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Jeanie Henry

House Judiciary

5-6-1985

1:30 pm

5-9-85

1:00 pm

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"

POSITION PAPER OF
ALASKA CHAPTER
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

ON

HB 211

NOTICE PROVISIONS TO PRIME CONTRACTORS

BY

SUBCONTRACTOR SUPPLIERS



The Alaska Chapter Associated General Contractors of America represents more than 850 companies including most of general contracting companies engaged in commercial construction. We appreciate the opportunity to present A.G.C.'s view on notice provisions to prime contractors by subcontractors.

The A.G.C. supports the inclusion of a "second tier notice" provision in the Little Miller Act.

Under existing law, a person with no direct contractual relationship with a general contractor, but who supplies material to a subcontractor, may make a claim against the payment bond by giving the general contractor written notice within 90 days from the last date on which the person furnished material. A general contractor has no way of knowing who may have supplied materials to a subcontractor. Accordingly, a general contractor has no easy way to assure that a subcontractor has paid all his suppliers. Certification by a subcontractor that all materialmen have been paid is no assurance if the certifying subcontractor is or becomes insolvent. The only "iron clad" safeguard for a general contractor is to delay payment to all subcontractors until 90 days after they have supplied materials. This solution would do little to harmonize relations and increase cooperation between general contractors and subcontractors.

Under existing law, a general contractor cannot determine, in advance of a claim being filed, which persons may be eligible to file a claim. Timely notice to the general contractor of the supplier's status and existence will allow a general contractor to assure that a subcontractor has paid all suppliers.

In summary, the A.G.C. believes that the notice provisions of this bill will ensure that commerce is conducted in a more enlightened and commercially reasonable manner.

The A.G.C. urges this Committee pass out of Committee the bill.

Chapter 25. Contractors' Bonds.

Section

10. Bonds of contractors for public buildings or works

20. Rights of persons furnishing labor or material

Section

25. Optional municipal exemption

NOTES TO DECISIONS

This chapter is modeled after the federal Miller Act. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op.

No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Collateral references. — 17 Am. Jur. 2d, Contractors' Bonds, §§ 43-138; 64 Am. Jur. 2d, Public Works and Contracts, §§ 105-136.

72 C.J.S. Supplement, Public Contracts,

§§ 41-61, 81A C.J.S., States, §§ 172-193.

Right of contractor with federal, state, or local public body to letter's immunity from tort liability. 9 ALR3d 382.

Sec. 36.25.010. Bonds of contractors for public buildings or works. (a) Except as provided in AS 44.33.300, before a contract exceeding \$100,000 for the construction, alteration, or repair of a public building or public work of the state or a political subdivision of the state is awarded to a general or specialty contractor, the contractor shall furnish to the state or a political subdivision of the state the following bonds, which become binding upon the award of the contract to that contractor:

(1) a performance bond with a corporate surety qualified to do business in the state, or at least two individual sureties who shall each justify in a sum equal to the amount of the bond; the amount of the performance bond shall be equivalent to the amount of the payment bond;

(2) a payment bond with a corporate surety qualified to do business in the state, or at least two individual sureties who shall each justify in a sum equal to the amount of the bond for the protection of all persons who supply labor and material in the prosecution of the work provided for in the contract; when the total amount payable by the terms of the contract is not more than \$1,000,000, the payment bond shall be in a sum of one-half the total amount payable by the terms of the contract; when the total amount payable by the terms of the contract is more than \$1,000,000 and not more than \$5,000,000, the payment bond shall be in a sum of 40 percent of the total amount payable by the terms of the contract; when the total amount payable by the terms of the contract is more than \$5,000,000, the payment bond shall be in the sum of \$2,500,000.

(b) This section does not limit the authority of a contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in (a) of this section.

(c) When no payment bond has been furnished, the contracting department shall not approve final payments to the contractor until the contractor files a written certification that all persons who supplied labor or material in the prosecution of the work provided for in the contract have been paid. (§ 1 ch 49 SLA 1953; am § 1 ch 77 SLA 1964; am § 14 ch 142 SLA 1972; am §§ 1, 2 ch 180 SLA 1976; am § 8 ch 277 SLA 1976; am 34 ch 108 SLA 1982)

Revisor's notes. — Subsection (a)(2) of this section has the figure of \$2,500,000 as in the enrolled bill. The 1953 session laws incorrectly carried the figure as \$2,800,000.

Effect of amendments. — The 1982 amendment substituted "\$100,000" for "\$50,000" near the beginning of the introductory paragraph of subsection (a).

NOTES TO DECISIONS

Purpose. — The purpose of this section and AS 36.25.020 is to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. In exchange for providing such protection, the state is assured that material and labor will be readily furnished for its projects. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Like its federal counterpart, Alaska's statute is designed to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Weight given to federal case law interpreting federal act. — In resolving disputes brought under this section, the supreme court will give more weight to principles derived from federal case law interpreting the Miller Act than to general common-law principles governing debtor-creditor relations. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Rights of persons furnishing labor or material. — See notes under AS 36.25.020.

Bonds required. — A payment bond as well as a performance bond is required for public contracts by this section. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Presumption. — Since under this sec-

tion the awarding of the contract, and necessarily the making of payments under the contract, is conditioned upon the furnishing of a payment and performance bond, it may be concluded from the fact that payments were made under the contract that the required bond had been furnished the state. Such a conclusion is based upon the presumption that official duty has been regularly performed and that state officials would not have awarded the contract and made progress payments had the required bond not been filed. United Bonding Ins. Co. v. Castle, Sup. Ct. Op. No. 497 (File No. 876), 444 P.2d 454 (1968).

State duty to investigate validity of bonds. — The State of Alaska has the duty to investigate the validity of payment and performance bonds on state construction projects. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

For cases arising after 1972, there is no doubt about who has the duty to check the validity of public construction contract bonds since in 1972 AS 36.05.035 was enacted placing the burden of verifying such bonds on the state or its political subdivision. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Although absent from this section, the burden on the contracting officer to determine the vitality of the surety can be read into the language "the contractor shall furnish to the state . . . a performance bond with a corporate surety qualified to do

business in the state..." Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Construction contractors have a continuing obligation to provide the required bonds even if the state does not discover defects in the bonds until after their acceptance. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Burden of proof as to agency. — The purpose of this section and AS 36.25.020 is best served by placing the burden of proof as to agency on the insurance company, particularly in light of the insurance company's far superior access to the facts surrounding the agency. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Subrogation right of surety. — A surety who completes a contract or satisfies the claims of laborers and materialmen has established a subrogation right to all funds, progress payments, or retained percentages which are in the hands of the contractee. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

Subrogation right of surety. — A surety who completes a contract or who satisfies the claims of laborers and materialmen has a superior equitable interest over one who made a loan to the contractor of monies which did not have to be applied to the construction contract. The surety, in such cases, has established a subrogation right to those funds retained by the obligee containing retained percentages. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

The contractor or principal of the surety agreement cannot give an assignee a greater right in a retained percentage than that given the surety so long as the surety performs under the agreement. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

Where the surety had assumed and completed the principal's contract and claimed monies due and payable to the contractor in the way of a progress payment at the time of default, and the assignee of the contractor had also made claim to the progress payment, the surety's claim to the progress payments was granted. Reliance Ins. Co. v. Alaska State Hous. Auth., 323 F. Supp. 1370 (D. Alas. 1971).

Debtor's power to designate account to which his payment should be applied. — A debtor, who is under a duty to a third person to apply funds he tenders to his creditor to a particular account, has

the power to so designate that account as the one to which payment should be applied. The creditor is under a correlative duty to apply the money as directed by his debtor, even though he does not consent to the debtor's wishes. This principle does not depend upon misconduct or fraud. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2815), 575 P.2d 1213 (1978).

Creditor's duty to apply payment to certain account. — Where there is sufficient evidence that a creditor knew or at least had reason to know that money received from a debtor came from a third party for application to a particular job account, the creditor was under a duty to apply the payment to such account. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Cases interpreting the Miller Act hold that when a creditor knows, or has reason to know, that the money paid to him is received from a particular bonded project, it is the creditor's duty to apply the payment received against the account for that project. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

State did not waive right to require replacement bonds. — State did not waive its right to require and was not estopped from requiring the contractor on a 1962 construction project to obtain new bonds as replacements for bonds found defective after they had been accepted by the state and after the contractor had commenced work. Arctic Contractors v. State, Sup. Ct. Op. No. 1420 (File Nos. 2595, 2657), 564 P.2d 30 (1977).

Collateral references. — What is "accident" within provision of bond or contract indemnifying against damage or injury to person or property by accident in performance of building or construction contract. 12 ALR 1409.

Validity of condition in bond of contractor for public work which is beyond requirements of statute or ordinance with respect to claims of third persons. 18 ALR 1227.

Recovery of premiums paid on bond of contractor for public improvement not legally authorized. 42 ALR 307.

Rental of equipment at within contractor's bond. 44 ALR 381.

Contractor's bond as covering clothing, food, or lodging for laborers. 46 ALR 511; 65 ALR 260.

Effect of affirmative provision in public contractor's bond excluding statutory conditions. 47 ALR 502; 89 ALR 457.

Contractor's bond, and claims for injuries to person or property. 67 ALR 990.

Claims for repairs or replacements of machinery, tools, and equipment as within contractor's bond. 67 ALR 1232.

Availability in action by third person for damages against public contractor, of provisions in contract as to care to be exercised or precautions to be taken for protection of third persons. 69 ALR 522.

Effect of payment to subcontractors or materialmen by owner or contractor, or by sureties on contractor's bond, within four months of principal contractor's bankruptcy, as a voidable preference. 70 ALR 983.

Construction of paving contract or contractor's bond in respect of the contractor's obligation as to repairs. 72 ALR 644.

Right as between surety on contractor's bond and assignee of money to become due on contract. 76 ALR 917.

Effect of recitals or provisions of bond to secure performance of contract as an interpretation of the terms of the contract. 76 ALR 941.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety. 77 ALR 229.

Claim for medical or hospital services to employees as within coverage of contractor's bond. 81 ALR 1051.

Statutory conditions prescribed for public contractor's bond as part of bond which does not in terms include them. 89 ALR 446.

Necessity of giving obligee notice of claim or action or making it a party to action by laborer, materialman or subcontractor upon bond of contractor for public work. 96 ALR 1185.

What constitutes "public work" within statute relating to contractor's bond. 101 ALR 565.

Workmen's compensation insurance premiums as within coverage of contractor's bond. 102 ALR 135; 164 ALR 1468.

Loss of profit of subcontractor, laborer, or materialman as within coverage of contractor's bond. 119 ALR 1281.

Money loaned or advanced to contractor as within coverage of bond of building or construction contractor. 127 ALR 974; 164 ALR 782.

Contractor's bond as covering insurance premiums other than workmen's compensation insurance. 129 ALR 1087.

Who is contractor or subcontractor, as distinguished from materialman, for purposes of mechanic's lien, contractor's bond, or other provision or securing compensation under construction contract. 141 ALR 321.

Bond of contractor for eradication or control of termites or other pests or vermin. 43 ALR2d 1237.

Liability on bid bond for public works. 70 ALR2d 1370.

Responsibility of construction contractor or his bond to contractee for defects or insufficiency of work attributable to plans and specifications furnished by latter, his engineer or architect. 6 ALR3d 1394.

Construction of attorneys' fees provision in contractor's bond. 8 ALR3d 1438.

Building contractor's liability, upon bond or other agreement to indemnify owner, for injury to death of third persons resulting from owner's negligence. 27 ALR3d 663.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used. 61 ALR3d 792.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property. 68 ALR3d 7.

Validity and construction of "no damage" clause with respect to delay in building or construction contract. 74 ALR3d 187.

Construction contract provision excusing delay caused by "severe weather". 85 ALR3d 1085.

Sec. 36.25.020. Rights of persons furnishing labor or material.
(a. A person who furnishes labor or material in the prosecution of the work provided for in the contract for which a payment bond is furnished under AS 36.25.010 and who is not paid in full before the expiration of 90 days after the last day on which the labor is performed or material is furnished for which the claim is made, may sue on the payment bond for the amount unpaid at the time of the suit.

(b) However, a person having direct contractual relationships with a subcontractor but no contractual relationship express or implied with the contractor furnishing the payment bond has a right of action on the payment bond upon giving written notice to the contractor within 90 days from the last date on which the person performed labor or furnished material for which the claim is made. The notice must state with substantial accuracy the amount claimed and the name of the person to whom the material was furnished or for whom the labor was performed. The notice shall be served by mailing it by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where the contractor maintains an office or conducts business, or the contractor's residence, or in any manner in which a peace officer is authorized to serve summons.

(c) A suit brought under this section shall be brought in the name of the state or the political subdivision of the state for the use of the person suing in the superior court. No suit may be started after the expiration of one year after the date of final settlement of the contract. The state or political subdivision of the state is not liable for costs or expenses of the suit. (§ 2 ch 49 SLA 1953; am § 15 ch 142 SLA 1972)

Editor's notes. — This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

NOTES TO DECISIONS

Purpose. — The purpose of this section and AS 36.25.010 is to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. In exchange for providing such protection, the state is assured that material and labor will be readily furnished for its projects. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Like its federal counterpart, Alaska's statute is designed to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

This section is substantially similar to 40 U.S.C. 270(a) et seq., the "Miller Act." Hyundai Constr. Co. v. Kalmbach, Inc., Sup. Ct. Op. No. 845 (File No. 1604), 502 P.2d 856 (1972).

"Final settlement" means that the contract has been completed and that there has been a specific administrative act authorizing payment. Safeco Ins. Co. of Am. v. Honeywell, Inc., Sup. Ct. Op. No.

2460 (File Nos. 5112, 5127), 639 P.2d 996 (1982).

It is appropriate to look at federal case law interpreting the previously similar Miller Act, (40 U.S.C. § 270(a) et seq.) ch. 642, § 2, 49 Stat. 793 when interpreting the phrase "final settlement" as used in subsection (c) of this section. Safeco Ins. Co. of Am. v. Honeywell, Inc., Sup. Ct. Op. No. 2460 (File Nos. 5112, 5127), 639 P.2d 996 (1982).

Bonds of contractors for public buildings or works. — See notes under AS 36.25.010.

Reliance on valid payment bond. — Persons who furnish labor and materials for the state's projects do so in reliance on the existence of a valid payment bond. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Evidence raising presumption that bond was executed. — See State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

The award of a state public works contract and the making of payments

under that contract raise a presumption that the required bond has been furnished; thus, a laborer or materialman should not have to inquire into the validity of the bond before furnishing labor or materials. Such a burden of inquiry would surely result in a reluctance to readily furnish materials or labor. To avoid this reluctance and the possible delays caused thereby, the state has provided special protections to laborers and materialmen in this section and AS 36.25.010. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Burden of proof as to agency. — The purpose of this section and AS 36.25.010 is best served by placing the burden of proof as to agency on the insurance company, particularly in light of the insurance company's far superior access to the facts surrounding the agency. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

A person furnishing labor or materials on a state public works project does not deal directly with the surety company or its purported agent. In many cases he does not even deal directly with the prime contractor who obtained the bond. He is in a relatively poor position to inquire into whether an agent with whom the prime contractor dealt had authority to bind the insurance company appearing as surety on the bond. The insurance company has far better access to the facts surrounding the nature of the purported agency relationship than does a laborer or materialman on a state public works project. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

For rule as to burden of proof on the agency where a laborer or materialman brings suit on a payment bond pursuant to this section, see State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Debtor's power to designate account to which his payment should be applied. — A debtor, who is under a duty to a third person to apply funds he tenders to his creditor to a particular account, has the power to so designate that account as the one to which payment should be applied. The creditor is under a correlative duty to apply the money as directed by his debtor, even though he does not consent to the debtor's wishes. This principle does not depend upon misconduct or fraud. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Creditor's duty to apply payment to certain account. — Where there is sufficient evidence that a creditor knew or at least had reason to know that money received from a debtor came from a third party for application to a particular job account, the creditor was under a duty to apply the payment to such account. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Cases interpreting the Miller Act hold that when a creditor knows, or has reason to know, that the money paid to him is received from a particular bonded project, it is the creditor's duty to apply the payment received against the account for that project. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

Collateral references. — Freight charges on material as within mechanic's lien statute giving lien for labor or material, or within contractor's bond securing such claims. 30 ALR 466.

Nature of remedy to enforce obligation under bond of public contractor for labor or material. 43 ALR 561.

Failure of public authorities to take contractor's bond as required by law, as rendering them liable to laborers or materialmen. 64 ALR 678.

Right to benefit of contractor's bond or mechanic's lien statute for labor or material furnished to contractor or subcontractor, as affected by acceptance from him of written obligation. 66 ALR 342.

Labor and materials furnished to subcontractor as within the coverage of principal contractor's bond for public improvements. 70 ALR 308; 92 ALR2d 1250.

Right of person furnishing material or labor to maintain action on contractor's bond to owner of public body, or on owner's bond to mortgagee. 77 ALR 21; 118 ALR 57.

Right or duty of obligee of contractor's bond to enforce condition thereof for benefit of laborers and materialmen. 77 ALR 217.

Claim under subcontract by which subcontractor agrees to furnish a man and truck, or other specified instrumentality, at an unapportioned compensation, as within contractor's bond conditioned for payment of claims for labor. 79 ALR 1253.

Material or labor employed in construction of concrete forms as basis of mechanics' lien or claim under contractor's bond. 84 ALR 460.



ONSTRUCTION, INC.

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Recd 3/4/85

February 26, 1985

Representative Mike Navarre, Chairman
House Labor & Commerce Committee
Juneau, Alaska 99801

Dear Sir:

The Little Miller Act provides for employees, all tiers of subcontractors, suppliers and materialmen to seek relief by filing a lien against the general contractor's payment bond on public works projects, if such notice is filed within 90 days of the last acts or charges. As the law now stands these people are allowed to seek this relief regardless of the circumstances, including negligence on their part, disputes, or any other reason if they have not been paid.

In many instances the projects are completed and paid in full by the general contractor before this ninety day period expires.

A case that happened to our company which is still in litigation, documentation can and will be furnished if you request, happened like this. A subcontractor on one of our projects leased a piece of equipment from an equipment dealer. The equipment was leased for a minimum guaranteed ninety days with option to purchase within the ninety days. A major portion of the lease payments to apply to the purchase if the purchase option was exercised. Our company was not privy to this agreement.

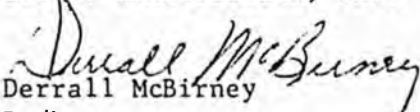
Seven and one half months after the equipment arrived jobsite we received notice from the equipment dealer of non payment and of his intent to file lien against our bond. At that time the subcontractor had received all monies due him on this contract. We feel that if the notifications of intent was required to be filed sooner, say within 15 days of the first act or charge that problems such as this would not happen or if they did it would be negligence on the part of the general contractor instead of the equipment dealer, who, in this case will probably win this litigation.

Your help in correcting this deficiency in the Little Miller Act would be greatly appreciated.

If there are any questions please call.

Very truly yours,

C.J.M. Construction, Inc.


Derrall McBirney
DM/bg

INTRODUCTION OF BILLS (House)(cont'd)

HB 210 (cont'd)

payment shall, subject to appropriation, be paid the the surviving spouse by the right of survivorship unless a different beneficiary is designated. If no spouse survives and no beneficiary is named the lump sum shall be paid to the decedent's estate. The payment must include all permanent fund dividend contributions made by the individual, plus interest, but shall not include any credits to the account made following appropriations by the legislature to the annuity investment fund or interest on the annuity credits (Senate version provides for equitable distribution of the decedent's lump sum payment among the accounts of all individuals of the same age).

Introduced February 18 and referred to State Affairs, Judiciary, Finance.

Contractors' Payment Bonds
(materials, equipment & supplies)

HOUSE BILL NO. 211, by Reps. Frank, Clocksin, M. W. Miller, Navarre and Rieger. Would require a contractor who is bidding on a state job that exceeds \$100,000 to furnish a payment bond for the protection of all persons who supply labor, materials, supplies or equipment (currently the bond must cover people who supply labor and material). The bond becomes binding upon the award of the contract. The person furnishing labor, materials, supplies, or equipment who is not paid in full 90 days after the work is completed or materials, supplies or equipment is furnished, may sue on the payment bond for the amount unpaid at the time of the suit (currently covers only labor and material).

Section outlining the rights of a contractor furnishing labor or material is rewritten (AS 36.25.020(b)) to more specifically spell out the rights of a person who contracts with a subcontractor, but who has no contractual relationship with the contractor. That person has a right of action on the payment bond for materials, supplies or equipment furnished if proper notice is given. Notice must be given not later than 30 days after the first date on which the materials, supplies or equipment were provided and must state that the person has supplied or is supplying materials, supplies or equipment for which the person may make a claim. The notice must name the subcontractor and building or project for which materials, etc., have been supplied, give a general description and must state that the bond may be held for payment if the person supplying materials, supplies or equipment is not paid.

The person contracting with the subcontractor also must give notice not later than 90 days after the last day materials, supplies or equipment for which the claim is made, stating the name of the subcontractor, the building or project and a description of materials, and must state with substantial accuracy the amount claimed.

Does not provide an effective date (takes effect 90 days after Governor signs bill).

Introduced February 18 and referred to Labor & Commerce, Judiciary, Finance.

Representative Steve Frank
February 15, 1985

Bill Summary:

"an act relating to contractor's bonds" HB 211

Under existing law on public projects, a person having no direct contractual relationship with a general contractor, but who supplies labor or material to a sub-contractor, may make a claim by giving the general contractor written notice within 90 days from the last date on which the person performed labor or furnished material. A general contractor has no way of knowing who may have supplied materials to a subcontractor. Accordingly, a general contractor has no easy way to assure that a subcontractor has paid all his suppliers. Certification by a subcontractor that all labor and materialmen have been paid is no assurance if the certifying subcontractor is or becomes insolvent. The only "iron clad" safeguard for a general contractor is to delay payment to all subcontractors until 90 days after they have supplied labor or materials. This solution does little to harmonize relations and increase cooperation between general contractors and subcontractors.

The change proposed in the bill will not preclude claims of a subcontractor's supplier against a general contractor's payment bond. However, timely notice to the general contractor of the supplier's status will become a prerequisite to filing a claim. This notice requirement will allow a general contractor to ensure that a subcontractor has paid all suppliers.

As proposed, a general contractor will know which persons may possibly have claims against his payment bond prior to a claim being made. Under existing law, a general contractor cannot determine, in advance of a claim being filed, which persons, may be eligible to file a claim.

The proposed revisions will still provide protection to the subcontractor's material and equipment suppliers however, to take advantage of that protection, the material and equipment suppliers must take the initiative in assuring that the contractor is aware of their existence.

The bill will put some responsibility on the supplier, because they are the beneficiary of the system. These suppliers are business people with the ability to provide notice as a normal part of a business transaction and it should not be an undue burden on the supplier.

NOTE: This bill would not affect persons supplying labor to a subcontractor. That is to say they would still have 90 days, after the last date they supplied labor, to file claim without a requirement to provide prior notice.

M E M O R A N D U M

TO: All Members, House Labor and Commerce Committee

FROM: Roger Poppe, Committee Staff

DATE: February 28, 1985 Thursday

SUBJECT: Overview, HB 211

On February 29, 1985, the House Labor and Commerce Committee met in Room 102 of the Capitol Building on HB 211, An Act relating to Contractor's payment of bonds.

There was a bill submitted last year, HB 540 by Bettisworth, that dealt with this issue, and received the support of AGC. Initially, this bill said that workers or suppliers must make any claims against the contractor within 10 days from the time that materials were furnished or work commenced. The Department of Labor was opposed to this bill for this and other points, and so the bill was revised, but it died in Senate Judiciary.

The bill before you is in essence the revised version of HB 540 from last year, according to the Department of Labor. As it reads now, it will not impact them and so they have no opposition to it. Apparently, in the private sector, workers and suppliers can put a claim against the property itself; this bill deals with the public sector, where the only real recourse deals with putting a claim in against the contractor's bond.

SECTIONAL ANALYSIS OF HB211: "An Act relating to contractors' payment bonds." By Frank, Clocksin, M.W. Miller, Navarre and Rieger

SECTION 1: This section clarifies the current statutes by adding supplies and equipment.

Any contractor, prior to entering into a contract (exceeding \$100,000) for construction, alteration or repair, on any public project shall furnish a performance bond and a payment bond. The payment bond serves as protection for persons who supply labor, materials, supplies and equipment to the subcontractor for work provided for in the contract.

SECTION 2: This section, as does section 1, clarifies the current statutes by adding supplies and equipment.

In the event a person, who has furnished labor, materials, equipment or supplies, has not been paid in full by the subcontractor before 90 days after the last day labor is performed or materials equipment or supplies are furnished, the person may sue on the contractors payment bond for the amount owed him.

SECTION 3: This section changes the notice provisions in this statute.

The present law only requires a notice 90 days after material equipment or supplies were last provided. This bill requires an additional notice be given to contractors. This addition is a notice of right to claim which must be made within 30 days of the first date materials supplies or equipment were furnished (so that contractors will be aware of potential claims against their payment bond). Notice of actual claim is still required within 90 days of the date materials, supplies or equipment were last provided (as is currently in statutes).

This bill would not affect persons supplying labor. That is to say they would still have 90 days, after the last date they supplied labor, to file a claim without a requirement to provide prior notice.

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: HR 211
 Title: "An Act relating to contractors' payment bonds."
 Sponsor: Frank, Clocksin et al.
 Requestor: House Labor & Commerce
 Date of Request: 2/19/85

FISCAL DETAIL

Agency Affected: Labor
 Program Category Affected: Public Protection
 BRU, Program or Subprogram(s) Affected: Labor Standards & Safety
Wage and Hour Administration

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
<u>OPERATING</u>						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
<u>TOTAL OPERATING</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>

<u>CAPITAL</u>						
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<u>REVENUE</u>						
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FUNDING: (Thousands of Dollars)

<u>GENERAL FUND</u>						
<u>FEDERAL FUNDS</u>						
<u>OTHER</u>						
<u>TOTAL</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>

POSITIONS:

<u>FULL-TIME</u>						
<u>PART-TIME</u>						
<u>TEMPORARY</u>						

ANALYSIS: Attach a separate page if necessary

Prepared By: ^{RB} Robert J. Bacolas, Jr. *R. Bacolas* Phone: 465-4870
 Division: Labor Standards & Safety Date: 2/21/85
 Approved by Commissioner: *Jim Robinson* Date: 2/21/85
 Agency: Labor

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Bill No. House Bill No. 211
Title "An Act relating to contractors' payment bonds."


Date February 26, 1985
Contact: Eileen Plate
465-2700
Bob Bacolas
465-4870

House Bill No. 211 makes editorial changes to provisions in Title 36 with respect to action against a contractor's payment bond by persons performing labor for subcontractors on public construction projects.

The bill also contains a number of more significant changes to Title 36 with respect to action against a contractor's payment bond by persons who furnish materials, supplies, or equipment to subcontractors on public construction projects. Inasmuch as persons who furnish materials, supplies or equipment on public construction projects fall outside of the department's authority or responsibility as far as collection of monies due them, we have no comments on these particular provisions.

The Department's position on House Bill 211 is neutral. It will not have a fiscal impact on the Department.

APPROVED:


Jim Robison, Commissioner
Department of Labor

Sec. 44.33.300. Waiver of certain provisions. When the governor has by proclamation declared an area impacted by an economic disaster, the following provisions regarding public contracts may be waived to the extent specified in the proclamation:

(1) the requirement of a contractor's bond as prescribed in AS 36.25.010 may be waived if the contract amount does not exceed \$100,000;

(2) the public bid requirements as contained in AS 19.10.170, 19.10.190, 19.30.191(b), and AS 35.15.010 — 35.15.030 may be waived if the contract is to be performed by a contractor whose principal office is in the designated area and the contract amount does not exceed \$50,000;

(3) the general policy to require all construction to be under bid contract as contained in AS 35.15.010 may be waived if the contract is to be performed by the state, another governmental entity, or a nonprofit entity. (§ 1 ch 277 SLA 1976)

Sec. 44.33.305. Regulations. The department, after consultation with the Department of Labor, may adopt regulations to implement AS 44.33.285 — 44.33.310. (§ 1 ch 277 SLA 1976)

Sec. 44.33.310. Definitions. In AS 44.33.285 — 44.33.310,

(1) "base period" means any 10 years after 1950, not necessarily continuous, and if the economic disaster is caused by a fisheries failure the period shall consist of years during which a fishery produced at economically representative levels as determined by the Department of Fish and Game;

(2) "department" means the Department of Commerce and Economic Development;

(3) "economic disaster" means that the annual income to workers in the designated area dropped below the average annual income for the base period for workers in the designated area and the drop in income is of such magnitude that the average family income of all residents of the designated area as determined by the department is below the Federal Social Security Administration Poverty Guideline, adjusted by the department to reflect subsistence economic patterns and appropriate cost-of-living differentials; the availability of alternate employment shall be considered in determining whether an economic disaster has occurred under this paragraph. (§ 1 ch 277 SLA 1976)

Editor's notes. — The "Federal Social Security Administration Poverty Guideline" referred to in (3) of this section is probably an obsolete reference. The federal Department of Health and Human

Services does issue an annual revision of poverty income guidelines, however. See, for instance, Federal Register, Vol. 48, No. 34, page 7010 (2/17/83).

Secs. 44.33.320 — 44.33.380. Residential Care Facility Revolving Loan Fund. [Repealed, § 72 ch 113 SLA 1982.]