

Chapter 36.25. CONTRACTORS' BONDS

Decisions –

This chapter is modeled after the federal Miller Act, 40 U.S.C. Sec. 270a et seq. State ex rel. Palmer Supply Co. v. Walsh & Co., 575 P.2d 1213 (Alaska 1978).

Collateral Refs -7 Am. Jur. 2d, Contractors' Bonds, Sec. 25-72; 64 Am. Jur. 2d, Public Works and Contracts, Sec. 105-136.

72 C.J.S. Supplement, Public Contracts, Sec. 41-61; 81A C.J.S., States, Sec. 291-310.

Right of contractor with federal, state, or local public body to latter'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:
- (b) (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;
- (c) (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.
- (d) (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.
- (e) (c) When no payment bond has been furnished, the contracting department may 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.
- (f) History –
- (g) (Sec. 1 ch 49 SLA 1953; am Sec. 1 ch 77 SLA 1964; am Sec. 14 ch 142 SLA 1972; am Sec. 1, 2 ch 180 SLA 1976; am Sec. 8 ch 277 SLA 1976; am 34 ch 108 SLA 1982)

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*, 489 P.2d 1016 (Alaska 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.*, 575 P.2d 1213 (Alaska 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 (40 U.S.C. Sec. 270a et seq.) than to general common-law principles governing debtor-creditor relations. *State ex rel. Palmer Supply Co. v. Walsh & Co.*, 575 P.2d 1213 (Alaska 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*, 489 P.2d 1016 (Alaska 1971).

A Miller Act bond covers repair for incidental damages and ordinary wear and tear. *McGee Steel Co. v. State ex rel. McDonald Indus. Alaska, Inc.*, 723 P.2d 611 (Alaska 1986).

Presumption. - Since under this section 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*, 444 P.2d 454 (Alaska 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*, 564 P.2d 30 (Alaska 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*, 564 P.2d 30 (Alaska 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*, 564 P.2d 30 (Alaska 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*, 564 P.2d 30 (Alaska 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*, 489 P.2d 1016 (Alaska 1971).

Liability of surety. - Unless an item is furnished for and used on the bonded project, the surety should not be liable. *McGee Steel Co. v. State ex rel. McDonald Indus. Alaska, Inc.*, 723 P.2d 611 (Alaska 1986).

A sub-contractor cannot recover on a prime contractor's payment bond for materials provided by the sub-subcontractor, when the contract (between the prime contractor and the owner) covered

by the bond was for labor only. *SKW/Eskimos, Inc. v. Sentry Automatic Sprinkler Co.*, 723 P.2d 1293 (Alaska 1986).

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 House. Auth.*, 323 F. Supp. 1370 (D. Alaska 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 House. Auth.*, 323 F. Supp. 1370 (D. Alaska 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 House. Auth.*, 323 F. Supp. 1370 (D. Alaska 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.*, 575 P.2d 1213 (Alaska 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.*, 575 P.2d 1213 (Alaska 1978).

Cases interpreting the Miller Act (40 U.S.C. Sec. 3131, 3132) 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.*, 575 P.2d 1213 (Alaska 1978).

State did not waive right to require replacement bonds. - State did not waive its right to require and was not stopped 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*, 564 P.2d 30 (Alaska 1977).

No private cause of action against political subdivision. - Trial court properly granted defendant school district's summary judgment motion, and ruled that this section does not provide a private cause of action against a political subdivision. *Imperial Mfg. Ice Cold Coolers, Inc. v. Shannon*, 101 P.3d 627 (Alaska 2004).

Contract for the delivery of "cover material" to a solid refuse landfill operated by the municipality of Anchorage was a supply contract which did not come within the scope of this chapter's bonding requirement. *Municipality of Anchorage v. Tatco, Inc.*, 774 P.2d 207 (Alaska 1989).

Collateral Refs –

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 attorney's 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.

Liability of termite or other pest control or inspection contractor for work or representations. 32 ALR4th 682.

What constitutes "public work" within statute relating to contractor's bond. 48 ALR4th 1170.