

STATE PUBLIC WORKS BOND CLAIM
WASHINGTON (LITTLE MILLER ACT) BOND CLAIM

1. Pre-claim Notice

<u>When</u>	<u>Who</u>	<u>Action Required</u>
Within 10 days of first supplying materials or equipment. There is <u>no</u> relation back. Possible exception: supplying on an open account and not under a fixed price contract.	All subcontractors, and suppliers on Washington Public Works Projects and who are <u>not</u> contracting directly with the prime contractor.	Provide preclaim notice of payment bond claim to the prime contractor by certified mail.

2. The Claim

<u>When</u>	<u>Who</u>	<u>Action Required</u>
Within 30 days after acceptance* (<u>not</u> completion) of the work of improvement by the public body.	All subcontractors, and suppliers on Washington Public Works Projects.**	Notice of the Claim must be served via certified mail upon the public body that let the contract.

3. Post-Claim Notice

NONE

4. Action

<u>When</u>	<u>Who</u>	<u>Action Required</u>
Within four (4) months after serving the notice of payment bond claim. The limitations period will either be set forth in the bond or it will be three, four or six years after the notice of bond claim is served. In order to be consistent with the retainage lien claim foreclosure limitation, claimants may want to file their action within the four month period.	All claimants.	File suit to foreclose the payment bond claim.

* To avoid early acceptance by the public body of a portion of the overall work, serve the notice of payment bond claim within thirty (30) days after the delivery of materials or equipment is complete.

** A material or equipment supplier will not be able to claim against the Washington public works bond unless it supplies to a "subcontractor." There is a two-part test to define who is a "subcontractor." These tests are found in Farwest Steel Corp. v. Mainline Metal Works, Inc., 48 Wn. App. 719 (1987).

First test: Did the "subcontractor" perform work on the project site? If so, then it should be a "subcontractor."

Second test: Does the "subcontractor's" subcontract with the prime contractor account for at least ten percent (10%) of the owner/prime contractor contract? If so, then the "subcontractor" status may be established.

It may be unclear whether the first or second test will be applied in a given situation. If only the second test is used, then many suppliers supplying to "subcontractors" may not be able to claim against the Washington public works bond. The bottom line is that each case will turn on its own facts.

Since Farwest Steel, three cases have consistently held that a supplier to a fabricator providing little or no on-site work has standing to assert a bond claim on a federal project. See U.S. ex rel. Conveyor Rental & Sales Co. v. Aetna Casualty & Surety Co., 781 F.2d 488 (9th Cir. 1992); U.S. ex rel. Tacoma Steel Supply, Inc. v. M. A. Mortenson Co. and Federal Insurance Co., U.S. District Court, Western District of Washington at Tacoma, Case No. C96-5833FDB (April, 1997); and U.S. ex rel. ISSC Inc., dba Seaport Steel v. Cree Construction Co., Inc., U.S. District Court, Western District of Washington at Seattle, Case No. C94-836C.

Given that the Farwest Steel court relied heavily on then existing federal authority, and the fact that subsequent federal authority is inconsistent with Farwest Steel, it may be that a Washington appellate court would now find that a supplier furnishing to a fabricator or contractor having a small portion of the overall work has standing to make payment bond and retainage liens claims on Washington state public works projects. Nevertheless, at this point, it is unclear whether such standing exists.

The key is determining whether the fabricator has a subcontractor relationship or supplier relationship with the prime contractor. If it is a subcontractor relationship, the supplier to the fabricator may have bond rights. If it is a supplier relationship, the supplier to the fabricator probably does not have bond rights. The Conveyor Rental court listed these thirteen (13) factors weighing in favor of a subcontractor relationship:

- (1) The product supplied is customer fabricated;
- (2) The product supplied is a complex integrated system;
- (3) A close financial interrelationship exists between the companies;
- (4) A continuing relationship exists with the prime contractor as evidenced by either the requirement of shop drawing approval by the prime contractor or the requirement that the supplier's representative be on the job site;
- (5) The supplier is required to perform on site;

- (6) There is a contract for labor in addition to materials;
- (7) The term "subcontractor" is used in the agreement;
- (8) The material supplied did not come from existing inventory;
- (9) The supplier's contract constitutes a substantial portion of the prime contract;
- (10) The supplier is required to furnish all the material of a particular type;
- (11) The supplier is required to post a performance bond;
- (12) There is a backcharge for the cost of correcting the supplier's mistakes; and
- (13) There is a system of progressive or proportionate fee payment.

The Conveyor Rental court listed the following five (5) factors when weighing in favor of a supplier relationship:

- (1) A purchase order form is used by the parties;
- (2) The materials come from pre-existing inventory;
- (3) The items supplied are relatively simple in nature;
- (4) The contract is a small percentage of the total construction costs; and
- (5) Sales tax is included in the contract price.

In reaching its determination, the court will likely apply a balancing test weighing factors that tend to favor a subcontractor relationship against factors that tend to favor a supplier relationship. Not all thirteen (13) factors in favor of a subcontractor relationship must exist. Likewise, not all five (5) factors indicating a supplier relationship must exist. Significantly, the contract between the prime contractor and fabricator need not call for on site performance by the fabricator to find a subcontractor relationship. In addition, the use of the term "subcontractor" in the agreement is not necessary to find a subcontractor relationship.

Practical Tip: In determining whether to provide materials or rental equipment to a fabricator or subcontractor having a small portion of the overall work, evaluate and determine the existence of the above thirteen (13) subcontractor relationship factors and five (5) supplier relationship factors. The more subcontractor relationship factors and the less supplier relationship factors that exist, the more likely you will have bond rights on federal and possibly even state public works projects.

To help avoid this unclear issue, consider requiring your customer to post a payment bond for you to claim against. In addition, consider requiring your customer and the prime contractor to sign a joint check agreement with you under which all parties agree that for purposes of public works claims, you are providing materials at the direct request of the prime contractor and that the prime contractor and your customer have a subcontractor relationship and not a supplier relationship.