

Chapter 7

Payment Bonds

7-1 PUBLIC WORKS CONTRACTS IN GEORGIA (THE LITTLE MILLER ACT)

7-1:1 Overview

Under Georgia law, every general contractor contracting with the State of Georgia, any county, municipal corporation, or any other public board or body for public work is required to furnish a payment bond for all public construction contracts with an estimated contract amount greater than \$100,000 for the use and protection of all subcontractors and other persons supplying labor, materials, machinery and equipment for the public works construction project.¹ Further, the state and all governmental entities may require a payment bond for public works construction contracts that are estimated at \$100,000 or less.² The payment bond must be in at least the total amount payable under the terms of the initial contract and must be increased if requested by the state or governmental entity as the contract amount increases.³ Public works construction contracts that require a payment bond are not valid for any purpose unless the contractor provides such a payment bond; however, the state or governmental entity, at its discretion, may accept a cashier's check, certified check, or cash in lieu of such a payment bond.⁴

¹ O.C.G.A. §§ 13-10-60 (state), 36-91-90 (local governments).

² O.C.G.A. §§ 13-10-60 (state), 36-91-90 (local governments).

³ O.C.G.A. §§ 13-10-60 (state), 36-91-90 (local governments).

⁴ O.C.G.A. §§ 13-10-60 (state), 36-91-90 (local governments).

Unlike construction lien claims which are strictly construed against the claimant,

... the statutes governing payment bonds on public works projects were enacted for the benefit of materialmen and sub-subcontractors and therefore should be “liberally construed to secure that object. [Cits.]” *Huddleston Concrete Co. v. Safeco Ins. Co. &c.*, 186 Ga. App. 531, 533(1), 368 S.E.2d 117 (1988).⁵

7-1:2 Who Are Proper Claimants Under the Bond?

The payment bond is “intended for the use and protection of all subcontractors and all persons supplying labor, materials, and equipment in the prosecution of the work,” on the project.⁶ Every person entitled to the protection of a payment bond who has not been paid in full for labor or materials furnished in the prosecution of the work referred to in such payment bond before the expiration of a period of 90 days after the day on which the last of the labor or material was furnished has the right to bring an action on such payment bond for the amount unpaid at the time of the commencement of such action.⁷ There is no statutory limit as to how far in the contractual chain the protection of the payment bond will extend. For instance, in *Tom Barrow Co. v. St. Paul Fire & Marine Insurance Co.*,⁸ a supplier to a sub-subcontractor was entitled to protection under the Little Miller Act payment bond. Under the federal Miller Act, such a person would not be entitled to make a payment bond claim.⁹ The protection of the bonds does not extend to those who provide administrative services, as distinguished from labor and materials.¹⁰

⁵ *J. Kinson Cook, Inc. v. Weaver*, 556 S.E.2d 831, 832 (Ga. Ct. App. 2001).

⁶ O.C.G.A. § 36-91-2(10); *see also* O.C.G.A. § 13-10-60.

⁷ O.C.G.A. §§ 13-10-63(a), 36-91-93(a).

⁸ *Tom Barrow Co. v. St. Paul Fire & Marine Ins. Co.*, 421 S.E.2d 85 (Ga. Ct. App. 1992).

⁹ *See also Barton Malow Co. v. Metro Mfg., Inc.*, 446 S.E.2d 785 (Ga. Ct. App. 1994) (court rejected limitations of federal Miller Act; supplier to subcontractor entitled to payment bond claim).

¹⁰ *See Gulf Ins. Co. v. GFA Grp., Inc.*, 554 S.E.2d 746 (Ga. Ct. App. 2001) (payroll service company who paid general contractor’s payroll is not entitled to payment bond protection).

7-1:3 Notice Requirements to Perfect Claim on the Payment Bond

Generally, a party who has a direct contract with a general contractor (such as a subcontractor) is not required to provide any notice before commencing an action to recover amounts for labor and material under the payment bond.¹¹ All other potential claimants, such as sub-subcontractors, suppliers to subcontractors or any other persons not having a direct contractual relationship with the general contractor, must satisfy one of two different preliminary notice requirements, discussed below.¹² All claimants must wait at least 90 days after they last supplied materials or performed services before commencing a lawsuit on the payment bond.¹³

7-1:3.1 90-Day Notice of Nonpayment (Where Notice of Commencement Is Not Filed)

Under O.C.G.A. §§ 13-10-63(a)(1) and 36-91-93(a)(1), where a general contractor has not complied with the notice of commencement rules, a person who does not have a direct contractual relationship with the general contractor must give written notice to the contractor within 90 days from the date on which such person last performed the labor or furnished the material, machinery or equipment for which a claim is made. The written notice must state with substantial accuracy (1) the amount claimed and (2) the name of the party to whom the material was furnished or supplied or for whom the labor was performed.¹⁴ The notice must be sent to the general contractor by registered or certified mail, statutory overnight delivery, or service in any manner in which the sheriffs are authorized by law to serve summons or process.¹⁵ No particular form of notice is required. It is sufficient if the notice reasonably informs the general contractor that the supplier is looking to the

¹¹. O.C.G.A. §§ 13-10-63(a)(1), 36-91-93(a)(1).

¹². *Southway Crane & Rigging, Inc. v. Fed. Ins. Co.*, 669 S.E.2d 482 (Ga. Ct. App. 2008); *J. Kinson Cook, Inc. v. Weaver*, 556 S.E.2d 831 (Ga. Ct. App. 2001).

¹³. O.C.G.A. §§ 13-10-63(a), 36-91-93(a).

¹⁴. O.C.G.A. §§ 13-10-63(a), 36-91-93(a).

¹⁵. O.C.G.A. §§ 13-10-63(a), 36-91-93(a).

contractor for payment.¹⁶ Failure to give written notice will result in forfeiture of rights.¹⁷ A material supplier who faxed invoices to the general contractor, substantially complied with the notice requirement, because the invoices identified the project and the subcontractor who failed to pay the supplier.¹⁸ This 90-Day Notice of Nonpayment requirement applies only if the general contractor did not file a Notice of Commencement, which is discussed in the next section.

7-1:3.2 Notice to Contractor (Where a Notice of Commencement Is Filed)

Under O.C.G.A. §§ 13-10-63(a)(2) and 36-91-93(a)(2), where a general contractor has filed a Notice of Commencement, a person who does not have a direct contractual relationship with a general contractor must give written notice to the contractor within 30 days from the filing of the Notice of Commencement or 30 days following the first delivery of labor, material, machinery or equipment, whichever is later. Georgia law provides that a general contractor on a public works job must prepare a Notice of Commencement and file it with the clerk of the superior court of the county where the work is located within 15 days after the contractor physically commences work on the project.¹⁹ The Notice of Commencement must be posted at the site, and the contractor must supply a copy of the Notice of Commencement to any person who makes a written request therefor.²⁰ Failure to provide a copy of the Notice of Commencement within 10 days after the contractor's receipt of the written request renders O.C.G.A. §§ 13-10-63(a)(1) and 36-91-93(a)(1) inapplicable to the person making the request.²¹

¹⁶. See *Devore & Johnson, Inc. v. Bowen & Watson, Inc.*, 453 S.E.2d 67 (Ga. Ct. App. 1995).

¹⁷. See *Devore & Johnson, Inc. v. Bowen & Watson, Inc.*, 453 S.E.2d 67 (Ga. Ct. App. 1995).

¹⁸. See *Southern Elec. Supply Co. v. Trend Constr., Inc.*, 578 S.E.2d 279 (Ga. Ct. App. 2003).

¹⁹. O.C.G.A. §§ 13-10-62(a), 36-91-92(a).

²⁰. O.C.G.A. §§ 13-10-62(a), 36-91-92(a).

²¹. O.C.G.A. §§ 13-10-62(a), 36-91-92(a); see also *Southway Crane & Rigging, Inc. v. Fed. Ins. Co.*, 669 S.E.2d 482 (Ga. Ct. App. 2008) (potential issue of fact existed whether claimant made a written request for a notice of commencement).

The Notice of Commencement must contain the following: (1) the name, address, and telephone number of the contractor; (2) the name and location of the public work being constructed; (3) the name and address of the state, state agency or authority, or governmental entity that is contracting for the construction; (4) the name and address of the surety for the performance and payment bonds, if any; and (5) the name and address of the holder of any security deposit provided in lieu of the performance or payment bond, if any.²²

If a contractor has filed a Notice of Commencement, then any person who does not have a direct contractual relationship with the contractor must give the contractor a written Notice to Contractor.²³ The Notice to Contractor must be given within 30 days after the filing of the Notice of Commencement or within 30 days following the first delivery of labor, material, machinery or equipment, whichever is later.²⁴ The Notice to Contractor must be sent to the contractor to preserve the person's right to make a payment bond claim at a later time. The Notice to Contractor must set forth the following: (1) the name, address and telephone number of the person providing labor, material, machinery or equipment; (2) the name and address of each person at whose instance the labor, material, machinery or equipment is being furnished; (3) the name and location of the public works construction site; and (4) a description of the labor, material, machinery or equipment being provided and, if known, the contract price or anticipated value of the labor, material, machinery or equipment to be provided or the amount claimed to be due, if any.²⁵

Where the Notice of Commencement is filed no later than 15 days after the contractor physically commences work on the public work, a sub-subcontractor who failed to give notice to contractor was barred from a bond claim.²⁶

²². O.C.G.A. §§ 13-10-62(a), 36-91-92(a).

²³. O.C.G.A. §§ 13-10-63(a)(2), 36-91-93(a)(2).

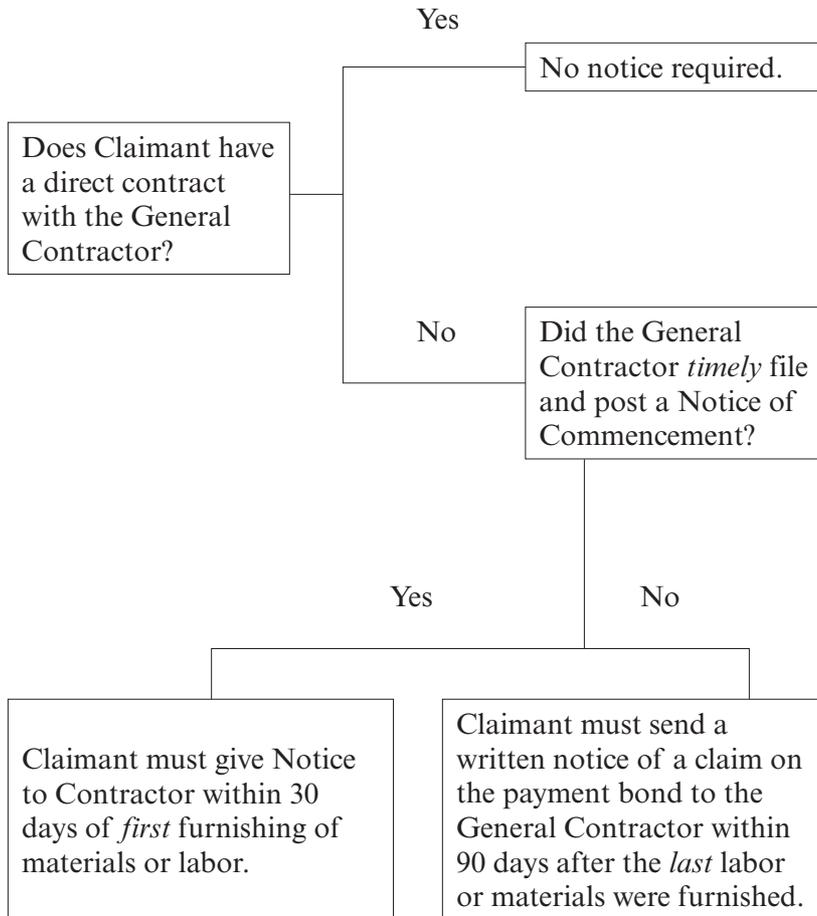
²⁴. O.C.G.A. §§ 13-10-63(a)(2), 36-91-93(a)(2).

²⁵. O.C.G.A. §§ 13-10-63(a)(2), 36-91-93(a)(2).

²⁶. *J. Kinson Cook, Inc. v. Weaver*, 556 S.E.2d 831 (Ga. Ct. App. 2001) (date of filing Notice of Commencement, not posting thereof, is determinative factor as to whether Notice to Contractor must be given).

The suggested form for the Notice of Commencement and Notice to Contractor for public works projects are attached hereto as Appendices M and N, respectively.

7-1:4 Summary of Notice Requirements of Georgia's "Little Miller Act"



7-1:5 Limitations on Time to Bring an Action

Any action on a Little Miller Act payment bond must be brought within one year from the completion of the contract and

the acceptance of the public building or public work by the proper public authorities.²⁷

7-1:6 Obtaining a Copy of the Bond

Under O.C.G.A. §§ 13-10-64 and 36-91-94, the public official who has the custody of the bond or security deposit is authorized to furnish a copy of the payment bond or security deposit agreement and the contract for which it was given to any person making application thereof. Technically, the person who desires a copy of a bond or security deposit must submit an affidavit to the effect that he or she has supplied labor and materials for the work and that payment has not been made.²⁸ There may be a fee for copy of the bond.²⁹

7-1:7 Burden of Proof on Bond Claimant

Although there are a number of procedural requirements to be observed, the burden of proof upon the party claiming under the payment bond is not as stringent. The claimant need not prove that its materials or products were actually incorporated in the project in order to sustain a claim on the payment bond. The materials are presumed to be used on a particular construction project when it is shown that the materials were delivered to the project for that purpose. The burden shifts to the contractor or the owner to prove that the materials were not so used. The supplier may carry this burden by producing evidence in the form of shipping tickets, indicating delivery of the materials to the project in question, and the burden then shifts to the owner or contractor to prove that they were diverted or used on some other project.³⁰

²⁷. O.C.G.A. §§ 13-10-65, 36-91-95; see *Masonry Specialists of Ga., Inc. v. U.S. Fid. & Guar. Co.*, 616 S.E.2d 103 (Ga. Ct. App. 2005) (one-year limitation begins to run on the payment bond claim when the facility is completed, fully occupied and dedicated, even if punch list items remain thereafter); *Southern Elec. Supply Co. v. Trend Constr., Inc.*, 578 S.E.2d 279 (Ga. Ct. App. 2003) (one-year period commences at the completion of the actual construction work and acceptance thereof by the owner).

²⁸. O.C.G.A. §§ 13-10-64, 36-91-94.

²⁹. O.C.G.A. §§ 13-10-64, 36-91-94.

³⁰. See *T.D.S. Constr. Inc. v. Burke Co.*, 2425 S.E.2d 359 (Ga. Ct. App. 1992).

7-2 FEDERAL MILLER ACT

7-2:1 Overview

Under the federal Miller Act, 40 U.S.C. § 3131, any general contractor for a contract for more than \$100,000 with the United States of America or any department or agency for the construction, alteration, or repair of any public building or public work must furnish a payment bond for the protection of all persons supplying labor and material in the prosecution of the work.³¹ Unlike the Georgia Little Miller Act, the amount of the payment bond under the Miller Act does not always have to equal the contract amount. The amount of the payment bond must be equal to the total amount payable under the terms of the contract unless the contracting officer awarding the contract makes a written determination supported by specific findings that a payment bond in that amount is impractical, in which case the amount of the payment bond will be set by the contracting officer.³² Further, the coverage of the Miller Act is more limited than the Georgia Little Miller Act. Clearly, subcontractors having a direct contract with the general contractor are covered by the act, as well as persons having a direct contract with the subcontractor; however, the Miller Act draws a line for protection at those persons having a contract with the general contractor or a subcontractor, and no one else. Thus, while a sub-subcontractor can avail itself of the protections of the Miller Act, a sub-sub-subcontractor or a supplier to a sub-subcontractor cannot recover under this Act.³³

7-2:2 Notice Requirement

No person may maintain an action on a Miller Act payment bond before the expiration of 90 days after the date on which the last labor was done or performed or material was furnished

³¹. See also 40 U.S.C. § 3133.

³². 40 U.S.C. § 3133(b)(2).

³³. See *J. W. Bateson Co. v. United States ex rel. Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund*, 434 U.S. 586 (1978); *United States ex rel. K&M Corp. v. A&M Gregos, Inc.*, 607 F.2d 44 (3d Cir. 1979); *Faerber Elec. Co. v. Atlanta Tri-Com, Inc.*, 795 F. Supp. 240 (N.D. Ill. 1992).

or supplied for which a claim is made.³⁴ In addition, persons having a direct contract with a subcontractor, but no contractual relationship, express or implied, with the general contractor must first give written notice to the contractor within 90 days from the date on which the person did or performed the last labor or furnished or supplied the last material for which a claim is made.³⁵ The notice must state with substantial accuracy (1) the amount claimed and (2) the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed. The notice must be served by any means that provides written, third-party verification of delivery to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the U.S. Marshal of the district in which the public improvement is situated is authorized by law to serve summons.³⁶

7-2:3 Jurisdiction and Limitations

Every suit under the Miller Act must be brought in the name of the United States for the use of the person suing.³⁷ The lawsuit must be filed in the United States District Court in any district in which the contract was to be performed and executed, irrespective of the amount in controversy.³⁸ The action must be commenced within one year after the day on which the last of the labor was performed or materials were supplied.³⁹

7-2:4 Waiver of Right to Bring Action

Any party waiving its right to bring an action on a payment bond under the Miller Act must do so in writing, signed by the party, and executed only after the party furnished the labor or material used in performing the contract.⁴⁰ In other words, the rights on a payment bond may not be waived in advance of furnishing labor or

^{34.} 40 U.S.C. § 3133(b)(1).

^{35.} 40 U.S.C. § 3133(b)(1).

^{36.} 40 U.S.C. § 3133(b)(2).

^{37.} 40 U.S.C. § 3133(b)(3).

^{38.} 40 U.S.C. § 3133(b)(3).

^{39.} 40 U.S.C. § 3133(b)(4).

^{40.} 40 U.S.C. § 3133(c).

materials. The rights against a Miller Act payment bond surety are not barred by a pay-when-paid clause in the general contract.⁴¹

7-3 NON-STATUTORY BONDS (PRIVATE WORK PAYMENT BONDS)

Contractors or subcontractors are frequently required to furnish payment and performance bonds when such bonds are not required by any law or statute. The circumstances could include private construction work and bonds from subcontractors on private as well as public works. Non-statutory bonds are not subject to the statutes such as the Little Miller Act and Miller Act, and claims on the bond must follow the terms and conditions of the bond.

In 1994, Georgia enacted O.C.G.A. § 10-7-31, which concerns payment bonds on projects other than public works projects and provides for the filing of a Notice of Commencement and the giving of a Notice to Contractor similar to the requirements of the lien law and the public works bond statute (the Little Miller Act). Indeed the requirements are almost identical and the courts construe them the same way.⁴² The Notice of Commencement must contain much of the same information required for the Notice of Commencement under the lien law and in addition must state the name and address of the holder of the security deposit, if any.⁴³ The Notice of Commencement must be filed in the office of the clerk of the superior court in the county where the project is located and not later than 15 days after the contractor physically commences work on the project.⁴⁴ The Notice must be posted at the project site and a copy given to any person who makes a written request to the contractor within 10 days of receipt of a request.⁴⁵ A suggested form for the Notice of Commencement under both the lien law and Section 10-7-31 is set forth in Appendix O.

⁴¹. See *United States ex rel. McKenney's, Inc. v. Gov't Technical Services, LLC*, 531 F. Supp. 2d 1375 (N.D. Ga. 2008).

⁴². See *Consolidated Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 633 S.E.2d 59 (Ga. Ct. App. 2006); see also *Sierra Craft, Inc. v. T.D. Farrell Constr., Inc.*, 638 S.E.2d 815 (Ga. Ct. App. 2006) (indexing requirements are substantially identical for Notice of Commencement under § 10-7-31 and the lien law; that it was labeled under the lien law was not fatal.).

⁴³. O.C.G.A. § 10-7-31; see also O.C.G.A. § 44-14-361.5(b).

⁴⁴. O.C.G.A. § 10-7-31(b).

⁴⁵. O.C.G.A. § 10-7-31(b).

Where a Notice of Commencement is filed and posted, any person having no contractual relationship, express or implied, with the contractor who furnishes a payment bond or security deposit must give the contractor a written Notice to Contractor within 30 days from the date of filing of the Notice of Commencement or 30 days from the first delivery of labor, material, machinery or equipment, whichever is later.⁴⁶ If the Notice to Contractor is not sent, then a later claim on the payment bond will fail. The statute does not specify anyone other than the contractor to whom the notice should be sent, nor does it specify the method of transmission. Better practice requires that it be sent via certified or registered mail or statutory overnight delivery, and that it be sent to the owner or agent of the owner as required by the lien law. It would not be harmful to send a copy to the surety as well.

The contents of the Notice of Contractor are substantially the same as required by the lien law.⁴⁷ In *Consolidated Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*,⁴⁸ a subcontractor's supplier's Notice to Contractor failed to provide the address of the subcontractor and the location of the project. The trial court granted summary judgment to the general contractor (Genoa) and its payment bond surety (Westfield) based upon the omissions from the notice. The Court of Appeals affirmed:

We reject Consolidated's argument that its Notice to Contractor was in substantial compliance with the statutory provisions. In enacting OCGA §§ 10-7-31 and 44-14-361.5, the General Assembly "provide[d] both a means of protecting owners and general contractors from being unfairly surprised by unknown debts of subcontractors and a method of ensuring that remote subcontractors and materialmen receive compensation for their contributions to the project." In so doing, the General Assembly determined and specified within

⁴⁶ O.C.G.A. § 10-7-31(a).

⁴⁷ O.C.G.A. § 10-7-31(a); see Appendix D; see also O.C.G.A. § 44-14-361.5(a), (c).

⁴⁸ *Consolidated Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 690 S.E.2d 894 (Ga. Ct. App. 2010).

the statutory provisions at issue the manner in which notice is to be provided to the contractor.

....

“It is true that, generally speaking, when there is actual compliance as to *all matters of substance*, then mere technicalities of form or variations in the mode of expression should not be given the stature of noncompliance.” Given that the statutory provisions at issue explicitly stated that the location of the construction project and the address of the entity be set forth in the Notice to Contractor, they are matters of substance; thus, the statutory requirements to include the information may not be disregarded as mere technicalities. *Because Consolidated’s Notice to Contractor wholly omitted the cited information, it failed to comply with either OCGA §§ 10-7-31(a) or 44-14-361.5(c).*

We reject also Consolidated’s argument that Genoa’s actual knowledge of the information omitted from its Notice to Contractor dispensed with the statutory requirements at issue. If the General Assembly had intended for the notice provisions of OCGA §§ 10-7-31(a) and 44-14-361.5(c) to be inapplicable upon a showing of actual knowledge, it could have explicitly stated that intention within the statutory framework. However, it did not do so; Consolidated has pointed to no ambiguous language that can be construed as rendering inapplicable the notice-to-contractor requirements as it urges; and case law relied upon by Consolidated does not control this case to an outcome in Consolidated’s favor.

The evidence discloses without dispute that Consolidated failed to comply with the cited statutory provisions, thereby failing to avail itself of the statutory remedies. “[Consolidated] could have ensured that it received compensation for

the materials it provided by giving [statutory] notice to the contractor that it was supplying the materials for the contractor's project. It did not do so, and it cannot escape the consequences of its failure." As there was no genuine issue of material fact remaining, the trial court properly granted summary judgment to Genoa and Westfield.⁴⁹

The statute refers only to a payment bond or security deposit provided pursuant to a contract for construction.⁵⁰ The words "contract" and "contractor" are not defined to limit them to the "prime" or "general" contract or contractor, therefore it is possible to apply the statute to bonds and security deposits provided by subcontractors as well. Until this issue is clarified, subcontractors may wish to file their own Notices of Commencement.

⁴⁹. *Consolidated Pipe & Supply Co. v. Genoa Const. Servs, Inc.*, 690 S.E.2d 894, 896-98 (Ga. Ct. App. 2010) (footnotes and citations omitted) (emphasis supplied).

⁵⁰. O.C.G.A. § 10-7-31(a).

