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SOME PROBLEMS OF COVERAGE UNDER PUBLIC WORKS BONDS.

During the last twenty-five years, and especially during the last decade, construction work of every conceivable nature has been undertaken and has proceeded at a rapid pace. The growth of the Nation's network of improved highways has been little short of phenomenal. The erection of public works has taxed the ingenuity and skill of architect and artisan. The construction of public and private works has long been a business of first magnitude. Billions of dollars have been spent in the greatest building boom this Nation has ever experienced.

The construction of private works throughout the Nation is now practically at a standstill. The county, municipal and state governments along with the national government, however, are extending their efforts to the limit in order to furnish employment to men who otherwise must remain without work. Public as well as private interests are usually involved. Many laws have been enacted and much litigation has ensued. Owners, contractors, subcontractors, laborers and materialmen have sought protection each from the other, and all, as the facts merited, from whatever surety that happened to be involved. The wide-awake private owner has, as a general rule, required his contractor to give bond conditioned to protect him from liens of subcontractors, materialmen and laborers. The less alert have not.

Materialmen and laborers, when aware of their rights, have been as to private construction, in a large measure, protected under the mechanics' and materialmen's lien statutes. Such has not been and is not the case, however, as to public construction—public buildings or other public property devoted to a public use not being subject to mechanics' or materialmen's liens.¹ This fact has led the federal government and almost all of the state governments to enact legislation for the protection of those who furnish materials, supplies or labor in the construction, improvement or repair of any public building, road or other public work. These statutes require the contractor to give a surety bond for the protection of such persons. Some of these

¹ 40 C. J. 57.

statutes are conditioned to protect any person supplying the contractor with labor, materials, feedstuffs or supplies; others enumerate in greater detail the coverage; and some, like our federal statute², are conditioned to pay all persons supplying the contractor "with labor and materials in the prosecution of the work provided for" in the contract. Some of the state statutes have been copied from the federal statutes, and where such is the case, the construction given the federal statutes by the federal courts prior to the enactment of such statutes, will be followed by the state courts in construing their respective statutes.³ The statutes are written into and become a part of the bond.⁴ "The obligors of statutory contracts and suretyship are presumed to have known the provisions of the statute entering therein, and to have contracted with reference thereto, and with such knowledge and intention (are) bound by the undertaking according to the law".⁵

There are a great number of legal principles involved in actions against sureties on construction bonds and a discussion of the same would carry this article to an unwarranted length. The writer will address himself primarily to the inquiries as to "What are materials, feedstuffs and supplies?" and as to "What is labor?" From the standpoint of the surety's liability upon public works bonds, and attempt will not be made to classify all such as clearly fall within the classifications. The practitioner is naturally more concerned where there is a doubt as to coverage than where such doubt does not exist. In dealing with this class of bonds he will, in practically every case, be confronted with the question of coverage more often than any other question.

Even in the absence of statutes public works bonds are liberally construed. However, "the liability against the surety is measured by the terms of his contract".⁶ The terms "labor," "material", and the like have been variously defined by the several courts. The decisions are in conflict in spite of the similarity of statutes.

² United States Code Annotated, Title 40, Sec. 270.

³ *State v. Southern Surety Co.*, 127 So. 805, 221 Ala. 113.

⁴ *County of Multnomah v. United States Fidelity & Guaranty Co.*, 180 Pac. 104, 92 Or. 146.

⁵ *American Book Company v. The State*, 113 So. 592, 216 Ala. 367.

⁶ *Standard Oil Co. v. National Surety Co.*, 29 S. W. (2nd) 29, 234 Ky. 764.

The following have been held to be covered under the terms of the public works bonds given pursuant to the statutes:

Bonus to contractor,⁷ board and lodging when absolutely essential as in a wilderness⁸ or when it is deducted from or constitutes a portion of the pay of the employee,⁹ cartage,¹⁰ clothing (small articles of) on a showing that laborers could not have been kept together in camp if not so supplied,¹¹ coal to generate power in the contractor's machinery,¹² demurrage,¹³ electric power furnished to a rock crusher and cable cars,¹⁴ explosives,¹⁵ feed for horses of contractor¹⁶ or of subcontractor,¹⁷ ferriage,¹⁸ foreman's services,¹⁹ freight,²⁰ gasoline used in trucks of the contractor or subcontractor,²¹ groceries furnished to the boarding house of the contractor in a remote district²² or to boarding camps of the subcontractor²³ or to workmen on the order of the contractor,²⁴ haulage,²⁵ illuminating oil for the contractor's camp,²⁶ labor at quarry fifty miles away from the job²⁷ or labor used in making repairs on trucks haul-

⁷ *Stowell v. Clark*, 118 So. 370, 152 Miss. 32.

⁸ *McPhee v. United States*, 174 Pac. 808, 64 Colo. 421.

⁹ *Franzen v. Southern Surety Co.*, 246 Pac. 30, 35 Wyo. 15.

¹⁰ *Title Guaranty & Trust Co. v. Crane Co.*, 55 L. Ed. 72.

¹¹ *Hansen v. Remer*, 200 N. W. 839, 160 Minn. 453.

¹² *Franzen v. Southern Surety Co.*, 246 Pac. 30, 35 Wyo. 15; *Smiley v. The State*, 110 N. E. 222, 60 Ind. A. 507.

¹³ *United States v. Hegeman*, 54 Atl. 344, 204 Pa. 438; *United States v. Columbus Circle Const. Co.*, 284 Fed. 155 (Dist. Ct. N. J.).

¹⁴ *Town of Cornelius v. Lumpton*, 128 S. E. 334, 189 N. C. 714.

¹⁵ *Franzen v. Southern Surety Co.*, 246 Pac. 30, 35 Wyo. 15.

¹⁶ *Supra* (15).

¹⁷ *Pacific Wood & Coal Co. v. Oswald*, 178 Pac. 854, 179 Cal. 712.

¹⁸ *Union Indemnity Co. v. The State*, 114 So. 415, 217 Ala. 35.

¹⁹ *Silver v. Harriss*, 115 So. 376, 165 La. 83.

²⁰ *United States v. Columbus Circle Const. Co.*, 284 Fed. 155 (Dist. Ct. N. J.).

²¹ *West v. Detroit Fidelity & Surety Co.*, 225 N. W. 673, 118 Nebr. 544; *Associated Oil Co. v. Commary-Peterson Co.*, 163 Pac. 702, 32 Cal. A. 582; *Smith v. Osting*, 203 N. W. 131, 230 Mich. 1; *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279.

²² *Brogan v. National Surety Co.*, 246 U. S. 257, 62 L. Ed. 703, L. R. A. 1918 D. 776.

²³ *Clatsop County v. Fidelity & Deposit Co. of Md.*, 189 Pac. 207, 96 Or. 2.

²⁴ *West v. Detroit Fidelity & Surety Co.*, 225 N. W. 673, 118 Nebr. 544.

²⁵ *Franzen v. Southern Surety Co.*, 246 Pac. 30, 35 Wyo. 15; *Union Indemnity Co. v. State*, 114 So. 415, 217 Ala. 35.

²⁶ *Franzen v. Southern Surety Co.*, 246 Pa. 30, 35 Wyo. 15.

²⁷ *United States v. Bartlett*, 231 U. S. 237, 58 L. Ed. 200.

ing gravel at a stated price per yard,²⁸ liquidated damages on account of delay in completion of contract²⁹ lubricants,³⁰ lumber used for forms,³¹ merchandise,³² money loaned by county to the contractor at the instance of the surety and contractor,³³ patterns furnished to the molding department of the builder,³⁴ powder,³⁵ profit of subcontractor,³⁶ rental of equipment³⁷ or of horses,³⁸ repairs when incidental,³⁹ scaffolding,⁴⁰ supplies and repairs for contractor's plant to be presently consumed⁴¹ or supplies furnished foreman's wife operating a cook shack upon the order of the contractor where the amount of the same is deducted from the foreman's wages,⁴² timekeeper's services,⁴³ tobacco⁴⁴ where laborers could not otherwise have been kept together,⁴⁵ towage.⁴⁶

The following have been held not to be covered :

Assigned claims when no payment has been made for the same,⁴⁷ automobile parts used in repairing the contractor's trucks,⁴⁸ board unless the cost of the same is deducted from or

²⁸ *West v. Detroit Fidelity & Surety Co.*, 225 N. W. 673, 118 Nebr. 544.

²⁹ *Maryland Casualty Co. v. Ballard Co.*, 289 S. W. 316, 217 Ky. 343.

³⁰ *Franzen v. Southern Surety Co.*, 246 Pac. 30, 35 Wyo. 15, 46 A. L. R. 508.

³¹ *Aderholt v. Condon, et al.*, 128 S. E. 334, 189 N. C. 748; *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279.

³² 46 A. L. R. 512.

³³ *Maryland Casualty Co. v. Ballard Co.*, 289 S. W. 316, 217 Ky. 343.

³⁴ *Title Guaranty & Trust Co. v. Crane & Co.*, 55 Law Ed. 72; *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th Cir.), L. R. A. 1917 A. 336.

³⁵ *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th Cir.), L. R. A. 1917 A. 336; *Bricker v. Rollins*, 173 Pac. 592, 178 Cal. 347.

³⁶ *Burton v. Frank A. Seifert Plastic Relief Co.*, 61 S. E. 933, 108 Va. 338.

³⁷ *Illinois Surety Co. v. Jno. Davis Co.*, 244 U. S. 376, 61 Law Ed. 1206; *Union Indemnity Co. v. State*, 118 So. 148, 218 Ala. 132, 44 A. L. R. 381, 46 A. L. R. 506.

³⁸ *Dawson v. Northwestern Const. Co.*, 163 N. W. 772, 137 Minn. 352.

³⁹ 46 A. L. R. 505.

⁴⁰ *Union Indemnity Co. v. State*, 114 So. 415, 217 Ala. 35.

⁴¹ *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th Cir.), 46 A. L. R. 505.

⁴² *West v. Detroit Fidelity & Surety Co.*, 225 N. W. 673, 118 Nebr. 544.

⁴³ *Miller v. Bonner*, 111 So. 776, 163 La. 332.

⁴⁴ *Union Indemnity Co. v. Handley*, 124 So. 876, 220 Ala. 292.

⁴⁵ *Hansen v. Remer*, 200 N. W. 839, 160 Minn. 453.

⁴⁶ *Title Guaranty & Trust Co. v. Crane & Co.*, 55 L. Ed. 72.

⁴⁷ *Miller v. Bonner*, 111 So. 776, 163 La. 332.

⁴⁸ *Montgomery v. Southern Surety Co.*, 162 N. E. 31 (Ind. A.).

constitutes a portion of the pay of the employee⁴⁹ or board furnished to subcontractor's employees where the same is not indispensable to the work,⁵⁰ camp equipment,⁵¹ cash used to purchase pay checks upon the order of the contractor in the absence of an assignment,⁵² clothing,⁵³ commissary clerk's wages,⁵⁴ demurrage,⁵⁵ depreciation of steam shovel⁵⁶ or of grading equipment,⁵⁷ equipment,⁵⁸ freight⁵⁹ or freight upon return of leased equipment⁶⁰ or upon equipment or machinery returned for repairs on account of an accident,⁶¹ furniture and household effects supplied to the contractor to maintain his camp,⁶² gasoline and oil to contractor⁶³ or to subcontractor,⁶⁴ harness,⁶⁵ horses killed,⁶⁶ loans of money without assignment of claims⁶⁷ or loans by a bank to the contractor with an assignment from the contractor, the surety having no notice thereof⁶⁸ or advances of money by the bank to pay for labor or

⁴⁹ *Franzen v. Southern Surety Company*, 246 Pac. 30, 35 Wyo. 15.

⁵⁰ *Delaware Dredging Co. v. Tucker Stevedoring Co.*, 25 Fed. (2nd) 44 (C. C. A. 3rd Cir.).

⁵¹ *United States Fidelity & Guaranty Co. v. Yazoo County*, 110 So. 780 (Miss.).

⁵² *Carter County v. Olive Hill Const. Co.*, 228 S. W. 720, 143 Tenn. 649.

⁵³ 46 A. L. R. 511.

⁵⁴ *Southern Const. Co. v. Halliburton*, 258 S. W. 409, 149 Tenn. 319.

⁵⁵ *Mandel v. United States*, 4 Fed. (2nd) 629 (C. C. A. 3rd Cir.).

⁵⁶ *State v. National Surety Co.*, 128 Atl. 916, 149 Md. 221.

⁵⁷ *Nebr. Culvert Mfg. Co. v. Freeman*, 198 N. W. 7, 197 Ia. 730.

⁵⁸ *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279.

⁵⁹ *Mandel v. United States*, 4 Fed. (2nd) 629 (C. C. A. 3rd Cir.); *United States v. Hyatt*, 92 Fed. 442 (C. C. A. 5th Cir.); *Wisconsin Brick Co. v. National Surety Co.*, 160 N. W. 1044, 164 Wis. 585, L. R. A. 1917 C. 912.

⁶⁰ *Dawson v. Northwestern Const. Co.*, 163 N. W. 772, 137 Minn. 352.

⁶¹ *Union Indemnity Co. v. State*, 118 So. 148, 218 Ala. 132.

⁶² *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279; *State v. Smith*, 119 So. 56, 167 La. 301.

⁶³ *State v. Smith*, 119 So. 63, 167 La. 301; *United States Fidelity & Guaranty Co. v. Yazoo County*, 110 So. 780 (Miss.).

⁶⁴ *Pierce Oil Corp. v. Parker*, 271 S. W. 24, 168 Ark. 400.

⁶⁵ *United States Fidelity & Guaranty Co. v. Yazoo County*, 110 So. 780 (Miss.).

⁶⁶ *Dawson v. Northwestern Const. Co.*, 163 N. W. 772, 137 Minn. 352.

⁶⁷ *United States v. Rundle*, 107 Fed. 227 (C. C. A. 9th Cir.); *Franzen v. Southern Surety Co.*, 246 Pac. 30, 35 Wyo. 15, 46 A. L. R. 496, 504; *Sweet v. Fresno Hotel Co.*, 164 Pac. 788, 174 Cal. 789, Ann. Cas. 1918 D. 346, 352; *Miller v. Bonner*, 111 So. 776, 163 La. 332; *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279; *Oliver Const. Co. v. Crawford*, 107 So. 897, 142 Miss. 490; *State v. United States Fidelity & Guaranty Co.*, 265 Pac. 775, 125 Or. 13.

⁶⁸ *Maryland Casualty Co. v. DuLaney Lumber Co.*, 23 Fed. (2nd) 378 (C. C. A. 5th Cir.).

material,⁶⁹ lubricants,⁷⁰ machinery and appliances constituting a part of the contractor's permanent equipment⁷¹ or to facilitate the contractor's work,⁷² merchandise furnished to a commissary operated by a contractor for profit and where sales are made to others than employees,⁷³ piling for temporary structures,⁷⁴ rent of camp site,⁷⁵ rental of equipment,⁷⁶ rental of grading equipment⁷⁷ or of tractors⁷⁸ or of steam shovel to a subcontractor,⁷⁹ repairs of a permanent nature to trucks owned by a contractor⁸⁰ or by drivers⁸¹ or extraordinary repairs necessitated by accident⁸² or repairs to subcontractor's machinery⁸³ or any repairs whatever,⁸⁴ replacement of machinery in the absence of proof that new parts were consumed on the job,⁸⁵ services of superintendent or foreman of subcontractor,⁸⁶ supplies and repairs constituting additions to contractor's plant or intended to maintain existing outfit in as good an order as possible against wear and depreciation,⁸⁷ tires and tubes for automobiles or trucks⁸⁸ not consumed on the job,⁸⁹ tobacco and

⁶⁹*First National Bank of Chisolm v. O'Neil*, 223 N. W. 298, 176 Minn. 258.

⁷⁰ 46 A. L. R. 507.

⁷¹ *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th Cir.), L. R. A. 1917 A. 336; *Clifton v. Norden*, 226 N. W. 940, 178 Minn. 288; *Miller v. American Bonding Co.*, 158 N. W. 432, 133 Minn. 336.

⁷² *Commonwealth v. National Surety Co.*, 97 Atl. 1034, 253 Pa. 5.

⁷³ *Watkins v. U. S. Fidelity & Guaranty Co.*, 103 So. 224, 138 Miss. 388; *Carter County v. Olive Hill Const. Co.*, 228 S. W. 720, 143 Tenn. 649; *Silver v. Harriss*, 115 So. 376, 165 La. 83.

⁷⁴ *State v. Smith*, 119 So. 56, 167 La. 301.

⁷⁵ *Southern Const. Co. v. Halliburton*, 258 S. W. 409, 149 Tenn. 319.

⁷⁶ 44 A. L. R. 383; 46 A. L. R. 506.

⁷⁷ *Nebraska Culvert & Mfg. Co. v. Freeman*, 198 N. W. 7, 197 Ia. 730.

⁷⁸ *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279.

⁷⁹ *State v. National Surety Company*, 128 Atl. 916, 148 Md. 221.

⁸⁰ *Montgomery v. Southern Surety Co.*, 162 N. E. 31 (Ind. A.).

⁸¹ *West v. Detroit Fidelity & Surety Co.*, 225 N. W. 673, 118 Nebr. 544.

⁸² *Union Indemnity Co. v. The State*, 118 So. 148, 218 Ala. 132.

⁸³ *Fitzgerald v. Neal*, 231 Pac. 645, 113 Or. 103.

⁸⁴ *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279.

⁸⁵ *Clifton v. Norden*, 226 N. W. 940, 178 Minn. 288.

⁸⁶ *Sou. Const. Co. v. Halliburton*, 258 S. W. 409, 149 Tenn. 319; *Missouri State Highway Commission v. Coopers Const. Service Co.*, 268 S. W. 701 (Springfield Ct. of A.).

⁸⁷ *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th Cir.).

⁸⁸ *McElrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279.

⁸⁹ *Clifton v. Norden*, 226 N. W. 940, 178 Minn. 288.

cigarettes,⁹⁰ tools sold to contractor⁹¹ or to subcontractor⁹² unless consumed on the job,⁹³ traveling expenses of foreman⁹⁴ or the cost of operating an automobile of the superintendent of a subcontractor,⁹⁵ trucks⁹⁶ where purchased new though the price was guaranteed by the contractor,⁹⁷ wagons.⁹⁸

Numerous other cases could be cited dealing with almost numberless items. In some instances under the public works statute there have been attempts to fix liability upon the surety for torts of the contractor, his subcontractor or their employees. In the case of *Schisel v. Marvill*⁹⁹ it was held that there was no liability on account of an injury to a traveler in an automobile accident caused by the negligence of an employee of the contractor. In *Redditt v. Wall*,¹⁰⁰ the court held that a surety on a contractor's bond was not liable to a traveler for injuries sustained by him on account of the negligence of the contractor in permitting a road to get in bad repair and in an unsafe condition. While in the case of *Moss v. Rowlett*¹⁰¹ it was held that a traveler could not recover for an injury sustained by him due to the negligence of the contractor in permitting a defective culvert. Negligent blasting by the contractor was held not to be covered in the case of *Kansas City v. O'Connell*,¹⁰² and to like effect was the holding in the case of *United States v. C. A. Rifle Company*.¹⁰³ Nor is the surety liable for fire negligently.

⁹⁰ *Clatsop Co. v. Feldchaw*, 196 Pac. 379, 99 Or. 680; *McEtrath & Rogers v. Kimmons & Sons*, 112 So. 164, 147 Miss. 279; *Overman & Co. v. Maryland Casualty Co.*, 136 S. E. 250, 193 N. C. 86; *March v. Butler*, 220 N. W. 461, 53 S. D. 170.

⁹¹ *United States v. Morgan*, 111 Fed. 474 (C. C. Me.); *Miller v. American Bonding Co.*, 158 N. W. 432, 133 Minn. 336.

⁹² *Heltzel Steel Form & Iron Co. v. Fidelity & Deposit Co.*, 271 S. W. 325, 168 Ark. 728.

⁹³ *National Surety Co. v. United States*, 228 Fed. 577 (C. C. A. 6th Cir.), L. R. A. 1917 A. 336.

⁹⁴ *Silver v. Harriss*, 115 So. 376, 165 La. 83.

⁹⁵ *Southern Const. Co. v. Halliburton*, 258 S. W. 409, 149 Tenn. 319.

⁹⁶ *U. S. Fidelity & Guaranty Co. v. Yazoo County*, 110 So. 780, (Miss.).

⁹⁷ *Clifton v. Norden*, 226 N. W. 940, 178 Minn. 288; *West v. Detroit Fidelity & Trust Co.*, 225 N. W. 673, 118 Nebr. 544.

⁹⁸ *Supra* (96).

⁹⁹ 197 N. W. 662, 198 Ia. 725.

¹⁰⁰ 55 So. 45 (Miss.), 45 L. R. A. (N. S.) 152.

¹⁰¹ 65 S. W. 153, 358, 112 Ky. 121.

¹⁰² 12 S. W. 791, 99 Mo. 357.

¹⁰³ 247 Fed. 374 (Dist. Ct. of Pa.).

set by the contractor.¹⁰⁴ And the collection of a judgment based on a tort against the contractor was denied in the case of *United States v. Massachusetts Bond Company*.¹⁰⁵ The Supreme Court of Iowa in *Schisel v. Marvill*, supra, with reference to this class of claims aptly ruled that "the liability of a surety under a statutory bond, is measured and defined by the statute; and—a construction of a statute is a construction of the bond."

An examination of the authorities reveals that the terms, "labor," "material," "supplies" and like terms, as employed in public works statutes, "cover a multitude of sins," considered from the viewpoint of the surety.

On account of the similarity of the statutes of the several jurisdictions the numerous cases construing the extent of coverage under public works bonds given pursuant to such statutes, in the absence of controlling decisions in a particular jurisdiction, must be given added consideration and weight in the determination of a surety's liability in such jurisdiction.

The mechanics of the average problem of coverage in a given case, from the standpoint of the time and labor involved in its solution, generally outweighs the same elements involved in the solution of purely legal principles; and the foregoing is submitted with the hope that the same may be of some interest and advantage to those of the profession handling this class of litigation, and with the further hope that their work may, in a small measure, be lightened by the writer's research.

H. H. GROOMS.

¹⁰⁴ *John L. Roper Lumber Co. v. Lewis Lawson*, 143 S. E. 847, 195 N. C. 840, 67 A. L. R. 984.

¹⁰⁵ 18 Fed. (2nd) 203 (C. C. A. 6th Cir.).