# THE SUBCONTRACT CONTINGENT PAYMENT CLAUSE: HOW DOES IT AFFECT THE CONSTRUCTION INDUSTRY?

*By Larry R. Leiby, Esq.*

A contingent payment clause in a subcontract is the clause that provides that the subcontractor assumes the risk of owner nonpayment. Such clauses are favored by contractors for the ostensible purpose of managing the risk of owner nonpayment. Subcontractors are often faced with accepting the risk of owner nonpayment in a contingent payment clause when they can least afford to accept that risk. One issue about which there is no disagreement is that nonpayment for construction work WILL create practical problems regardless of legal issues. As a practical matter due to lack of capitalization, a smaller subcontractor may not have a real choice about slowing down or stopping work in the face of nonpayment, whether or not there is a legal right to get paid.

## WHICH CLAUSE?

Florida has held that the issue of whether subcontract language communicates assumption of the risk of owner nonpayment may be considered as an issue of law (contract interpretation).[1] Any ambiguity in the payment language will preclude enforcement of the clause as creating a contingent payment obligation and leave it as a time of payment clause, which requires payment to the subcontractor within a "reasonable time" in order to allow the contractor some time to receive payment from the owner. Courts are not clear on any particular period being a reasonable time for payment.[2] The "reasonable time" for postponing payment has been defined to be the time within which the general contractor is actively pursuing collection, and while there remains a reasonable likelihood that the general contractor will actually collect the payment due from the owner.[3] Two Florida courts have been the most beneficent to the subcontractor with respect to when payment is due under a time of payment clause. Florida courts have said a) A reasonable time occurred as of the writing of the appellate opinion, but was still a fact issue,[4] and b) 90 days from completion of the work was a reasonable time (however the reasonable time of 90 days was agreed between the parties in that case).[5]

A contingent payment clause[6] in a subcontract clearly communicates that the subcontractor assumes the risk of owner nonpayment.[7] Courts have generally held that where there is a contract with an enforceable contingent payment clause, the subcontractor may not avoid or get around the contingency in the express subcontract by making an equitable claim for unjust enrichment.[8]

## WHAT IS THE EFFECT OF THE SUBCONTRACT CONTINGENT PAYMENT OBLIGATION ON CONSTRUCTION INDUSTRY PARTICIPANTS

**Owners.** In most cases the owner has a goal to obtain the completed construction promptly so that the owner can occupy, rent, use, live in, or sell the completed construction. Generally the owner wants the job completed as soon as possible or by a time certain. The owner also is very interested in not paying more than a reasonable amount for the improvements, and not paying twice for the same work (for obvious reasons). The owner could be faced with paying twice in the event of a) failure to comply with statutory construction lien procedures, or b) having overpaid a defaulting uncollectible contractor. Looking at the owners' interests: timely completion and payment one time for work done, what is the impact of the contingent payment clause in the subcontract?

**Timely Completion.** Timely completion of the work is a key owner goal. However, when a subcontractor does not get paid the funds it needs to pay for its labor and materials, that subcontractor may do two things:

1) Search for creative reasons to stop performing or slow down the performance (and cash outflow) of the work. If the subcontractor searches for and finds a reason (other than nonpayment, the real reason) to stop the work, the result may be the subcontractor making a claim and/or seeking a time extension. The administrative activity addressing possible "creative" claims, along with the slowing or stopping of the work itself, directly and adversely impacts the owner's interest in getting the job timely completed.

2) If the subcontractor is financially able to continue with the work despite lack of payment, and chooses to abide by the law, the contingent payment clause works to the benefit of the owner. However if the subcontractor cannot or will not perform without payment despite the legal obligation to continue, the paying party (owner or prime contractor) may be faced with being right, but perhaps "dead right." With a subcontractor who cannot or will not work without funds, the owner or prime contractor is looking at a job completion problem and perhaps legal remedy.

**Lien Claims.** Where the defense to enforcement of a subcontractor lien claim is alleged to be owner nonpayment and the work for which payment is sought has been performed by the lien claimant, the equity of owner nonpayment to the contractor without a good faith reason rings hollow.[9] Where the general contractor shifts the risk of owner nonpayment by a clear contingent payment clause, what purpose is served by the defendant owner claiming that the condition precedent of owner payment to the contractor has not been performed? If the subcontractor does assume the risk of owner nonpayment what is wrong with the subcontractor pursuing payment directly from the source, the owner, by enforcing a claim of lien against the owner's property?

Remember that in Florida a construction lien may be recorded for amounts owed for work performed, not just for sums due.[10] The time within which a construction lien may be recorded should not relate to any time or duty of payment, but it relates to the last date that work was performed under the authorized contract (or the time that the prime contract was terminated).[11] Thus nonperformance of the condition precedent of owner payment to the contractor is not a basis to defend the lienor's equitable action against the improved property of the owner pursuant to the language of the construction lien statute. The lien should be enforced for sums unpaid and owed that made the property more valuable (to the extent of the reasonable unpaid value thereof), regardless of the ability of the subcontractor lienor to sue for breach of contract against the general contractor, a separate remedy.[12] The sums that are exposed for recovery by the subcontractor lienor are: the amount of the contract price owed (not due) for the value improved, less proper payments made by the owner.[13] The amount that has been paid to the general contractor for the subcontractor's work is not an issue in the lien enforcement against the owner, except to the extent of proper payments which relates to releases of lien obtained. However once a subcontractor has served a notice to owner, the owner cannot make a proper payment to the contractor without getting a release from the subcontractor if the subcontractor is owed funds.[14] The value of the work performed, and proper payments are issues to be addressed in the lien enforcement. Thus the contingent payment subcontract clause does not benefit the owner as a defense to a lien, just as proper payment defenses under the lien law do not apply to contract or payment bond claims.[15]

**Payment only once.** The owner is generally well advised to obtain a release of lien (as well as release of contract rights and equitable claims) from every person who can make a claim for payment against the owner and/or the owner's property, to the extent of each payment being made. If the owner is seeking a release from the contractor and everyone under the contractor who could make a claim for payment against the owner and/or the owner's property,[16] how do the subs and suppliers give a release of their portion of the funds sought by the contractor to facilitate the owner paying the contractor when the subs and suppliers are not paid or entitled to be paid unless and until the contractor gets paid? There are several methods to address this issue created by the subcontract contingent payment clause that affect the owner. Methods to address this issue include:

a) Require from all potential claimants a release for prior payments made, and a contingent release for the current payment sought. Once payment is made for the payment sought, then the contingency has been performed and the release is no longer conditional.

b) A monthly payment meeting could be scheduled to obtain and simultaneously exchange releases for payments to the contractor and subcontractors.

c) There could be escrow arrangements made through a third party, or conditional delivery of releases to a third party, pending receipt of payment. This is administrative red tape that adds to the cost of the project. When dealing with a knowledgeable subcontractor who is not willing to release claims on faith before receiving payment for the work being released, these extra steps may put the owner at risk of inability to receive funding from the lender, or defending subcontractor lien claims due to a possible misstep in the payment process.

**Contractors, Construction Managers, and Subcontractors.** The contractor, or construction manager at risk, is the construction participant who is the primary supporter and beneficiary of the subcontract contingent payment clause.

One way for a contractor to manage the risk of owner nonpayment to trade contractors, and avoid the issue of the contractor being in the middle of owner nonpayment with his or her trade contractors, is for the contractor to use the construction management as agent for the owner form of procurement. With respect to trade contractors, the construction manager does not contract on its own account. If the trade contracts are executed by the construction manager as agent for the owner, pursuant to authority of the owner, then the payment obligation is owed directly from the owner to the trade contractor. While the construction manager will review and opine as to whether payment has been earned in accordance with the trade contract, it is the owner's obligation to pay the trade contractors directly. The construction manager is not in the middle of the payment issue beyond opining as to whether the payment is earned or not. Any legal action for nonpayment of contract sums by the trade contractor against the owner need not involve the construction manager as a party. The benefit to the

contractor/CM about the direct payment to trade contractor arrangement is that the contractor/CM has managed the risk of owner nonpayment for major trade work.

The contingent payment clause as a cash flow management tool *may* be effective should an owner not make payment to the contractor for the work of the subcontractor so long as the subcontractor is not financially weak. There are large, well financed subcontractors, and there are undercapitalized subcontractors who are in business without adequate funds to pay bills without payment from the contractor. There are many good or adequate tradesmen who fancy themselves as business people and not just tradesmen. Many become subcontractors. Some do well and grow into larger businesses. Many fail.

There is nothing inherently wrong with a subcontract that shifts the risk of owner nonpayment to a subcontractor. Some courts have so held.[17] However where the subcontractor is either unaware[18] or has undertaken the risk of owner nonpayment without having the ability to address that possible nonpayment, problems occur. The most prevalent complaint about contingent payment clauses is that the subcontractor, who may be less able to withstand nonpayment than the contractor , is the one who accepts the risk of owner nonpayment in order to get work when it can least afford to do so.

Where a subcontractor is required to furnish a warranty for its work the warranty may be a countervailing measure to combat contingent final payment. Roofing contractors, mechanical contractors, and elevator contractors, for example, provide in the subcontract (or in the warranty that is required by the subcontract) that the warranty is not effective, or is suspended, unless and until final payment is made. These warranties are an important and valuable aspect of the work. Conditioning the delivery or effectiveness of the warranty upon receipt of final payment can be an effective tool with respect to the subcontractor obtaining final payment whether or not there is a contingent payment clause in the subcontract.

**What is the Problem?** Understanding that all participants in the construction process would prefer to not have payment issues, what is the problem with a contingent payment clause?[19] Legal purists argue that there is no reason to meddle with freedom of contract. If the subcontractor has freely entered into the subcontract, then this is an agreement that should be enforced in accordance with its terms.[20]

Where the laws of economics and practicality dictate that the subcontractor can no longer continue to pay its obligations and proceed with the work despite a legal obligation to do so without receiving payment, problems arise. There are the following circumstances where the contingent payment clause becomes problematic:

1) The subcontractor does not have the financial ability to continue performing without payment from the contractor. Typically the subcontractor was imprudent in signing a contingent payment clause but did so without fully understanding it, or with the hope that the contingency would never become an issue (a very naïve approach).

2) The contractor and/or the owner have conspired to avoid payment to the contractor, who owes most if not all of the payment to subcontractors. Texas has legislated that a sham relationship will avoid a contingent payment clause.[21] A contractor cannot act in bad faith to create a defense to liability but must comply with the implied covenant of good faith and fair dealing.[22] If the contractor acts in bad faith by not actively pursuing owner payment, such action could avoid the contingent payment clause based on bad faith.[23]

This situation usually requires legal action for the subcontractor to prove conspiracy or fraud in order to avoid the contingency. In some cases the subcontractor cannot afford such litigation and just leaves the job, perhaps closing its doors. The contractor and owner are then faced with completing the job with others, but may have saved the value of the work unpaid the original subcontractor to address added costs of a new trade contractor. However that value may be temporary if the subcontractor can later find counsel to bring the action for fraud or conspiracy. In addition the completing contractor may cost more to complete the work than the original bargained price with the original subcontractor.

3) There is no alternative remedy to allow the unpaid subcontractor to go to a source of payment other than the contractor, such as a lien or payment bond. An alternative remedy *may* give the subcontractor more comfort to proceed, but an alternative remedy may still not be adequate to address the cash flow issue. It is critical for a subcontractor to timely serve a notice to owner and/or bond notice so that the alternative remedies are there if needed.

When the subcontractor cannot (or will not) continue to work without funding, the contractor (and to some degree the owner) are faced with supplementing the work force, declaring a breach for nonperformance and then completing the job with others, or reaching some middle ground with the subcontractor and its laborers/suppliers on how to control making payment for remaining work to move the project toward completion, despite a lack of legal liability for payment pursuant to the terms of the subcontract. This assumes that the contractor has the resources to do this. Alternatively if the original subcontractor is not capable of proceeding with the work then the contractor may supplement the work force of the nonperforming subcontractor, or terminate the original subcontractor and arrange to complete the work with others. Termination and completion with others may be a more expensive alternative to having the original subcontractor completing the project with some financial help. Adding a replacement trade contractor may also impact permitting and warranty obligations.

**Sureties.** Sureties for contractors support contingent payment clauses in subcontracts. The surety argues the legal principle of suretyship that a surety stands in the shoes of the principal (contractor) and thus if the contractor has no obligation to pay payment bond claimants by virtue of a contingent payment clause, then the surety has no obligation to pay those claimants.

Courts have gone both ways on enforcing a contingent payment clause as a defense to a payment bond claim against a surety, generally being split based on whether the bond is a common law bond issued on private work in addition to lien rights; or whether the bond is a statutory bond where the bond is a substitute for lien rights. Some courts have allowed a contingent payment clause in a subcontract to be enforced as a defense by the surety. Those courts stood on the basic legal principle of suretyship that the surety stands in the shoes of the bond principal.[24] The surety has no liability unless the bond principal has triggered a default (under the bond) by nonpayment.

Other courts have used various reasons to avoid the contingent payment defense to a payment bond claim. In some instances the courts have said that while the clause is in the subcontract, it is not enforceable against the surety unless the contingent payment language is in the bond.[25] The bond and the contract are considered separate obligations. In many cases the subcontract is incorporated by reference into the bond, which negates that argument. Other courts have said that where the bond language says that liability exists for sums "justly due," the term "justly due" implies that there is a subcontract that must be read in pari materia with the bond.[26] Still other courts outside of Florida have held as a matter of public policy that a contingent payment clause in a subcontract may not be used to make the subcontractor assume the owner risk of nonpayment.[27]

In cases where the bond acts as a substitute for lien rights (F.S. 713.23 or 255.05), or if the bond is a Miller Act bond,[28] courts have held that these bonds are "special" by virtue of substituting the bond claim for a cumulative lien right against real property. Florida case law interpreting such statutory bonds generally does not allow the surety to assert a subcontract contingent payment defense.[29] However a surety may assert a failure of the condition precedent in the subcontract of failing to furnish a release as a condition precedent to payment.[30]

Florida has created a special statutory bond for use with contingent payment clauses in subcontracts.[31] In Florida here are two statutory payment bonds given by a contractor on private property improvements. The exemptory statutory payment bond that does not recognize the contingent payment clause as a defense exempts the real property from claims of lien of anyone working under the bonded contractor.[32] The other more recent statute,[33] where the contractor wishes to use contingent payment clauses in subcontracts, provides for a bond that exempts the property from liens, but only to the extent that the owner has paid the contractor.[34] If the contractor does not agree that the owner has been paid for the work of the subcontractor who liens, the subcontractor lien remains against the property until it is decided whether the owner has paid for the work described in the claim of lien. The creation of the contingent payment bond has made it more difficult for an exemptory bond (F.S. 713.23) surety to claim benefit of the contingent payment clause. The argument exists that if you wanted to have contingent payment be a valid defense then you should have used the F.S.713.245 bond that was created for this purpose.

Where there are no lien rights, but instead there are bond rights legislated as a substitute for lien rights (such as Miller Act bonds or state Little Miller Act bonds) the liability for payment to the subcontractors rests with the contractor and its surety (and ultimately the indemnitors). This exposure by a surety for payment under the bond despite owner payment appears less equitable or fair than the situation where the subcontractor can pursue payment at the source of nonpayment, the owner, by lien enforcement. Where the payment bond is a substitute for lien rights, or where states do not recognize a contingent payment clause as a defense to a payment bond claim, the surety and its bond principal contractor have liability for payment to the subcontractors.[35] The ability to manage the risk of owner nonpayment by use of a subcontract contingent payment clause is lost. This places the risk of owner nonpayment squarely on the shoulders of the contractor and its surety without funding from the owner.

Is it fair and equitable to the contractor to be forced to shoulder the risk of owner nonpayment without the ability to pass that risk through to subs? Some would argue that the contractor has the better ability to make the credit judgment on whether to take a job or not. Thus if the decision was made to take the job, perhaps the contractor should suffer the owner nonpayment risk. On the other side of the coin the same argument can be made in some cases for the contractor as is made on behalf of subcontractors: competition forces the contractor to take jobs whether or not it has the capital to withstand owner nonpayment. Not all contractors are well capitalized.

**Appropriate Legislation?** When social legislation is considered to "protect the little guy" that situation is often fraught with problems. How do you define "the little guy?" Once you define "the little guy" what protection do you give him? While one could argue that a subcontractor who cannot meet payroll without prompt payment is not the type of business that should shoulder owner nonpayment, not all contractors are large firms either. Why is it wrong for the smaller contractor to manage the business risk of owner nonpayment with subcontract contingent payment clauses?

It would appear that where the subcontractor can pursue lien rights despite a contingent payment clause, the alternative lien remedy is particularly equitable in that it allows the subcontractor to pursue payment from the

ultimate recipient of the work despite the prohibition of recovery from the contractor (middleman) under the contract. Florida has a somewhat unique law prescribing lien enforcement that allows a personal money judgment against a contractor by an unpaid subcontractor lienor.[36] If the owner has received the work and has not paid for the work, then the owner is the party that should be pursued for payment.

The use of a statutory contingent payment bond for private work in Florida appears to be an acceptable solution to the risk of owner nonpayment where applicable law authorizes the use of such a bond.[37]

One area that may be particularly appropriate for legislation to protect "the little guy" subcontractor would be where the subcontractor is qualified/certified as a disadvantaged small business entity (DBE). The use of small business entities, where required by prime contract on public work, is seldom more than a minor percentage of the work. Thus if the contractor were obliged to make payment and not use contingent payment clauses with disadvantaged small business entities (by virtue of a statute or ordinance) such a provision may be appropriate to actually protect "the little guy" who cannot withstand a payment contingency. Some local governments have given protection to certified disadvantaged business contractors involved with public contracts by enacting ordinances that require payment to subcontractors within a particular period from the date of billing from the contractor to the owner.[38] A contract that is at variance with the ordinance would be a violation of the disadvantaged business enterprise ordinance. Such a contract provision would be unenforceable. There could be legislated a certification of a DBE for unenforceability of contingent payment clauses on private work. ■

*Larry Leiby, Esq. is a mediator, arbitrator and special master with JAMS, specializing in construction and business commercial matters. He founded and chaired the Construction Law Committee of the Florida Bar Real Property Section from 1976 to 1994. He can be reached at lleiby@jamsadr.com.*

[1] Peacock Construction Co. v. Modern Air Conditioning, Inc., 353 So.2d 840, 841 (Fla.1977).

[2] Two years was reasonable - Moore v. Continental Cas. Co., 366 F.Supp. 954, 956- 57 (W.D.Okla.1973); more than three years was reasonable - Avon Brothers, Inc. v. Tom Martin Construction Company, Inc., 2000 WL 34241102 (N.J. App. 2000); Midland Engineering Co. v. John A. Hall Constr. Co., 398 F.Supp.981 (U.S.D.C. Dist. Ind. 1975).

[3] Thos. J. Dyer Co. v. Bishop Intern. Engineering Co., 303 F.2d 655 (6th Cir. 1962); Statesville Roofing & Heating Co., Inc. v. Duncan, 702 F.Supp. 118 (U.S.D.C. W.D.N.C. 1988). But see Nalley v. Harris, 176 Ga.App. 553, 336 S.E.2d 822 (Ga.App. 1985) where a condition precedent was determined to be performed by exercising good faith efforts to achieve the contingency).

[4] Harris Air Systems, Inc. v. Gentrac, Inc., 578 So.2d 879 (Fla. 1st DCA 1991).

[5] Bentley Const. Development & Engineering Inc. v. All Phase Elec. & Mntnce. Inc., 562 So.2d 800 (Fla. 2nd DCA 1990).

[6] The clause under discussion is the one where the contractor must receive payment for the work of the subcontractor. There may well be other conditions precedent to payment, but receipt of payment by the contractor is the focus of this article. See 17B C.J.S. Contracts §579.

[7] Nicholas Acoustics & Specialty Co. v. H & M Const. Co., Inc., 695 F.2d 839 (5th Cir. 1983); OBS Co., Inc. v. Pace Const. Corp., 558 So.2d 404 (Fla. 1990); Power & Pollution Services, Inc. v. Suburban Power Piping Corp., 598 N.E.2d 69 (Ohio App. 1991); Koch v. Construction Technology, Inc., 924 S.W.2d 68 (Tenn. 1996).

[8] R.N. Robinson & Son, Inc. v. Ground Imp. Techniques, 31 F.Supp.2d 881 (U.S.D.C. D. Co. 1998); Pilar Services, Inc. v. NCI Information Systems, Inc., 569 F.Supp.2d 563 (U.S.D.C. E.D.Va.2008); Centex Constr. v. Acstar Ins. Co., 448 F.Supp.2d 697, 707 (U.S.D.C. E.D.Va. 2006); Raymond, Colesar, Glaspy & Huss, P.C. v. Allied, 961 F.2d 489 (4th Cir. 1992).

[9] Even in states that have not found contingent payment clauses to be violative of public policy.

[10] Fla. Stats. 713.06(1) and 713.08(1)(g) (2011).

[11] Fla. Stat. 713.08(1)(5) (2011).

[12] Fla. Stat. 713.30 (1997).

[13] Fla. Stats. 713.06 and 713.08 (1997).

[14] Fla. Stat. 713.06 (1997).

[15] Coordinated Constructors v. Florida Fill, Inc., 387 So.2d 1006 (Fla. 3rd DCA 1980).

[16] The Florida Supreme Court has held that where a) a prime contract requires the contractor to pay the subcontractors before the contractor is entitled to payment, b) there is a contingent payment clause in the subcontract, and c) the prime contract is incorporated by reference into the subcontract, then the conflicting payment terms render the contingent payment clause ambiguous. An ambiguous payment clause will be interpreted as being a time of payment clause. See OBS Co. v, Pace Constr. 558 So.2d 404 (Fla. 1990).

[17] Robert F. Wilson, Inc. v. Post-Tensioned Structures, Inc., 522 So.2d 79 (Fla. 3rd DCA 1988); J.J. Shane, Inc. v. Aetna Cas. & Sur. Co., 723 So.2d 302 (Fla. 3rd DCA 1998); DEC Elec., Inc. v. Raphael Const. Corp., 538 So.2d 963, 965 (Fla. 4th DCA 1989); Berkel & Co. Contractors v. Christman Co., 533 N.W.2d 838 (Mich. App. 1995); Able Demolition v. Pontiac, 739 N.W.2d 696 (Mich. App. 2007); Fixture Specialists, Inc. v. Global Const., LLC, Slip Copy, 2009 WL 904031 (U.S.D.C. D. N.J. 2009).

[18] This does not speak well of the business acumen of the trade contractor since courts have held that contingent payment language must be clear.

[19] See "Payment Provisions in Construction Contracts and Construction Trust Fund Statutes: A Fifty State Survey", Robert Carney and Adam Cizek, Construction Law 5 (2004).

[20] In the experience of the author, as a practical matter subcontractors cannot put in their price any item that will make their price less competitive, with the possible exception of a small general contingency. Finding a cost item in a subcontractor estimate for "financing owner nonpayment" would be rare, and difficult to quantify if actually estimated. Would you estimate a year's worth of interest, assuming that the subcontractor could get a loan?

[21] Vernon's Texas Code Annotated, Bus. & C. § 56.053 (2009).

[22] Cox v. CSX Intermodal, Inc., 732 So.2d 1092 (Fla. 1st DCA 1999); County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997); Gulf American Land Corp. v. Wain, 166 So.2d 763 (Fla. 3rd DCA 1964); Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc., 966 So.2d 1 (Fla. 2nd DCA 2007).

[23] Jones v. H.N.S. Management Co., 92 Conn. App. 223, 227, 883 A.2d 831 (2005).

[24] 74 Am.Jur.2d Suretyship §88; Wellington Power Corp. v. CNA Surety Corp., 217 W.Va. 33, 614 S.E.2d 680 (W.Va. 2005); Fixture Specialists, Inc. v. Global Const., LLC, Slip Copy, 2009 WL 904031 (U.S.D.C. Dist. N.J. 2009); In re Kemper Ins. Cos., 819 NE2d 491 (Ind. Ct. App. 2004); Wellington Power Corp. v. CNA Sur. Corp., 217 W.Va. 33, 614 S.E.2d 680 (W.Va. 2005) (Note that this was a public project with a statutory payment bond.); Star Contracting Corp. v. Manway Const. Co., Inc. 32 Conn. Supp. 64, 337 A.2d 669 (Conn. Super. 1973); Wellington Power Corp. v. CNA Surety Corp., 217 W.Va. 33, 614 S.E.2d 680 (W.Va. 2005).

[25] Culligan Corp. v. Transamerica Ins. Co., 580 F.2d 251 (Ind. APP.1978): U.S. ex rel. Straightline Corp. v. American Casualty Co. of Reading, PA, Not Reported in F.Supp.2d, 2007 WL 2050323 (U.S.D.C. N.D.W.Va. 2007).

[26] See 11 C.J.S. Bonds §44.

[27] West Fair Electric Contractors v. Aetna Cas. & Surety Co., 87 N.Y.2d 148, 661 N.E.2d 967, 638 N.Y.S.2d 394 (N.Y. 1995); Bonavist v. Inner City Carpentry, Inc., 244 F.Supp.2d 154 (E.D. N.Y. 2003); Capitol Steel Fabricators, Inc. v. Mega Construction Co., Inc., 58 Cal.App.4th 1049, 68 Cal.Rptr.2d 672(Cal. App. 1997).

[28] Also a substitute for lien rights that would exist if the improvements were made to private property. See United States ex rel Walton Tech., Inc. v. Weststar Engineering, Inc., 290 F.3d 1199, 1209 (9th Cir.2002); United States ex rel. McKenney's, Inc. v. Governmentt Tech. Services, LLC, 531 F.Supp.2d 1375, 1379 (N.D.Ga.2008); U.S. ex rel. Straightline Corp. v. American Casualty Co. of Reading, PA, Not Reported in F.Supp.2d, 2007 WL 2050323 (U.S.D.C. N.D.W.Va. 2007); U.S. ex rel. J.H. Lynch & Sons, Inc. v. Travelers Cas. & Sur. Co. of America, --- F.Supp.2d ----, 2011 WL 1532142 (U.S.D.C. Dist. R.I. 2011).

[29] Aetna Cas. & Sur. Co. v. Warren Bros. Co., 355 So.2d 785 (Fla. 1978); G.E.L. Recycling, Inc. v. Atlantic Environmental, Inc., 821 So.2d 431 (Fla. 5th DCA 2002).

[30] Team Land Development, Inc. v. Anzac Contractors, Inc., 811 So.2d 698 (Fla. 3rd DCA 2002).

[31] Fla. Stat. 713.245 (originally enacted in 1990, current version modified as of 2001).

[32] Fla. Stat. 713.23 (2005).

[33] Enacted shortly after the Florida Supreme Court decided OBS Co. v, Pace Constr. 558 So.2d 404 (Fla. 1990).

[34] Fla. Stat. 713.245 (2001).

[35] One situation that has not yet been decided by Florida courts would be where both the subcontract and the payment bond contain the contingent payment obligation. That could not occur in a F.S. 713.23 bond or 255.05 bond after October 1, 2012.

[36] Fla. Stat. 85.021 (1995).

[37] One issue with this procedure is that there are so many details for compliance that there are frequent missteps. When all the details of the statute are not followed then the bond is considered an unconditional bond. See North American Specialty Ins. Co. v. Hughes Supply, Inc., 705 So.2d 616 (Fla. 4th DCA 1998).

[38] E.g., Section 10-33.02, Miami Dade County Code of Ordinances (2010).