

PAYMENT BONDS IN MICHIGAN

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PAYMENT BONDS IN MICHIGAN

INTRODUCTION:

- What is a bond?
- There are different types of bonds.
- Only going to deal with Payment Bond today.
- Only type of bond most of you will run into.
- Only one generally used to get paid as a subcontractor.

- A Payment Bond is a guarantee by the surety to the obligee (normally, the owner) for the benefit of claimants that the principal (normally the contractor) will pay the claims of those persons who furnish labor and materials to the construction project.

- So essentially, a Payment Bond is a document that says if a contractor does not pay people with legitimate claims for labor and materials furnished to the project, the surety (insurance company) will pay those claimants so there is no claim against the owner's property.

- Bonds are almost always seen on public projects. The reason for this is that public property is not capable of being encumbered by a lien. Therefore, those who provide improvements to public property who are not paid, must seek a remedy under Michigan's Bond Statutes.

- There are three (3) types of public projects in Michigan:
 1. General public property (Michigan's Public Works Bond Statute, MCL 129.201)
 2. Michigan highway projects (Michigan Public Works Bond Statute for Highway Projects, MCL 570.101 et seq.)
 3. Federal projects (Federal Public Works Bond Statute/Miller Act, 40 USC 270a, et seq.)

I. GENERAL PUBLIC WORKS PROJECTS:

When is it required?

1. Before a contract which exceeds \$50,000.00 for the construction, alteration or repair of any public building of a governmental unit is awarded, a principal contractor (General Contractor) must secure a Payment Bond at his own cost and expense.

2. "Governmental Units" includes State, County, City, Village, Township,
School
District, public educational institution, other political subdivision, public

authority or public agency, public university.

What amount?

1. The Payment Bond is fixed by the governmental unit and may not be less than 25% of the contract amount.

Who is a proper claimant?

1. Claimants under the bonds include: persons who furnish labor and/or materials used or reasonably required for use in performance of the contract. Labor and material includes water, gas, power, light, heat, oil, telephone service or equipment rented which is directly applicable to the contract.

How Do I Perfect My Right To Make A Claim On The Bond?

- If a claimant has a direct contractual relationship with the principal contractor named in the bond, then it does not have to provide notice.
- If a claimant does not have a direct contractual relationship with the principal contractor, but instead is a subcontractor to a subcontractor, it must serve by certified mail, within **30 days** after furnishing the first of the material and/or performing the first of the labor, a written notice on the principal contractor which informs the principal contractor of:
 1. The nature of the material being furnished or the labor being performed
 2. Identify the party who you contracted with
 3. The project where the labor or materials were provided to
- Written notice must be provided by certified mail to the principal contractor and the governmental unit involved within **90 days** from the date in which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made stating with substantial accuracy:
 1. The amount claimed
 2. The name of the party to whom you supplied labor or materials
- Always send notices certified mail, postage prepaid to be safe. Send to all parties involved to be safe (including surety).
- Once you have satisfied each of those notices (**30 day notice** and **90 day notice**) you are a proper claimant under the bond.

- If you do not comply with both notices, you are out of luck.

How Do You Then Make A Claim On The Bond If You Have Not Been Paid?

1. This is not required. You can just file lawsuit.
2. Send a letter to the surety named in the bond.
3. It is likely the surety will respond and request information about the claim in order to investigate the claim and determine whether it should pay the claim directly, without a lawsuit or other legal proceedings. It is also likely the Surety will ask for similar information from the principal contractor, in effect asking the principal contractor if it knows of any reason why the claim should not be paid. If there is a legitimate dispute, it will be difficult for the surety to pay the claim over the objection of the principal contractor.
4. Statute of Limitations not tolled during this time.

How Do You Obtain A Copy Of The Bond To Know Who The Surety Is And Where To Send This Letter?

- General Public Works:

Pursuant to MCL §129.205 the bonds for a public project must be filed in the office of the governmental unit awarding the contract. The agent in charge of the office must furnish anyone making an application for them and submitting an affidavit indicating he/she has supplied labor or materials and has not received payment with a certified copy of the bond and the contract for which it was given.

129, 208

Statute Of Limitations For Lawsuit?

1. A lawsuit under the bond must be filed within **1 year** from the date final payment was made to the principal contractor, but no sooner than **90 days** after the claimant's work is completed ("final payment" means the last contractual payment made to the principal contractor).

How Do You Know When That Final Payment Has Been Made?

1. Often times you don't know when the final payment has been made to the principal contractor. In those cases, you have to use your head and common sense and play it safe.
2. If the project has been over for quite a while and you know the principal contractor has not done any work on the project in quite some time, you

better get to the courthouse to file your lawsuit because if that one year period expires before the day you file your lawsuit, you are out of luck.

II. STATE HIGHWAY PROJECTS:

When required?

- Construction and maintenance contracts with the State Highway Commission require issuance of a Payment Bond only.
- All State highway contracts require a Payment Bond regardless of amount.
- The general contractor is responsible for having the bond issued.

Claimants?

- Subcontractors, materialmen and laborers are claimants able to sue under the bond.

How Do I Perfect My Right To Make A Claim On The Bond?

- Claimant must, within **60 days** from the last day labor or material was provided by claimant, serve a notice on the State Highway Department, in duplicate, which identifies the work provided, the party for whom the work was provided (the general contractor) and the amount due and owing.

How Do You Then Make A Claim On The Bond If You Have Not Been Paid?

- Same as with Public Works Projects.

How Do You Obtain A Copy Of The Bond To Know Who The Surety Is And Where To Send This Letter?

- MCL §570.103 provides that any bond given pursuant to the statute shall be deposited with and held by the board of officers or agents of the state and shall be for the use of any party interested therein. Otherwise, the statute contains no specific provision requiring the governmental unit to provide copies of the bonds. Making the same type of demand as allowed under MCL §129.201 et. seq. may accomplish a claimant's purpose. A demand upon the Department, the commissioner of transportation, or the person in charge of the particular project on behalf of MDOT is probably your best bet.

Statute Of Limitations

- A lawsuit must be commenced within **1 year** from completion and acceptance of the

project.

- In the lawsuit, a subcontractor must prove he has paid all parties working for him on the project for labor, material and supplies.

III. MILLER ACT (FEDERAL PROJECTS)

When required?

- The Miller Act requires that before a federal contract which is in excess of \$100,000.00 for the construction, alteration or repair of a public building or public work is awarded to any person, that person must furnish a Payment Bond.

Claimants?

- Subcontractors and suppliers to principal contractors and first tier contractors. Does not include suppliers to materialmen or suppliers. Does not include labor and materials to second tier subcontractors.
- In order to sue under a Miller Act bond, the claimant must deal directly with the principal contractor or have a direct contractual relationship with a subcontractor who is protected.
- If you are not at least a sub of a sub, you are out of luck.

Perfecting Rights Under Statute?

- Those who deal directly with the principal contractor do not have to provide notice before suing.
- Those who do not deal directly with the principal contractor must, within **90 days** from performing the last of the labor or material, send by certified mail to the principal contractor a written notice stating the amount claimed and the party to whom the material was furnished.

How Do You Then Make A Claim On The Bond If You Have Not Been Paid?

- Same as with Public Works Projects and State Highway Projects.

How Do You Obtain A Copy Of The Bond To Know Who The Surety Is And Where To Send This Letter?

- Pursuant to 40 USC §270c the contracting head of the federal department or agency contracting for the improvement is required to provide a potential claimant against the bond with a certified copy of the bond and the contract for which it was given. In order to obtain certified copies of the bond and contract, the potential bond claimant must submit an affidavit to the department secretary or agency head contracting for the improvement. The affidavit must state that the claimant has supplied labor or materials

for work in connection with the contract and payment has not been made thereon.

Statute Of Limitations?

- No suit may be brought under a Miller Act bond until **90 days** after the last labor or material was furnished by the claimant.
- Claimant must sue within **one year** from the date the last of the labor or material was provided.
- Several cases have held that a subcontractors right to sue on a Miller Act bond may be waived by a clear and express provision in a contract between the subcontractor and principal contractor. There is conflicting case law on this but your best bet is to try to make sure any such language is excluded from your contract.

REQUIREMENTS

PROJECTS

State and Local

State Highway

Federal

Projects exceeding \$50,000.00 in amount.

All Projects.

Projects exceeding ~~\$25,000.00~~ 100,000.⁰⁰ in amount.

Not Less than 25% of the contract price.

Amount to be determined by the Michigan Department of Transportation.

Varies depending on the Contract terms.

One who has furnished labor and/or material used or reasonably required for use on the project.

Those who have performed labor or furnished materials/supplies used in the project.

Every person who has furnished labor or material in the prosecution of the work.

Two Notices Required
a) Notice to principal contractor within 30 days of first furnishing stating the labor/materials being furnished and identifying the party contracting for the improvement.

Within 60 Days after last furnishing to the project, serve notice to the Mich. Dept of Trans. of the amount claimed and the name of the person for whom the labor or materials were furnished.
(does not apply to those supplying labor only).

Within 90 Days after last labor or materials furnished, send notice to the principal contractor of the amount claimed and the person for whom materials or labor were furnished.

b) Notice to the principal contractor & and the governmental unit within 90 days of last furnishing labor or materials stating the amount claimed and the person for whom the materials or labor were furnished.

Same as above.

N/A

N/A

Same as above.

N/A

Within one year from the date final payment was made to principal contractor.

Within one year after completion and acceptance of project.

Within one year after the day on which the last labor or material was furnished to the project by the claimant.

which construction projects is a payment bond required?

What is the required amount of the bond?

Who may make a claim on payment bond?

Written Notice Requirements for those who do not have direct contract with the principal contractor.

Written Notice Requirements for those in direct contact with principal contractor.

Statute of Limitations for bringing suit.

FIRST NOTICE ON PUBLIC CONSTRUCTION PROJECTS

[Date]

[Principal Contractor]

[Address]

Re: [Project and Location]

Dear Sir/Madam:

Notice is hereby given pursuant to MCLA 129.207 that [name of claimant] is providing [indicate description of labor or material being provided] to [name of subcontractor in connection with the above project] at [Location of project].

Furnishing of this notice is a standard procedure followed by our company on public jobs and is not in any way intended to be a reflection on credit standing or ability to pay.

Sincerely,

[name of claimant]

By:

Its:

**CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED**

cc: [Governmental Unit]
[Surety, if known]
[Subcontractor]

**LAST NOTICE ON PUBLIC
CONSTRUCTION PROJECTS**

[Date]

[Principal Contractor] and [Governmental Unit]
[Address]

Re: [Project and Location]

Dear Sir/Madam:

Notice is hereby given pursuant to MCLA 129.207 that [name of claimant] last provided labor and/or material to [name of subcontractor] on [last day of work]. There is now due and owing to [name of claimant], the principal sum of [amount owing], plus interest thereon. In the event payment is not made within [time period of payment] days of the date of this letter, [name of claimant] will pursue all of its available legal remedies pursuant to MCLA 129.201 et. seq. against [name of subcontractor] and its surety.

Furnishing of this notice is a standard procedure followed by our company on public jobs and is not in any way intended to be a reflection on credit standing or ability to pay.

Sincerely,

[Name of claimant]

By:
Its:

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

cc: [Subcontractor]
[Surety, if known]

REQUEST FOR BOND/CONTRACT

[Date]

[Governmental Unit]
[Address]

Re: [Project and Location]

Dear Sir/Madam:

This shall confirm that [name of claimant] has supplied labor and/or material to [name of subcontractor] in connection with the above referenced project. In accordance with MCLA 129.208, please provide us with copies of the contract with the principal contractor and the bond provided pursuant to MCLA 129.201 et. seq., for the above referenced project.

Furnishing of this notice is a standard procedure followed by our company on public jobs and is not in any way intended to be a reflection on credit standing or ability to pay.

Sincerely,

[Name of claimant]

By:

Its:

STATE OF)

)SS.

COUNTY OF)

On this ____ day of _____, 199__, before me, a Notary Public, in and for said County, personally appeared _____, to me known to be the same person described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same as his voluntary act and deed.

Notary Public

County, Michigan

My Commission Expires: _____

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

cc: [Principal Contractor]
[Subcontractor]

NOTICE ON MDOT PROJECTS

[Date]

[Governmental Unit]
[Address]

Re: [Project]

Dear Sir/Madam:

Notice is hereby given pursuant to MCLA 570.102 that [name of claimant] is a subcontractor on the above project providing [indicate description of labor or material being provided] to [name of subcontractor] and that the labor and material provided by [name of claimant] is a portion of the contract between [name of principal contractor] and [governmental unit]. [Name of claimant] relies on the security of the bond provided by the principal contractor pursuant to MCLA 570.102. Name of claimant] is now owed the principal sum of [amount owing], plus interest thereon. Unless payment is made within [number of days for payment] days of the date of this letter, [name of claimant] will have no alternative but to pursue all of its available legal remedies.

Sincerely,

By: [Name of claimant]

Its:

**CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED**

cc: [Principal Contractor]
[Surety, if known]
[Subcontractor]

NOTICE FOR THE FEDERAL GOVERNMENT PROJECTS

[Principal Contractor]
[Address]

Re: [Project]

Dear Sir/Madam:

Please be advised that [name of claimant] is furnishing [description of labor and/or material] to [name of subcontractor] in connection with the above referenced project. [Name of claimant] last provided labor and/or material on [last day of project] and is now owed the principal sum of [amount owed], plus interest thereon.

In the event payment is not made within [number of days for payment] days of the date of this letter, [name of claimant] will have no alternative but to pursue all of its available legal remedies against [name of principal contractor] and its surety pursuant to *40 USC §270 et. seq.*

Sincerely,

By: [name of claimant]

Its:

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

cc: [Principal Contractor]
[Surety, if known]
[Subcontractor]

NOTICE OF CLAIM ON PAYMENT BOND

[Governmental Entity]
[Address]

[Date]

**CERTIFIED MAIL/RETURN RECEIPT
REQUESTED**

In Re: [Project]

Gentlemen:

Enclosed please find a copy of the following:

Notice of Claim on Payment Bond;
Proof of Service of Mailing

Very truly yours,

[Your name]
[Your company]

encs.

xc w/encs.: [Principal Contractor]

[Surety]

[Subcontractor]

NOTICE OF CLAIM ON PAYMENT BOND

[Governmental Entity]

[Principal Contractor]

[Surety]

[Subcontractor]

TAKE NOTICE that the undersigned, [Your Company], furnished to [Principal Contractor] certain labor and materials for a certain building situated on or around or in front of the following described property:

[Project]

hereinafter referred to as the "Project".

YOU ARE FURTHER NOTIFIED:

1. That the labor and materials furnished by the undersigned were for the Project.
2. The first day of providing service was _____.
3. That the last day labor and materials were provided was _____.
4. The amount claimed unpaid as of [Date of letter] is \$ _____, plus time price differential.
5. That [Principal Contractor], who is the Principal and General Contractor of the Project, used the aforesaid labor and materials on the aforesaid property.
6. That the undersigned, [Your Company], hereby claims upon the payment bond furnished by

[Principal Contractor] and underwritten through [Surety]. The undersigned requests payment in the amount of \$ _____, plus interest, costs and attorney fees.

[YOUR COMPANY]

[Date]

[Your Name]

