion in accordance with the terms of the contract;
- (ii) Upon the owner's beneficial use or occupation of the premises (unless the owner's occupation continued during a renovation);
- (iii) When the project architect or engineer certifies the project is complete.

§ 87-7-3(b) [private jobs] *Miss. Code Ann.*

In the case of public jobs, the events triggering the due date of a final payment are the same as the three listed above for private jobs, except that in addition a certification of completion by the State or municipal authority can also trigger the final payment due date if that is the earliest of the listed events to occur. § 31-5-25(a) [public jobs] *Miss. Code Ann.*

B. SubContractors' and Suppliers' Statutory Claims for Interest

Prime contractors, on both private and public jobs, can become liable to pay statutory interest in Mississippi for late payment to their subs and suppliers. There is one exception to this rule: the late payment law does not apply on private jobs to payment of subs and 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.*

C. Right to Stop Work for Nonpayment under AIA Contracts

1. Prime Contractors' Right to Stop Work

An owner's failure to timely pay the prime contractor can lead to the prime's stopping work and, if nonpayment continues, to termination of the contract for breach under AIA contract provisions. However, the contractor must be careful to observe the notice requirements. The AIA General Conditions for Construction provide that the prime contractor can stop work until payment is made:

- If the architect does not issue a Certificate of Payment within 7 days of the Application for Payment through no fault of the contractor; or
- if the owner does not pay the contractor within 7 days of a due date under the contract; and
- the contractor gives 7 days additional written notice to the owner and architect of that the work will stop if payment is not made.

Article 9.7.1 (A201-1997).

2. Prime Contractors' Right to Terminate the AIA Contract

The prime contractor, after stopping work for nonpayment, can then terminate the contract and sue for payment and damages:

- If the work is stopped for nonpayment for 30 consecutive days through no fault of the contractor or of a subcontractor or of a sub-sub contractor; and
- the contractor provides 7 additional days written notice of termination.

Articles 14.1.1, 14.1.3 (A201-1997).

3. Subcontractor's Right to Stop Work or Terminate AIA Contract

The subcontractor can stop work until payment is made after the contractor's failure to make timely payment for 7 days, and after provision of 7 days' additional written notice to the contractor that work will stop. Article 4.7.1 (A401-1997).

II. MISSISSIPPI BOND LAW:

A. PRIVATE CONSTRUCTION PROJECTS

1. Bonding Around A Stop Notice: A General Contractor's Provision of a Private Bond to an Owner Dissolves A Sub's Stop Notice Rights: Mississippi law does not require contractors on private projects to furnish performance or payment bonds. **However, the first inquiry one should make on a private job is whether there is a bond since bond rights, where they exist, are in lieu of statutory lien or stop notice rights.** In other words, stop notices become legally ineffective where the general contractor provides to the owner a payment bond protecting subcontractors and suppliers. As a result, a contractor, faced with a sub's stop notice claim that could delay the owner's closing with its lender (preventing final payment to the general, and by the general to all

the other subs), can get rid of the stop notice by “bonding around the lien”, providing the owner a payment bond that will cover the amount of the stop notice claim. The contractor’s provision of a payment bond dissolves the stop notice rights of the sub as a matter of law. *Dickson v. U.S.F.&G. Co.*, 117 So. 245, 248 (Miss. 1928):

If the contractor does not give the bond provided by the statute, laborers and materialmen have an equity...in the funds due the contractor by the owner of the building. But where a bond is given as provided by the statute, such funds are released from such equity or trust in favor of materialmen and laborers and go into the hands of the contractor untrammelled. The purpose of the bond section of the statute was to provide for the protection of materialmen and laborers, the bond being in lieu of their equity in the funds arising out of the building contract.”.

Also, the prime contractor can achieve the same protection from stop notices at the start of the project by providing the owner a payment bond. *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.).

One hastens to add that if the prime contractor posts a performance bond instead of a payment bond, Mississippi law automatically writes into the performance bond a payment provision protecting subcontractors, laborers and materialmen of the general

contractor at § 85-7-185. Therefore, the private bond statute requires protection of tier 1 contractors and materialmen below the bonded contractor but, unlike the Little Miller Act which protects also the next tier upon their giving timely notice of claims, the private bond statute does not require that the bond protect tier 2 sub-subs and materialmen of subs.

2. Motion to Expunge Stop Notice and Lis Pendens Filing Given the Presence of a Payment Bond: What, though, if the subcontractor stubbornly refuses to remove a stop notice and accompanying lis pendens notice even in the face of the contractor's providing him a copy of a bond? In that case the contractor, preferably joined by the owner (to ensure standing), should apply to the county or chancery court to have the lis pendens notice immediately enjoined and expunged under the authority of § 85-7-201 *Miss. Code Ann.* That section, the false notice statute, allows application to the county or chancery court on two day's notice to expunge the inappropriate lis pendens filing from the land records, and to enjoin the further filing of such notices. At the very least, the court should consider award of attorney's fees where the sub's stubbornness necessitates the motion.

The Mississippi Court of Appeals has noted a chancellor's right to examine whether a recorded materialmen's lien is void and of no effect, and whether the lien should be enjoined, in *Cummings v. Davis*, 751 So. 2d 1055, 1058 (Miss. App. 1999).

Although a more cumbersome claim, it also possible for an owner to assert an action for slander of title where the false filing of a lien is malicious. *Walley v. Hunt*, 54 So.2d 393, 212 Miss. 294 (Miss. 1951).

3. Remote Materialmen: 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 protect 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). For example, the Court held in the *Alabama Marble Co.* case that a bond provided by the prime contractor for the construction of the Lamar Life Building in Jackson did not cover the claim of a provider of marble to a subcontractor on the job. *Id.* 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.

4. Equipment: Finding coverage under a private bond for equipment rentals or repairs can be problematic unless the bond specifically covers "equipment" as well as "labor and materials". However, modern bond forms do usually cover equipment as well as "labor and materials". In the case of *Western Casualty & Surety Company v. Stribling Brothers Machinery Company*, 162 Miss. 581, 139 So. 838, 840-841 (1962), the Mississippi Supreme Court strictly interpreted the terms "labor and materials" under the private bond statute to hold that the surety was not liable for the claims of intervenors for

unpaid equipment rentals and transportation costs of equipment. The Court did recognize coverage claims for gas and oil and necessary repairs to the equipment used in the work. *Id.* The Court in a subsequent case, based on the terms of the indemnity bond in that action, broadly disallowed bond claims for equipment rentals, transportation, repairs and parts, stating that “all persons furnishing labor or material under said contract” did not include lessors of equipment. *Great American Insurance Company v. Busby*, 247 Miss. 39, 150 So. 2d 131, 135, 137 (1963). See also, *Carruth v. Standard Accident Insurance Co.*, 329 F. 2d 690, 692-93 (5th Cir. 1964), reaching the same conclusion. However, the Mississippi Court did find coverage for equipment repairs (as well as fuel and oil consumed) in *Seaboard Surety Co. v. Bosarge*, 226 Miss. 482, 84 So. 2d 517, 519 (1956), where the private performance bond specifically covered the contractor’s obligation to provide “equipment”, as well as labor, supervision and tools, to complete a housing project. The *Bosarge* and *Busby* cases are compared in *Coatings Manufacturers, Inc. v. DPI, Inc.*, 926 F. 2d 474, 477 (5th Cir. 1991). And again, the bond at issue by its terms may very well explicitly cover equipment rentals.

5. Commencement of Suit and Joinder In Suit on Bond: The statute also provides that if a claimant brings suit on the bond, other persons furnishing labor or materials under the contract may intervene in the action to have their rights determined under the bond. However, unlike the public project bond requirements under the Little Miller Act, the private bond statute does not require that the bond be sufficient to cover the full amount of the prime’s or subcontractor’s contract. Therefore, the statute provides that the owner or prime to whom the bond was given (the bond obligee) has the first

priority in the bond proceeds for satisfaction of his claim for damages ahead of other parties. § 85-7-185. Remaining claimants are left to share in the available bond proceeds on a pro rata basis. § 85-7-193.

Only the owner or the prime to whom the bond was given (the obligee) on a private project can bring suit within the first six months following either notice of abandonment or completion and final settlement of the contract. Thereafter if the bond obligee has not brought suit, any third party supplying labor or materials can initiate suit on the bond. §85-7-187. Once suit is brought by a party eligible to relief under the bond, any other party entitled to bond relief may intervene in the action and be made a party to the suit since by statute only one action can be brought on the bond. §85-7-191.

However, while §85-7-191 states there can be only one action on the private bond, the Supreme Court has refused to uphold the one action rule on constitutional grounds against a claimant who had no notice of the suit. *American Fidelity Fire Insurance Company v. Athens Stove Works, Inc.*, 481 So. 2d 292, 295 (Miss. 1985).

6. Statute of Limitations: The suit on the bond can not be commenced by any party before a notice of abandonment or the complete performance and final settlement of the contract. §85-7-189. However, once the suit can be filed, it must be filed within the statute of limitations of one (1) year after the earliest of the following events: (a) newspaper publication of the performance and final settlement of the contract, or notice of abandonment; (b) written acceptance of the project by the owner; or (c) actual occupancy or use by the owner. *Id.* The same statute of limitations period also applies to any motions of claimants to intervene in an ongoing suit on the bond. § 85-7-191.

However, the Fifth Circuit Court of Appeals, applying Mississippi law, has held that where the bonding company takes over a defaulting contractor's contract and supplies a substitute contractor whose work turns out to be defective, the bonding company subjects itself to the normal six year statute of limitations for deficiencies (§ 15-1-41), rather than the one year bond statute of limitations (§ 85-7-189), since it elected to serve as the contractor. *Cooper Industries, Inc. v. Tarmac Roofing Systems, Inc.*, 276 F. 3d 704, 712-713 (C.A. (Miss.) 2002). However, the bonding company would not have a liability for the substitute contractor's deficiencies if it chose to re-bid the contract, supplying a new contract to the owner, rather than simply appointing the substitute contractor to complete the contract in default. *Id.* The one year bond statute of limitations applies only to laborers and materialmen to the job, and owners who themselves have supplied labor or materials. *Id.*, 276 F. 3d at 714.

7. Priorities in Recovery; Attorney's Fees: As noted previously, if the recovery on the bond turns out to be inadequate to satisfy all parties to the action, the bond obligee is to be satisfied first as to all claims and damages before judgment is given for remaining parties on a pro rata basis. § 85-7-193; § 85-7-185. Section 85-7-193 also authorizes the award of reasonable attorneys fees in an action on a private bond in an amount to be set by the judge, but the attorneys fees must be authorized in the bond contract or by separate statute. *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So.2d 954, 971 (Miss.1999).

8. Interest: Prime contractors and subcontractors on private projects who do not received timely payment will be able to charge interest as permitted by the

Mississippi Prompt Payment Act. See the descriptions of § 87-7-3 and § 87-7-5 in Section I above.

B. PUBLIC WORKS PROJECTS

1. **Bid Bonds:** A bid bond provides relief to the owner in the event the contractor whose bid has been accepted refuses to proceed with signing the contract and construction (a performance bond, by contrast, covers construction performance). Public authorities in Mississippi in their discretion may require contractors to post bid bonds with bids on public construction contracts. Cities, for example, may impose the requirement of a bid bond pursuant to § 21-17-5 *Miss. Code Ann.* (1972), which gives cities control over management of their finances. AG Opinion, 1990 WL 547943; AG Opinion, 1990 WL 548140. Generally, there is no statutory requirement that the public authority require a bid bond from contractors. However, the private financing and construction of dorm facilities for the Institutions of Higher Learning requires that bids be accompanied by a check or “bid-bond payable to said board in a sum not less than five percent of the gross construction cost of the facility to be constructed as estimated by said board.... The said bid security...shall be forfeited if the successful bidder fails to enter into the lease contract and commence construction within the time limitation set forth in the notice.” § 37-101-43 *Miss Code Ann.* Further, where the public authority chooses to require a bid bond, it may accept cash or its equivalent, including a personal check or irrevocable letter of credit, in lieu of the bid bond. AG Opinion, 1996 WL 508568 at p. 3; AG Opinion, 1995 WL 526173.

