

PAYMENT BOND CLAIMS AND DEFENSES ON PUBLIC PROJECTS

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I. Bond Claims in General

Mechanics and materialmen may not assert lien claims against public property. Public policy simply prohibits secured claims against publically held property. In lieu of lien claims, mechanics and materialmen may assert payment bond claims. Properly perfected payment bond claims are powerful collection tools.

Payment bonds are not insurance. Payment bonds are three party instruments that involve: (1) a surety (commercial surety which guarantees performance of the principal's obligations under the bond); (2) a principal (general contractor); and (3) an obligee (the public owner of the project to which the principal's and surety's bond obligations are owed). Payment bond claims also involve (4) claimants who have supplied labor and/or materials to the project and are, therefore, the beneficiaries of the payment bond obligations owed by the principal and the surety to the owner. The principal pays the surety a premium to post the payment bond. The principal and surety are jointly and severally liable under the bond. While the principal and surety are jointly and severally liable, the surety will generally offset its risk by requiring indemnity, security, and/or personal guarantees from the principal.

Bond claims on federal public works projects are governed by the Miller Act. 40 U.S.C. § 3131 et seq. Bond claims on Georgia state public works projects are governed by two "Little Miller Acts." State projects are governed by the "State Little Miller Act," O.C.G.A. § 13-10-60, et seq., and county and municipal public projects are governed by the "County/Municipality Little Miller Act." O.C.G.A. § 36-91-90, et seq. The provisions of these two acts mirror one another and for purposes of this paper are referred to collectively as the "Little Miller Acts."

Lien claims must be analyzed from an entirely different framework than bond claims. Lien claims are subject to standards of strict statutory interpretation construed against the claimant. *Brockett Road Apartments v. Georgia Pacific Corp.*, 138 Ga. App. 198, 225 S.E.2d 771 (1976). On the other hand, bond claims are subject to standards of liberal statutory interpretation and are generally construed in favor of the claimant. *United States ex rel. Sherman v. Carter*, 353 U.S. 216 (1957); *Sunderland v. Vertex Assocs.*, 199 Ga. App. 278, 404 S.E.2d 574 (1991); *Fireman's Fund Ins. Co. v. Fischer & Porter Co.*, 143 Ga. App. 533, 239 S.E.2d 174 (1977); *Sommers Constr. Co. v. Atlantic Coast Line R. Co.*, 63 Ga. App. 23, 7 S.E.2d 429 (1940).

In light of the vast body of case law interpreting the federal Miller Act, Georgia courts generally give significant weight to federal decisions when called upon to interpret the Little Miller Acts. This is especially true when provisions of the Miller Act are “substantially similar” to the Little Miller Acts. *Fireman's Fund Ins. Co. v. Fischer & Porter Co.*, 143 Ga. App. 533, 239 S.E.2d 174 (1977). Likewise, the Little Miller Acts are relatively recent statutory creations. The State Little Miller Act O.C.G.A § 13-10-60, et seq., has been effective since July 1, 2001, while the County/Municipality Little Miller Act, O.C.G.A § 36-91-90, et seq., has been effective since April 20, 2000. As such, in seeking to interpret the Little Miller Acts, practitioners and courts must consider decisions rendered under the repealed “Old Little Miller Act,” O.C.G.A § 36-82-100, et seq.

II. Perfecting a Claim Against a Public Works Payment Bond

A. Determine the Law Applicable to the Claim

The federal Miller Act requires payment bonds on contracts over \$100,000.00 for construction, alteration or repair of public buildings or public works of the United States.

40 U.S.C. § 3131. The State Little Miller Act requires payment bonds on all state public works construction contracts with estimated contract amounts greater than \$100,000.00. O.C.G.A § 13-10-60. State is defined as the state of Georgia, any agency of the state, and any state authority. O.C.G.A § 13-10-1. Likewise, the County/Municipality Little Miller Act requires payment bonds on all local government contracts with estimated contract amounts greater than \$100,000.00. O.C.G.A § 36-91-90. Local government entities include a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission, but does not include any authority, board, department, or commission of the state, or a public transportation agency as defined by Chapter 9 of Title 32. O.C.G.A § 36-91-2(7). While payment bonds are required on all projects with estimated contract amounts greater than \$100,000.00, the Little Miller Acts also permit either the State or County/Municipality to require a payment bond on projects with estimated contract amounts less than \$100,000.00. O.C.G.A §§ 36-91-90, 13-10-60.

B. Determine Whether the Claim is Covered by the Payment Bond

The terms of the payment bond are largely irrelevant to any determination of payment bond coverage. The provisions of the applicable statutes are “read in” and any contradictory provisions contained in the bond are “read out.” While both the federal Miller Act and the Little Miller Acts apply the “read in/read out” rule of bond interpretation, they do so in a different manner. Under the federal Miller Act, bond terms that expand coverage beyond the Miller Act requirements are upheld, while terms that attempt to limit coverage below the Miller Act requirements are read out. *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 215-16 (1957). On the other hand, Georgia courts have adopted a strict read in/read out rule. Even when the terms of the bond expand coverage, Georgia courts will

read out provisions that are not required by statute. *Sunderland v. Vertex Associates*, 199 Ga. App. 278, 404 S.E.2d 574 (1991); *Collins v. Unites States Fidelity & Guar. Co.*, 72 Ga. App. 875, 35 S.E.2d 474 (1945).

On federal projects, coverage extends to “[e]very person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished,” *i.e.*, parties in direct contractual privity with the general contractor, and “[a] person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond,” *i.e.* parties in direct contractual privity with a subcontractor. 40 U.S.C. §§ 3133(b)(1), 3133(b)(2). In short, bond claim coverage extends only to the second tier.

On state, county, or municipal projects, coverage extends to “all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of work provided in the contract.” O.C.G.A §§ 36-91-90, 13-10-60; see also *Tom Barrow Co. v. St. Paul Fire & Marine Ins. Co.*, 205 Ga. App. 10, 421 S.E.2d 85 (1992) (upholding coverage to a third tier claimant (supplier to sub-subcontractor)). In short, coverage extends beyond the second tier.

Both the Miller Act and the Little Miller Acts allow coverage for claimants who provide a wide variety of materials and labor. However, the two acts differ slightly in the presumptions enjoyed by material suppliers. Under the Miller Act, material suppliers essentially enjoy an irrebuttable presumption that the materials were used on the project if they were delivered or furnished in the prosecution of the work. *Montgomery v. Unity Elec. Co.*, 155 F. Supp. 179 (D.P.R. 1957). If the materials were delivered to the project in good faith, then they are presumed to have been used in “carrying out [the] work.” 40

U.S.C. § 3133(b)(1). Under the Little Miller Acts, this presumption may be rebutted by evidence that the materials were diverted to another project, even if such diversion was carried out without the material supplier's knowledge or participation. *Sierra Craft, Inc. v. T.D. Farrell Construction, Inc.*, 282 Ga. App. 377, 638 S.E.2d 815 (2006).

C. Request a Copy of the Notice of Commencement

Claimants can potentially relieve themselves of the notice to contractor requirements by simply requesting a copy of the notice of commencement. Unfortunately, the interplay of statutory provisions has been complicated by what appears to be a statutory drafting error. O.C.G.A. §§ 36-91-92 and 13-10-62 provide that “[f]ailure to supply a copy of the notice of commencement within ten calendar days of receipt of the written request . . . shall render the provisions of paragraph (1) of subsection (a) of Code § 36-91-93 [or paragraph (1) of subsection (a) of Code § 13-10-63] inapplicable to the [party] making the request.” While the statute relieves the claimant of the 90 day notice requirement, this appears to be a rather unfortunate “drafting error rather than a matter of legislative intent.” Hinkle, *GEORGIA CONSTRUCTION MECHANICS’ & MATERIALMEN’S LIENS* (4th ed.), § 12-3. The legislative intent was to relieve the claimant of the 30 day notice to contractor requirement set forth in O.C.G.A. §§ 36-91-93(a)(2) and 13-10-63(a)(2), rather than the 90 day notice set forth in O.C.G.A. §§ 36-91-93(a)(1) and 13-10-63(a)(1). Regardless of this drafting error, claimants should request a copy of the notice of commencement in an effort to gain a potential response to a notice of commencement defense and contractors should immediately provide a copy of the notice of commencement upon receipt of a written request in an effort to retain any notice of commencement defense.

D. Send Preliminary Notice of Claim, a/k/a Notice to Contractor

There is no pre-completion notice requirement in connection with Miller Act projects. There are pre-completion notice requirements in connection with Little Miller Act projects if: (1) the claimant is not in direct contractual privity with the general contractor; (2) the general contractor has recorded a notice of commencement; and (3) the general contractor provides copies of the notice of commencement as required by statute.¹ If all these conditions are met, then the claimant must send notice to the contractor within thirty days of starting work or first delivery of materials, or within thirty days of the recording of the notice of commencement, whichever is later. O.C.G.A. §§ 13-10-63, 36-91-93. The required content of the notice to contractor is specified in the applicable statutes. O.C.G.A. §§ 13-10-63, 36-91-93. There are no statutory requirements as to how the notice must be delivered.

Unfortunately, claimants generally consult with their attorneys only after the above-referenced thirty day periods have expired. As such, disputes in this area generally focus on whether the notice of commencement includes the required content. Like the notice to contractor, the notice of commencement must contain certain content specified in the applicable statutes. O.C.G.A. §§ 13-10-62, 36-91-92. Failure to include the required content may render the notice of commencement noncompliant and alleviate any notice to contractor required under O.C.G.A §§ 13-10-63 or 36-91-93. *Harris Ventures, Inc., v. Mallory & Evans, Inc.*, 291 Ga.App. 843, 662 S.E.2d 874 (2008) (citing *Gen. Elec. Co. v. North Point Ministries*, 289 Ga.App. 382, 657 S.E.2d 297 (2008)). *Harris* and *Gen. Elec.*

¹ The general contractor's statutory duty to provide copies of the notice of commencement is discussed in Section II. E., below.

Co., are lien cases which hold that the failure to properly identify the true owner of the property and the failure to include a legal description of the property rendered the respective notices of commencement invalid, thereby relieving the claimant of any obligation to send Notice to Contractor. While the notice of commencement content required under the Little Miller Act is substantially different from that required under the lien statute, these cases open the door to challenges arising from any deviation in the required content, including but not limited to failing to properly name the government entity, to properly name the surety, or to properly identify the name or location of the public work.

E. Request a Copy of the Bond

While the provisions of the bond are largely irrelevant due to the “read in” and “read out” rules of bond interpretation previously discussed, obtaining a copy of the bond and notifying the surety of the claim are important steps toward resolving a claim. Copies of both federal and Georgia bonds can be obtained by sending a request to the department secretary or agency head of the contracting agency, accompanied by an affidavit stating (1) that the person/entity has supplied labor or material for work described in the contract and that payment for the work has not been made, or (2) that the person/entity is being sued on the bond. O.C.G.A §§ 36-91-94, 13-10-64. Copies of the bond can also be obtained by sending a request pursuant to the federal (5 U.S.C. § 552) and State or County/Municipal (O.C.G.A. § 15-8-70) acts relating to open records requests.

F. Send Post Completion Notice of Claim

Post completion notice requirements under the Miller Act and the Little Miller Acts apply only to entities not in direct privity with the general contractor. Under the Miller Act,

all claimants who are not in direct privity with the general contractor must provide written notice of their claim to the general contractor by registered mail or in any manner in which the United States Marshal is authorized to serve summons. 40 U.S.C. § 3133(b)(2)(A) and (B). The notice must be provided within ninety (90) days of the “date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made.” 40 U.S.C. § 3133(b)(2). The notice is effective upon mailing if sent via registered mail. *United States ex rel. Crow v. Continental Cas. Co.*, 245 F. Supp. 871 (E.D. La. 1965). Likewise, provided that the notice is written and received by the contractor, it will generally be upheld even if it was not served by the statutory methods. *Fleisher Eng’g & Const. Co. v. United States*, 311 U.S. 15 (1940); *United States ex rel. Moody v. American Ins. Co.*, 835 F.2d 745 (10th Cir. 1987). However, oral communication followed up by written communication outside the ninety (90) day period is insufficient. *U.S. ex rel. Brothers Builders Supply Co. V. Old World Artisans, Inc.*, 702 F. Supp. 1561 (N.D. Ga. 1988); *U.S. for Use of Acme Transfer & Trucking Co. v. H. S. Kaiser, Inc.*, 270 F. Supp. 215 (E.D. Wis. 1967).

While there are a seemingly endless supply of competing cases addressing the content of the notice, it is best to err on the side of caution and to provide as much detail and support as possible. Compare *U.S. for Use and Benefit of Bailey v. Freethy*, 469 F.2d 1348 (Cal. 1972), to *U.S. for Use and Benefit of Blue Circle West, Inc. v. Tucson Mechanical Contracting, Inc.*, 921 F.2d 911 (Ariz. 1990). At the very least, the notice should inform the prime contractor that the claimant is looking to the prime contractor and to the bond for payment, state the amount owed, and identify the subcontractor for whom the work was performed. *United States ex. rel. Blue Circle W., Inc. v. Tucson Mechanical Contracting,*

Inc., 921 F.2d 911 (9th Cir. 1990); *United States ex rel. Honeywell, Inc. v. A&L Mechanical Contractors, Inc.*, 677 F.2d 383 (4th Cir. 1982); *Apache Powder Co. v. Ashton Co.*, 264 F.2d 417 (9th Cir. 1959).

Under the Little Miller Acts, post completion notice of claim is only required when the general contractor has **not** “complied” with the notice of commencement requirements. O.C.G.A §§ 36-91-93, 13-10-63. When the general contractor has complied with the notice of commencement requirements, all that is required is preliminary notice or “notice to the contractor within thirty days of starting work or first delivery of materials or within thirty days of the recording of the notice of commencement, whichever is later.” O.C.G.A §§ 13-10-63, 36-91-93.

When the general contractor has complied with the notice of commencement requirements, then all claimants who are not in direct privity with the general contractor must provide written notice of their claim to the general contractor within ninety (90) days “from the date on which such person did or performed the last of the labor or furnished the last of the material or machinery or equipment.” O.C.G.A §§ 13-10-63, 36-91-93. The post completion notice must state with “substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was performed or done.” The post completion notice must be served by registered or certified mail or statutory overnight delivery.

Georgia’s appellate courts have been fairly liberal in their interpretation of this notice statute. The court has held that a telephone call followed up with invoices faxed within the ninety (90) day period was sufficient notice. *Southern Elec. Supply Co. v. Trend Const.*, 259 Ga. App. 666, 578 S.E.2d 279 (2003). Likewise, the court has found that a question of

fact regarding sufficiency of notice existed where a representative of a supplier met with the general contractor's president and showed him copies of unpaid invoices. *Fireman's Fund Ins. Co. v. Foster Remodeling Co.*, 177 Ga. App. 711, 340 S.E.2d 668 (1986). Moreover, the court has held that a letter sent by certified mail from a material supplier to a general contractor that (1) identified the party to whom the materials were supplied, and (2) identified the amount owed was sufficient notice. *Devore & Johnson, Inc. v. Bowen & Watson, Inc.*, 216 Ga. App. 63, 453 S.E.2d 67 (1994).

While the Little Miller Acts only require post completion notice when a notice of commencement has not been recorded, claimants who are not in direct privity with the general contractor should send post completion notice. For example, if a notice of commencement has been recorded and preliminary notice has not been sent (which is generally the case), then the viability of the claim rests on whether the notice of commencement is compliant. If the claimant is able to establish that the notice of commencement is defective, then it is arguably relieved of its obligation to provide preliminary notice. *Harris Ventures, Inc., v. Mallory & Evans, Inc.*, 291 Ga.App. 843, 662 S.E.2d 874 (2008) (citing *Gen. Elec. Co. v. North Point Ministries*, 289 Ga.App. 382, 657 S.E.2d 297 (2008)). However, such non-compliance arguably triggers a post completion notice requirement because the contractor has not "complied" with the notice of commencement statutes. O.C.G.A §§ 36-91-93, 13-10-63. As such, it is advisable to send post completion notice regardless of whether Notice to Contractor has been provided.

G. File Suit

A suit under the federal Miller Act may be brought any time after ninety days and before one year from the last date of work or delivery of materials. 40 U.S.C. § 3133(b)(4).

The requirement to file suit within one year is not changed even when the parties engage in concurrent arbitration. *United States ex. rel. Harvey Golf International Marine, Inc. v. Maryland Casualty Co.*, 573 F.2d 245 (5th Cir. 1978). A suit under Georgia's Little Miller Acts may be brought any time after ninety days from the last date of work or delivery of materials and before one year from completion of the project and acceptance of the project by the proper public authority. O.C.G.A. §§ 36-91-95, 13-10-65. The project will be deemed completed upon full payment to the general contractor and occupancy by the public entity owner. *U.S. Fidelity & Guaranty Co. v. Rome Concrete Pipe Co.*, 256 Ga. 661, 353 S.E.2d 15 (1987).

For federal suits under the Miller Act, the claimant must be listed as "The United States for the use of" the person bringing the action. 40 U.S.C. § 3133(b)(3)(A). However, claims brought under either of Georgia's Little Miller Acts should be brought only in the name of the claimant that provided materials/services without payment. O.C.G.A. §§ 36-91-95, 13-10-65. Both the principle and surety are jointly and severally liable on the bond. Therefore, the claimant can sue either the principal or surety, or both the principal and surety.

Venue for federal Miller Act claims is determined by statute. The suit should be brought in the U.S. District Court for the district in which the public project is located. 40 U.S.C. § 3133(b)(3)(B). For Georgia claims, venue is determined by the Georgia Constitution. Civil actions in the state of Georgia must be brought in the county in which the defendant resides when the case is filed. GA. CONST. art. 6, §2, para. VI. When defendants are jointly liable and all defendants are residents of Georgia, venue may be placed in the county in which any of the defendants resides. GA. CONST. art. 6, §2, para. IV.

A commercial surety is deemed to be a resident of any county (1) where the registered agent is located, (2) where the company has an agent or place of business either at present or at the time the contract was made, (3) where the property covered by an insurance contract is located, or (4) where the person entitled to the proceeds of an insurance contract upon which action is brought maintains his legal residence. O.C.G.A. § 33-4-1. Therefore, if the principal and surety are sued in the same action as joint obligors, venue is proper in any county where either the principal or surety may be sued.

III. Defenses to Payment Bond Claims

As procedural defenses to payment bond claims, any statutory requirement of the bond claimant with which the claimant does not comply operates as a defense to the claim. For example, failure to perform the following statutory requirements will defeat a claim (these defenses are discussed in more detail in Section I, above) : (1) failure of the general contractor to post a bond (although the claimant may have a cause of action against the general contractor or public entity which may afford recovery²), (2) for federal projects, if the claimant is a third tier claimant or lower, (3) proof that the materials/services provided were not used in carrying out the work, (4) for remote claimants, failure to timely provide sufficient notice of claim to the proper person/entity, (5) for Georgia claimants, failure to timely provide sufficient Notice to Contractor when the general contractor has recorded a Notice of Commencement, and (6) failure to timely file suit against the bond principal and/or surety in the proper venue and with a properly named claimant. Additionally, all contract defenses are available to both surety and contractor.

² See Section IV. B., *infra*.

IV. Additional Considerations

A. Surety Bad Faith

A bad-faith claim under O.C.G.A. § 10-7-30 is the exclusive means of recovering attorney's fees from sureties on statutory payment bonds. *Id.* Under this statute, attorney's fees are recoverable only if (1) a surety refuses to pay a claim within 60 days from receipt of a proper demand for payment, (2) the claimant waits the full 60 days before filing suit, and (3) the trier of fact finds "that such refusal was in bad faith." O.C.G.A. § 10-7-30(b). A "proper demand" is one that puts the insurer or surety on notice that it is facing a bad faith claim so that it can decide whether or not to pay the claim. *BayRock Mortgage Corp. v. Chicago Title Ins. Co.*, 286 Ga. App. 18, 648 S.E.2d 433, (2007). Merely submitting the claim and demanding payment is not sufficient. *Id.* Statutory bad faith in Georgia is considered a penalty and must be strictly construed. *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340 (N.D. Ga. 2001); *Interstate Life & Acc. Ins. Co. v. Williamson*, 220 Ga. 323, 138 S.E.2d 668 (1964); *Progressive Cas. Ins. Co. v. Avery*, 165 Ga. App. 703, 302 S.E.2d 605 (1983).

B. Public Entity Liability

While both the federal and Georgia statutes require a sufficient payment bond be posted in an amount at least sufficient to cover the contract price, a claimant will sometimes encounter a situation in which these obligations either have not been performed or have been performed in an insufficient manner. Two common problems exist with regard to insufficient bonds: (1) the public entity has completely failed to ensure that the general contractor post a bond, and (2) a bond is posted but the public entity has failed to ensure that the surety is solvent, and the surety subsequently is determined to be insolvent.

1. Failure to Ensure that the General Contractor has Posted a Bond

For federal claims under the Miller Act, if no bond has been posted, a claimant may find it very difficult to recover the value of the materials/services provided. As a general rule, a claimant has no cause of action against the United States if no bond is posted. *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981). If the claimant is in direct contractual privity with the contractor, the claimant will always have a claim for breach of contract. However, this remedy is of little use when the general contractor is insolvent or otherwise unable to pay.

Depending on the federal entity, the claimant may have a claim against the government for enforcement of an "equitable lien." *United Electric Corp. v. United States*, 647 F.2d 1082 (1982); *Kennedy Electric Co. v. United Postal Service*, 508 F.2d 954 (10th Cir. 1974). In *United Electric*, the Court of Claims held that an unpaid claimant has an equitable lien on funds retained by the governmental entity. However, where the governmental entity is a subordinate unit of the federal government, such as the Air Force, sovereign immunity prevents a claimant from suing to enforce the lien. *Id.* In contrast, the *Kennedy* court held that where the governmental entity is an independent establishment conferred by congress with the capacity to sue and be sued, sovereign immunity does not bar a suit to enforce the equitable lien. *Kennedy Electric*, 508 F.2d 954.

A claimant on a Georgia project will find recovery significantly more likely. It is clear that a Georgia claimant has the right to sue the governmental entity to recover its damages where the public entity failed to ensure that a bond was posted. O.C.G.A. §§ 13-10-61, 36-91-91. However, where a bond was posted and the surety is or becomes insolvent, the public entity's liability will be much more difficult to prove.

2. Failure to Ensure that the Surety is Solvent

Georgia's Little Miller Acts provide that a failure to ensure the posting of a bond "in the manner and form" required by the statute renders the public entity liable to all persons furnishing materials/services to the project "for any loss resulting to them from such failure." O.C.G.A. §§ 13-10-61, 36-91-91. The Little Miller Acts further create a specific duty of the public entity to investigate a surety's solvency prior to the execution of the contract. O.C.G.A. §§ 13-10-2(a)(2), 36-91-40(a)(2). Therefore, if a public entity fails to investigate a surety's solvency, the public entity can be held liable to all subcontractors and materialmen. However, even a failure of the public entity to take any action to investigate the solvency of the surety will not be sufficient for an award of summary judgment. In order for a claimant to recover, the surety's unsound financial condition must have been discoverable and the public entity's failure to investigate must have been the cause of the claimant's loss. *Hall County School Dist. v. C. Robert Beals & Associates, Inc.*, 231 Ga. App. 492, 498 S.E.2d 72 (1998). Further, as with a federal bond claim, a Georgia claimant is entitled to an equitable lien against the contract funds for which the general contractor has performed work, but for which payment has not yet been made. *Id.*

C. Telescoping, Straw Parties, and Sham Transactions

Under the Miller Act, parties that do not have direct contractual privity with the general contractor or with a subcontractor are precluded from recovery against a payment bond. In an attempt to preclude legitimate claims, a contractor may establish a "straw party" that directly contracts with the general contractor as "subcontractor." However, if a claimant can show that the relationship between the primary contractor and the first-tier subcontractor is merely a sham, established for the purpose of limiting valid claims, the

court will have grounds to disregard the technical relationships and allow lower-tier claimants to make claims on the bond. *Glen Falls Insurance Co. v. Newton Lumber & Manufacturing Co.*, 388 F.2d 66 (10th Cir. 1967). This procedure is known as “telescoping” because the court looks through certain subcontracts and effectively eliminates a party in the contractual chain. *North Star Terminal and Stevedore Co. ex. rel. v. Nugget Construction Inc.*, 126 Fed. Appx. 348 (Ak. 2005). Even when no evidence exists that an intermediate subcontractor was hired for an illegitimate purpose, courts still may telescope and disregard a party who served no function and performed no work on the project. *United States ex re. Hillsdale Rock Co. v. Cortelyou & Cole, Inc.*, 581 F.2d 239 (9th Cir. 1978).

While establishing a straw company will have a less preclusive effect in Georgia because all tiers of subcontractors and suppliers are afforded the ability to make a claim against the bond, contractors still might establish straw companies to take advantage of Georgia’s preliminary notice requirements. Only claimants not in direct contractual privity with the general contractor (*i.e.*, third tier or higher subcontractors and suppliers) must provide preliminary notice of claim. Therefore, a straw company might be established in an attempt to require every subcontractor and supplier to provide preliminary notice of claim. While there are no Georgia cases that have specifically discussed this issue, it is likely that the courts would apply the reasoning of cases decided under the Miller Act and prevent straw companies from being used in this manner.

D. Public / Private Entity Hybrids

It is not uncommon to have a project owned by a public entity, but ground-leased to a private entity, *e.g.*, airport or local development authority projects. Because the public owner is merely leasing this property and is not involved in the actual construction of

improvements, construction in connection with such a project is not a “public works construction contract” within the scope of Georgia’s Litter Miller Acts. Therefore, a payment bond is not required. Likewise, there are no lien rights against the public entity’s ownership interest in the property. As such, a claimant’s remedies are limited to claims against private payment bonds or a lien on the leasehold interest in the property.

E. Bonds on Private Projects

Private payment bonds are frequently posted in connection with private commercial and multifamily construction projects, and less frequently in connection with single family residential projects. The question of whether a payment bond will be posted on a private project is usually a contractual matter between the owner and the general contractor. For example, the AIA A201 (General Conditions) allows the owner to require a payment bond from the general contractor. The Miller Acts are not “read in” to such bonds. As such, claim procedure is governed by the terms of the bond. For example, under the AIA payment bond form, claimants who are not in direct contractual privity with the contractor must give notice to the contractor and the owner followed up by additional notice to the surety and the owner. In short, it is imperative that remote claimants attain copies of private payment bonds and strictly adhere to the notice procedures set forth in the bonds. If the claimant is unsure whether a private bond is posted, then it is advisable to incorporate such notice into a claimant’s lien notification letter or send separate notice to the owner and general contractor.

V. Changes on the Horizon

During the 2009 legislative Session, SB 184 passed the senate, but failed to pass the house. The proposed bill sought to change the time frames and notice requirements related

to public bond claims so as to conform to the time frames and notice requirements set forth in the new lien law. Hopefully, the proposed changes will be reconsidered and passed in 2010.