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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IA Planning and Administration; IC Transportation Law; IIA Highway and Facility Design; IIIB Materials and Construction

Indemnification and Insurance Requirements for Design Consultants and Contractors on Highway Projects

This report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Darrell W. Harp. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

This paper will be published in a future addendum to *Selected Studies in Highway Law* (SSHL). Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. The next addendum is scheduled for mid 1997. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency.

APPLICATIONS

Insurance and indemnification requirements have played an important part in government contracting for construction. Government transportation agencies should ensure proper insurance coverage for tort liability, and faulty design and construction to minimize charges to the capital or operating budgets when something goes wrong.

This research should be helpful to transportation departments' administrators, design and construction engineers, contracting officers, right-of-way officials, and attorneys. This report should be particularly informative for any official who needs to know how a potential liability claim should be handled, the pitfalls to avoid when buying or accepting insurance coverage, and against which insurance coverage a claim should be filed.

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Indemnification and Insurance Requirements for Consultants and Contractors on Highway Projects

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I. INTRODUCTION

Understanding how state highway departments require contractors and/or consultants to provide insurance, performance and payment bonds, and indemnification in public works construction contracts has become very important. All jurisdictions require highway contractors to provide liability insurance. They also have a statutory or contractual requirement for performance and/or payment bonds, although the type and coverage may vary from state to state. Not every state requires the contractor to indemnify the state highway department; when required, however, the application and limitations of such indemnification vary greatly from state to state. The requirements for liability insurance, errors and omissions insurance, suretyship, and indemnification for design and construction inspection consultants also vary greatly from state to state. Furthermore, with the increased use of consultants in most states, consultant insurance, suretyship, and indemnification have become more important. Prior articles have not dealt in depth with consultant insurance, suretyship, and indemnification; this article will provide much needed information on these topics.

II. SCOPE OF ARTICLE

This article revises the material in the articles "Indemnification and Suretyship in Highway Construction Contracts" and the "Supplement to Indemnification and Suretyship in Highway Construction Contracts" (*Selected Studies in Highway Law*, pages 1231–1293 and pages 1294-S1–1294-S45, respectively) by Dr. Ross D. Netherton, as to the statutory or contractual requirements for performance and payment bonds and the required coverages thereof. Developments not covered in those articles that are relative to bonds and their coverage are discussed in Section III of this article. Problems that have arisen between insurance policies and surety bonds concerning coverage and the impacts thereof are also considered and discussed in Section III, as are the requirements for liability insurance for contractors and consultants.

Insurance requirements for contractors and consultants have, in some respects, similar effects on government agencies: in other respects, the effects are dissimilar. This paper thus presents separate discussions on contractors and consultants. The requirements for consultant's errors and omission insurance and indemnification, which were not covered in previous articles, are discussed. Administrative processes that have been used in consultant recovery attempts are described. Situations in which government agencies have attempted to enforce coverage or recovery from contractors or consultants are further considered in Sections VI and VII.

III. UPDATED AND ADDITIONAL MATERIAL TO THAT FOUND IN PREVIOUS ARTICLES ON INDEMNIFICATION AND SURETYSHIP

A. Insurance Requirements for Contractors

The federal government[1] and the states require their contractors to have general liability insurance, property damage liability insurance, automobile liability insurance, and workers' compensation insurance in connection with their construction projects. The general provisions of the general liability insurance policies are set by the insurance industry, not by an individual government agency, and are therefore quite uniform nationwide. The dollar amount of insurance coverage for insurance that contractors are required to have for their public works projects has been periodically increased, although it varies from state to state. Other types of insurance policies required of contractors, such as protective liability insurance, have been modified from time to time. The modifications tend to not only increase the per incident and aggregate amounts of the policies, but also extend coverage for named persons, entities, items, and situations not previously covered.

The regulations for direct federal contracts[2] and most state contracts require contractors to provide coverage or allow[3] the contractors to pass that responsibility to their subcontractors. A few states do, however, require the contractor to assist, or prohibit a full pass-through of insurance requirements to, subcontractors that are protected entities, such as Disadvantaged Business Enterprises.[4]

There is a difference of opinion in some jurisdictions as to a surety's obligations when the contractor is required to provide insurance to protect the government agency against damages arising out of performance of the contract and is also required to indemnify or hold harmless the agency under another provision of the contract.[5] In *Rupp v. American Crystal Sugar Co.*,[6] the court ruled that the surety was obligated to cover the lack of insurance, but only to the amount of coverage specified in the contract. The court appeared to ignore the contractor's requirement to also "hold harmless" the owner and to require the surety to provide coverage for such "hold harmless" obligation.

The statutes and specifications relative to the contractor's insurance requirements have been upheld in court actions. In *Kinney v. Lisk Co.*,[7] the court ruled that the surety was obligated to see that the contractor fulfilled its obligations for both insurance and indemnification, but limited the extent of the indemnification to conform with an insurance requirement statute. Under a New Jersey statute,[8] the surety has a responsibility to see that coverage is in place, but the surety bond must not be a liability insurance policy.

Table 1 (page 4) sets forth the basic insurance requirements that the state transportation agencies stipulate for their contractors. Except for general liability insurance coverage, most of the states fail to require coverage for acts of subcontractors, their own employees and agents, and others—unless required in compliance with federal aid.[9] The lack of coverage for additional named persons and entities is a major deficiency in the requirements for contractors' insurance. Insurance coverage for other persons (department employees, agents, and consultants), entities (utility companies, railroads, municipalities, and authorities whose facilities are being affected), items, and situations protects the state agencies against unlimited liability for any errors occurring during construction.

B. Recent Developments in and Additional Material on Surety Bond Coverage

Application of Contractual Requirements

In *Pacific Employers Insurance Co. v. City of Berkeley*,[10] the court held that surety contracts are to be construed according to the same rules that govern interpretation of all contracts. A contract performance bond must be read with the contract. The bond given by the surety, which expressly referred to the contract between the contractor and the governmental entity, incorporated that contract by reference. The surety under its bond, therefore, was bound by the provisions in the contract.

TABLE 1. CURRENT REQUIREMENTS FOR CONTRACTORS' INSURANCE IN CONNECTION WITH THE PERFORMANCE OF PROJECTS[a]

REQUIREMENT	NO.	STATES
Contractors must have general liability insurance	50	All
Contractors must have insurance that protects the state from acts of subcontractors	19	Alaska, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Maine, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Dakota,[b] Rhode Island, South Carolina, Washington, and Wisconsin
Contractors must provide insurance coverage for acts of the government agency and its employees or agents	18	Alaska, California, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Maine, Mississippi, Missouri, New Mexico, New York, Oregon, Rhode Island, South Carolina, Washington, and Wisconsin
Contractors must provide insurance coverage for acts of others	12	Alaska, Connecticut, Indiana, Iowa, Maine, Mississippi, Missouri, Nevada, New Mexico, New York, North Dakota, and Wisconsin

[a] Eight states did not report any information. Seven other states did not report any information about contractor insurance. Thirty-four states reported information about insurance provisions for its contractors. Excluded from the listing of states are those that reported having hold harmless or indemnity provisions that would supply such coverage, but did not indicate that there was also a requirement for insurance policy or policies. Also, note the Federal Highway Administration's (FHWA) long-standing interpretation of 23 U.S.C. § 302, which requires the state highway departments to be suitably equipped and organized to discharge the duties of Title 23, and the American Association of State Highway and Transportation Officials (AASHTO) Guide Specifications that prohibit FHWA participation in the costs of contractors providing insurance coverage for the acts of the state highway agency and its employees or agents.
[b] North Dakota: Subcontractor must obtain the same insurance as the contractor.

In another situation where the contractor abandoned performance, the Oregon State Highway Commission was able to impose contractually provided liquidated damages when it showed that it diligently proceeded to complete the work with another contractor.[11] A similar result was reached in *Boston v. New England Sales & Mfg. Corp.*, where the surety was also called on to assist the contractor in meeting its completion date.[12] The courts, however, tend to limit liquidated damage recovery to the period of reasonable delay.[13] The principle that recovery of contractually provided liquidated damages from the contractor or its surety applies only to delayed—not abandoned—performance still prevails in some jurisdictions.[14]

Bond Coverage

The performance bonds obtained by the contractor must cover all parties and events specified in the government's requirements. In *Green Electric Systems, Inc. v. Metropolitan Airports Commission,*[15] the performance bond that the contractor obtained did not specifically run to the benefit of laborers and persons supplying materials and therefore did not satisfy the statutory labor and materials payment requirements. The court still found that the surety had to pay on the claims.

To determine if parties are too remote to allow recovery under state payment bonds, the correct test continues to be a functional relationship test that examines the nature of dealings between the parties.[16]

Bond Coverage Extended to Additional Items

In the review of cases on the subject, it was found that the penal sum of the surety bond is rarely needed to fully satisfy the surety bond claims that arise. Governors and state legislatures have taken note of this fact. Therefore, the items specified in the statutory coverage of the surety bonds have expanded, and fewer and fewer states now strictly follow the Miller Act[17] language. For instance, a 1985 amendment to the Colorado bond statutes[18] extended bond coverage to include equipment.

There has been a continued expansion of contractors' obligations under their bonds to include insurance and/or indemnification[19] of the contracting agency for damages that it may have to pay because of the contractor's negligence. However, that trend is not universal. The present New Jersey bond statute provides in part:

> A surety's obligation shall not extend to any claim for damages based upon alleged negligence that resulted in personal injury, wrongful death, or damage to real or personal property, and no bond shall in any way be construed as a liability insurance policy. Nothing herein shall relieve the surety's obligation to guarantee the contractor's performance of all conditions of the contract, including the maintenance of liability insurance if and as required by the contract....[20]

In New Jersey, for example, intensive executive consideration was needed to prevent legislative extension of bond protection.[21]

Overall, there is general governmental concern about adding risks covered by bonds, thus diluting overall monetary coverage. But the trend is towards retaining surety bond features that legislatures deem necessary and requiring liability insurance and coverage for other items not previously included within bond coverage.

The federal court decisions on bonds indicate that the phrase "labor and materials" includes only those costs that are necessary to provide these products and services or that add value to the project, and does not include attorneys' fees.[22] Some state bond acts do, however, require payment of attorneys' fees to successful claimants.[23]

The exact terms of the payment bond statutes or standard specifications play an important part in determining whether there is bond coverage for a specific situation.[24] Several states, including Wisconsin, provide by statute that the contractor's payment bond applies only to the first tier of subcontractors and supplies—that is, those who have a "direct contractual relationship, express or implied, with the prime contractor to perform labor or furnish materials."[25] For each jurisdiction, statutory requirements should be examined to determine if they adequately protect the agency against unlimited liability for errors in construction. Where statutory provisions do not provide coverage sufficient to protect the government, to the extent not prohibited by statute, the specifications should include provisions supplementing statutory requirements.

Cost Benefit Discussion Regarding Performance and/or Payment Bonds

Forty-nine states statutorily require contractors performing highway work for the state highway department to have performance and/or payment bonds. The other state requires such bonds pursuant in its specifications. The Wisconsin Department of Transportation estimates that up to 2 percent of the highway bid prices represent the costs of such bonds. Some public authorities, like the Port Authority of New York and New Jersey, have not required performance and payment bonds for a considerable time. Information from the National Cooperative Highway Research Program study on insurance and surety bonds demonstrates that the payout versus the cost of the bonds is relatively low. Logic there-

fore suggests that it would be beneficial to discontinue the use of such bonds. A state highway department considering such discontinuance should look at the following factors:

- The main reason for requiring such bonds is that subcontractors, laborers, and suppliers cannot place mechanics' liens against the public works project. Bonds encourage subcontractors, laborers, and suppliers to perform their functions on public works projects at the lowest competitive prices by assuring adequate performance and timely payment to the subcontractors, laborers, and suppliers. The possible effect on the prices of the subcontractors, laborers, and suppliers if the bonds are not required must be considered.
- Some states use the fact that a contractor is able to obtain the bonds as the main qualification for obtaining the public works project. For those states an alternative to such a process would have to be developed.
- Some surety agents package their insurance services in such a manner that it is difficult to determine the actual cost of the bonds and various policies. The real cost of the bonds would have to be determined to measure whether there would be significant savings by eliminating them.

Table 2 summarizes the current state laws and specifications that require contractor performance and payment bonds.

TABLE 2. STATE LAWS RELATING TO SCOPE AND COVERAGE OF CONTRACTOR BONDS

REQUIREMENT	NO.	STATES
Statutorily require performance and/or payment bonds or combined contract bonds.	49	Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming
Require performance and/or payment bonds by specification only.	1	Arkansas
Statutorily require only performance bonds that do not include payment provisions.	0	
Statutorily require only payment bonds.	4	Michigan, Missouri, Nebraska, and New Hampshire

The state-by-state requirement of bond coverage is included as Appendix A.

C. State Requirements for Filing Notice of Claims or Suits on Payment Bonds

The statutory provisions stating requirements for filing notice of claims and/or suits on payment bonds have been infrequently modified. However, it is suggested that for a particular application, the current requirements should be examined. For instance, the New York State statutes[26] authorize nonexclusive remedies for payment of subcontractors and materialmen that can be undertaken at the same time, but with only one collection. A Colorado case presented another exception when it held that the payment bond surety is not a necessary party when there is sufficient retainage to satisfy the subcontractor's claims.[27]

Appendix B sets forth the statutes and specifications that relate to contractors' payment bonds.

D. Surety Bond Coverage and Statutory Penalties

In some jurisdictions, the courts have considered the issue of whether or not the surety on a payment bond or performance bond is liable for statutory penalties that are imposed for nonpayment, or late payment, of items like wages, correct prevailing wages, and subcontractors. A leading case on this issue is the Ohio case of *Dean v. Seco Electric Co.*,[28] where certain employees who were not paid their wages under the prevailing wage statute were entitled to recover statutory penalties. The surety on a labor and material payment bond was not required to pay the penalties when the court determined that the surety's liability was limited to payment for labor and materials only and did not extend to the penalties under the Ohio statute. The dissenting opinion in the *Dean* case, however, argued that the bond provided that the contractor and surety were jointly and severally liable for all amounts due employees for labor on the construction; therefore, the surety should also be responsible for the penalties. A similar result has been found in other jurisdictions where there are no regulations, contract specification requirements, constitutional provisions, or legislative enactments[29] that control the situation.[30] Where there are provisions requiring the surety to be liable for all sums, the courts have upheld them.

E. Issues Concerning Coverage Under Insurance Policies and Surety Bonds in Construction Contracts

Another issue occasionally encountered is a determination of the party responsible for paying claims when the contractor's general liability insurance carrier disputes coverage for damage claims resulting from construction, or when the policy has deductibles and exclusions not permitted by the specifications. One such case, *Zurich Insurance Co. v. White*,[31] took 6 years of court action. The specifications for the project required that the contractor obtain liability insurance coverage for both the contractor and the Department of Transportation (DOT) and that the limits of coverage not be amended by a deductible of any kind without prior notice to the DOT. The insurance certification provided to the DOT by the contractor and the insurance carrier stated that the policy complied with the specifications. However, the actual policy did not comply and had deductibles and diluted coverage because of other work by the contractor in other states.[32] There were extensive damage claims by third parties for overspray of paint on a bridge project. The insurance carrier paid some claims, but eventually denied further coverage and sought reimbursement of claims previously paid and the deductibles on the basis of provisions in the actual policy. The court held that the insurance carrier had to pay the damage claims and could not impose a deductible on the contractor for each claim, since the certificates of insurance were relied on by the DOT and the contractor. These certificates specifically incorporated by reference the contract specifications for insurance.

Other claims coverage issues that may result in conflict between liability insurance and bond coverage involve situations in which

- the public agency, contractor, subcontractors, insurance carriers, and sureties are all asserting or contesting the coverage of the bond or insurance policy;
- the public agency invokes the indemnity provisions that the contractor has given the public agency; or
- a statute imposes absolute liability on the suretor.

These problems may have severe consequences, resulting in delayed or no compensation to third parties. To avoid these time- and resource-consuming conflicts, the author suggests that program officials carefully study the applicable statutes, contract language, specifications, and bond and insurance policy language to determine if the appropriate coverage has been specified.

IV. REQUIREMENTS FOR CONSULTANT INSURANCE, SURETY BONDS, AND INDEMNIFICATION

Responses to the survey of the 50 states[33] were analyzed and divided into categories of requirements for: (1) consultant insurance, both general liability and errors and omissions (malpractice), (2) consultant surety bonds, and (3) consultant indemnification for design errors and construction inspection failures. The requirements have been identified based on whether they are statutory or contractual. This section will highlight and discuss any unique aspects of insurance or bond requirements.

A. Consultant Insurance

Consultants are generally required to carry two types of insurance: (1) general liability insurance, which provides coverage for negligence of the contractor or its agents and employees, and (2) errors and omissions insurance, which provides coverage for the consultant's poor performance (malpractice). Most states require that their consultants carry general liability insurance similar to that carried by their construction contractors.[34] Requirements for errors and omissions insurance vary widely from state to state. For instance, the states of Colorado, Maine, Missouri, Nebraska, New Hampshire, Oregon, and South Carolina require errors and omissions insurance as a condition of contract execution, but there is no such requirement in the states of California and Maryland. In states that do not require errors and omissions insurance, many consultants, especially small firms, assume the risk of errors and omissions and do not carry such insurance. Even if there is a "hold harmless" clause in the consultant agreement, the state in such circumstances will be relying on the assets of the consultant firm to cover errors and omissions claims.

There are two basic types of errors and omissions insurance available to consultants. The type known as "occurrence" covers work done within the policy period for as long as the consulting firm is responsible for its errors and omissions. Under the other type of insurance, known as "claims made," the claim must be made during the life of the policy for a work failure that occurred during the life of the policy. Alternate coverage under the claims-made policies is known as "tail coverage," which extends the insurance coverage after the term of the policy, as long as the incident results from the work performed within the policy period. In some instances, however, claims-made policies are the only type of insurance the consultants can obtain because the insurance industry in that particular state will only issue that type of policy.

Another aspect of consultant errors and omissions insurance that should be considered when requiring such coverage is the use of "umbrella" policies. Such policies cover all the work of the consultant firm under one aggregate limit. While the overall coverage is diluted under such policies, it should be remembered that usually there are few claims for errors and omissions; therefore, the risk of failing to have adequate coverage for an event under umbrella policies is slight, and the insurance costs generally are greatly reduced.

Often a contractor or third party recovers against a governmental entity based on a consultant's design or inspection error or omission that may have occurred several years prior to its discovery. When the government agency seeks reimbursement from the consultant or calls upon the insurer, the consultant may have no errors or omissions insurance coverage for the event that caused the damage if the consultant has a claims-made insurance policy that expired before the claim was made, if the work of the consultant was completed and accepted, or if the consultant switched to another insurance company.

To avoid this type of situation, the type of insurance and extent of coverage should be clearly specified in the contract.

B. Consultant Surety Bonds

Only a few states require that their consultant obtain a performance bond similar to that required of their contractors.[35] Because of the limitations on the effectiveness of such bonds with respect to coverage and duration of the period of coverage, it would appear that they offer little protection to state entities against unlimited liability for errors made by contractors and design consultants.

C. Indemnification

Several states require that consultants agree to indemnify and hold them harmless from any damages or claims.[36] When the design consultants commit errors and omissions that result in liability to the state, the state can generally recover damages from the consultant under the indemnification agreement. Occasionally, a governmental entity encounters problems when it seeks enforcement of such agreements. One such case is *Fairbanks North Star Borough v. Roen Design Assocs., Inc.*,[37] which involved an agreement that the consultant was to provide the survey and contract specifications for a subdivision. The pertinent indemnification language stated:

> The Contractor shall save, hold harmless and indemnify the Borough from any liability, claims, suits or demands, including costs, expenses and reasonable attorney's fees, incurred for or on account of injuries or damages to persons or property as a result of any act or omission of the Contractor in the performance pursuant to this contract.[38]

During construction the general contractor discovered serious design errors resulting from the contract specifications. The Alaska court enforced the indemnity provision, but limited the indemnity coverage to only "injuries or damages to persons or property." Recovery for correction of the design errors was not permitted under the indemnity agreement. The court did, however, permit the municipality to proceed with a common-law indemnity action.

V. ADMINISTRATIVE AND CONTRACTUAL PROCESSES USED TO PROTECT GOVERNMENT AGENCIES AGAINST LIABILITY

The best protection state agencies can have against liability to third parties for consultants' errors and omissions is for the state agency to have an adequate and precise requirement that assigns ultimate responsibility for errors and omissions

to the consultant or contractor. For instance, a Maryland general provision for construction contracts[39] provides:

> The Contractor shall indemnify and save harmless the State and all of its representatives from suits, actions, or claims of any character brought on account of any injuries or damages sustained by any person or property in consequence of any neglect in safeguarding the work or through the use of unacceptable materials in the construction of the improvement, or on account of any act or omission by the said Contractor, or as a result of faulty, inadequate or improper temporary drainage during construction, or on account of the use, misuse, storage or handling of explosives, or on account of any claims or amounts recovered for any infringement of patent, trademark, or copyright, or from any claims or amounts arising or recovered under the Workmen's Compensation Laws, or any other State or local law, bylaw, ordinance, regulation, order or decree whether by himself or his employees or subcontractors. The Contractor shall be responsible for all damage or injury to property of any character during the prosecution of the work resulting from any act, omission, neglect or misconduct, in the manner or method of executing said work satisfactorily or due to the nonexecution of said work or at any time due to defective work or materials and said responsibility shall continue until the improvement shall have been completed and accepted.

At the state level there are variations in such precise requirements for construction contracts.

For consultants at the federal level, 48 C.F.R. § 36.608 provides:

> Architect-engineer contractors shall be responsible for the professional quality, technical accuracy, and coordination of all services required under their contracts. A firm may be liable for Government costs resulting from errors or deficiencies in designs furnished under its contract. Therefore, when a modification to a construction contract is required because of an error or deficiency in the services provided under an architect-engineer contract, the contracting officer (with the advice of technical personnel and legal counsel) shall consider the extent to which the architect-engineer contractor may be reasonably liable....

The U.S. Army Corps of Engineers has a clause in its design agreements that reads as follows:

> 52.236-23. RESPONSIBILITY OF THE ARCHITECT-ENGINEER CONTRACTOR. (APR 1984)
>
> (a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.
>
> (b) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contractor or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the Contractor's negligent performance of any of the services furnished under this contract.
>
> (c) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.
>
> (d) If the Contractor is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.[40]

Basically, the foregoing provisions assign to the consulting engineer the ultimate responsibility for the designed product. Similar clear requirements can be imposed on a contractor for its errors and omissions. When a state uses these similar requirements for its consultants or contractors, few enforcement problems should develop.

A major issue to which state agencies should be sensitive is the nature of their relationship with the design and/or construction inspection consultants. The consulting engineer should be considered part of the construction team, but with strong contractual responsibility to produce an acceptable professional engineer result.

Typically, however, many states use design and/or construction inspection consultants to complement their own staff. This may result in a blending of responsibilities, an unclear scope of responsibility, or the procurement of various engineering consulting services that do not require complete designs. Construction inspection services are similarly procured.

A problem occurred in connection with the Oak-Point Link Rail Project in New York State.[41] A major rail link to New York City was to be placed on a viaduct in a nearby river. The government agency gave the consultant the criteria on expected loads the viaduct would carry. The project was on a quick track, but the funds allocated were insufficient. The design consultant was told that the State would provide the soil samples, borings, and evaluations and was instructed to use as-built plans for existing structures in the immediate area to gain whatever information it deemed appropriate in connection with the design. The State instructed that the limited boring information and interpolations were to be used to determine where rock formations and other obstructions might reasonably be anticipated. As it turned out, the rock formations, in many instances, deviated from the information obtained from the plans. The State subsequently ordered additional site boring and worked closely with the consultants to identify a solution.

Because of the overlapping agency staff and consultant activity and the lack of clear engineering responsibility placed solely on the consultants, the agency officials were not able to decisively determine who was responsible for the errors and failures when the project was terminated. The State paid the contractor several million dollars for extra work and delay damages after determining that no recovery should be sought from the consultant because of the instructions from the agency staff and the fusion of engineering functions.

In response to the survey, no state reported any pending court actions against consulting engineers for errors and omissions. A few states reported that they had recently used various measures to get the consultants to better understand their responsibilities.[42] New York State, in particular, had some matters that were handled through negotiation.[43]

VI. STRATEGIES FOR SUCCESSFUL BOND COVERAGE OR RECOVERY FROM CONTRACTORS OR CONSULTANTS

A. Contract Provision

In order to have comprehensive bond coverage that permits recovery from contractors and/or consultants, the documents, particularly the contract provisions, must be carefully drafted to cover the anticipated situations. Such an approach should better protect transportation agencies against liability for errors and omissions committed by the contractors and consultants. When a situation does arise it has to be analyzed to determine the responsibilities of the parties in accordance with such statutes and contract provisions. The following material should assist in a review of a particular matter.

Several states have contractual provisions that shift to the contractor responsibility for expenses incurred by the state for engineering, inspection, testing, design, or evaluation activities relative to correction necessitated by errors, omis-

sions, or negligence on the part of the contractor. For instance, the Arkansas State Highway and Transportation Department's *Standard Specifications for Highway Construction*, (§ 107.16) provide that "In case of errors or negligence on the part of the Contractor, any expenses incurred by the Department for engineering, inspection, testing, design, or evaluation relative to correction of the work will be assessed against the Contractor."

B. Statutes and Regulations

Some states have statutes that specify the requirements of a contractor's bond relative to protecting the state agency. A Rhode Island statute (§ 37-12-1) has a requirement that the contract bond include coverage to "indemnify and save harmless the state, the respective department, and all of its officers, agents, and employees."[44] A Minnesota statute (§ 574.26) has a requirement that the performance bond coverage include "saving the public body harmless from all costs and charges that may accrue on account of completing the specified work." In a case that tested the scope of that statute, *Iowa Concrete Breaking Corp. v. Jewat Trucking, Inc.*,[45] the court found that the subcontractor's performance and payment bonds must follow the statute, including "saving the public body harmless from all costs," and therefore must even cover attorney's fees. The Texas statute [46] shields the state from paying costs, while another statute permits the courts to impose costs and attorney's fees on the contractor or surety when the claimant is successful.[47]

Other states may have very broad statutory or regulatory requirements for the contractor to indemnify or hold the state harmless against errors or omissions.[48] Statutes or regulations of this nature generally are upheld when challenged in court. In *City of New Orleans v. Vicon, Inc.*, [49] where the Louisiana Code required the party breaching the contract to place the injured party in the same position he would have been in had the contract been properly performed, the consultant was found liable for breach of contract and assessed damages that greatly exceeded the consultant's fees.[50]

An Ohio statute provides that in "no case is the state liable for damages sustained in the construction of any work, improvement, or project...."[51] But in an Ohio case where the contractor claimed a share of the state's immunity under the statute, the court determined that the contractor was only entitled to immunity coverage where the damage resulted from carrying out the contract with the State or following the State's directions. The contractor could not rely on the State's immunity when the damage resulted from negligent activity in an area in which the contractor exercised discretion.[52]

The ostensible requirements for extensive coverage found in some bond statutes may be strictly construed against the surety in some jurisdictions and liberally construed in others. In *Pacific Employers Insurance. Co. v. City of Berkeley*,[53] the court determined that construction performance bonds are generally considered contracts of insurance and therefore are to be liberally construed in favor of the insured and strictly against the insurer if there is ambiguity. As a result the court permitted the city to recover against the surety.[54] In contrast, the Louisiana courts have ruled that the statute must be strictly construed and liability of the surety under the bond should not be expanded beyond that specifically stated in the statute.[55]

The courts have ruled that where the requirements for payment bond coverage are set forth in a statute, the statutory provisions take precedence over any narrower bond provisions in a contract. The Texas statute[56] provides that contractors' bonds, submitted to comply with contract requirements, shall be deemed to comply with the rights created, limitations on those rights, and remedies provided. However, some courts have ruled that such a situation may be enforced only by a statutory court procedure.[57]

C. Bond Coverage

There are often issues pertaining to what items are covered by payment and/or performance bonds. Although it is clear that labor, materials, and the cost of completing the work are covered items, the answer is not that simple for such expenses as insurance, fringe benefits, interest, taxes, and other indirect costs.

Cases pertaining to these issues have been decided both ways. For instance, the surety was responsible for payment of unpaid unemployment insurance taxes incurred in connection with a bonded project in *Hartford Accounting. & Indemnity. Co. v. Arizona Department. of Transportation.*[58] The surety had to pay statutory interest in *SaBell's Inc. v. City of Golden.*[59] The reverse, however, is found in the federal court case of *Can-Tex Industries v. Safeco Insurance. Co. of America*,[60] in which the court relieved the surety of liability for payment for finance charges and attorney's fees that were required by the agreement between the contractor and subcontractor, but were not expressly included in the surety bond between the government agency and the contractor.[61]

D. Surety Responsibilities

The sureties are generally held responsible according to the terms of the statute or bond. The cases clearly hold that the surety is liable for the express terms of its undertakings. Further, the surety on a performance bond is not always relieved of further liability after the project is accepted. In *School Board. of Pinalles City. v. St. Paul Fire & Marine Insurance. Co,*[62] the school board did not know of latent defects in the work of the project when the structure was accepted. The court found that the surety could be held liable for latent defects discovered in the project after the completion of the building and acceptance by the owner. The holding is based on the fact that the contract was, by reference, made part of the bond, and the bond guaranteed "faithful performance" of the contract.

The surety may be relieved of coverage in some circumstances. In *Florida Board of Regents v. Fidelity & Deposit Co.*,[63] the dicta indicate that the surety would be relieved "because the latent defects complained of were not covered by the bond once the owner accepted the building...." In *Crane Co. v. Park Construction. Co.*,[64] the court found that the surety was not responsible for payment of materials for which a waiver of liens had been executed by a supplier's agent. The court implied that, as to the nonconsenting surety, the subcontractor had to prove that custom existed in the industry for subcontractors to give lien waivers to the general contractors before receiving payment and that the surety was aware of this custom, before the surety would be liable. In *Wisconsin Electric Sales Co. v. Langdon*,[65] the surety was relieved of responsibility when the subcontractor who was furnishing work and materials to the project supplied a false receipt so that the contractor could obtain its final payment from the school district.

E. Indemnification

States may require that "hold harmless" (indemnification) agreements be accepted by their contractors in connection with the public works projects.[66] Such statutes, specifications and contract requirements are generally held to be valid and enforceable.[67] A Wisconsin court has held that an indemnification requirement

was enforceable in covering the indemnitee's negligence and that there was no negligence whatsoever on the part of the indemnitor.[68] In *St. Paul Fire and Marine Insurance. v. Gilpatrick*,[69] a subcontractor was required to indemnify the contractor's insurance carrier for a settlement made with an employee of the subcontractor.

The validity of the contractor's agreement to indemnify an owner against loss or liability for injury or death of a third party arising out of the owner's negligence has been upheld in several states.[70] However, such an obligation must be clearly and unequivocally expressed.[71]

By statute, starting in 1998, Arizona will prohibit an indemnitee from recovering damages resulting from the indemnitee's "negligence."[72]

One state statute prohibits an indemnitee from recovering damages resulting from the indemnitee's "sole negligence." When such a statute exists, it generally does not bar indemnification where the agreement excepts "negligent and willful misconduct" of the indemnitee.[73] Mississippi has a statute that makes "hold harmless" agreements to indemnify for the indemnitee's own negligence void.[74] In a case where a contractor agreed to indemnify the owner of the premises against all personal injury actions incidental to its performance of the construction contract, a federal court in Mississippi refined the application of the statute when it determined that the Mississippi statute was not violated, since the owner had been absolved of fault in the underlying personal injury action and thus was not seeking to recover for its own negligence.[75] In *Schelble v. ADF Construction. Corp.*,[76] the court ruled that the contract provision that required the subcontractor to indemnify the contractor against all claims that arise out of performance of the work was valid even when the contractor breached a statutory duty, since the contractor's liability was founded on a statute that imposed absolute liability. The opposite result is found in *Monsanto Co. v. Owens Corning Fiberglass Corp.*,[77] where the general contractor was liable for injuries to the subcontractor's employee despite an indemnity agreement between the contractor (indemnitee) and the subcontractor (indemnitor). The court found that the agreement did not mention negligence nor provide for contractual comparative, concurrent, or gross negligence.

State statutes that prohibit indemnification for the indemnitee's own negligence may specify that such prohibitions do not apply to construction bonds nor insurance contracts or agreements.[78] Furthermore, in the New York case of *Kinney v. Lisk Co.*,[79] the court determined that an agreement that required the contractor to provide insurance for the owner's negligence did not violate the statute that made indemnity for one's own negligence void.

Also, the term "sole" negligence has been strictly construed to mean that as long as the indemnitee was not the "sole" tortfeasor the statute would not bar indemnity.[80] In the Massachusetts case of *Callahan v. A.J. Welch Equipment. Corp.*,[81] the court allowed recovery when it declared that General Law (Chapter 149, § 29C), which made void any provision in construction contracts requiring a subcontractor to indemnity any party for injuries not caused by that subcontractor or its employees or agents, did not prohibit a concurrent fault recovery that involved both the contractor (indemnitee) and the subcontractor (indemnitor). In a few cases the courts have considered comparative fault or required a contribution from the indemnitee based on the percentage of fault.[82]

F. Fraud or Misrepresentation

Generally, the presence of fraud or misrepresentation as to facts will permit the government agency to recover or avoid responsibility to those involved in the fraud or misrepresentation of facts.[83] In *City of New Orleans v. Vicon, Inc.*,[84] the court found that the contractor was still responsible for the repair costs after "acceptance" of the project when there was misrepresentation of asphalt deliveries. "The acceptance did not constitute a waiver because latent defects existed in the work and the test results did not fully or accurately reflect the extent to which Vicon [contractor] deviated from the specifications."[85] The repair work was costly; therefore, the amount recovered exceeded the contract price. In a Texas case,[86] the contractor induced subcontractors supplying labor and materials to provide false receipts and releases without the knowledge of the school district or the payment bond surety upon which the school district relied in making payments to the contractor. The subcontractors were unable to collect against either the school district or the surety when they were not paid.

There are a few cases that have held the owner and/or surety responsible even though false or misleading documents or misrepresentations were involved. For example, in *Moyer v. United States*,[87] false receipts were furnished by materialmen to the subcontractor; in *United States v. Aetna Casualty & Surety Co.*,[88] there was a sham letter reciting payment; and in *U.S. for Use of Farwell, Ozmun, Kirk & Co. v. Shea-Adamson Co.*,[89] there were false representations to workers about releases for wages. In *U.S. for Use of Lincoln Electric Products Co. v. Greene Electrical Service of Long Island, Inc.*,[90] however, the issue was raised, but there was no proof of deception or broken promises.

There are a number of legal barriers to successful actions against negligent consultants, architects, professional engineers, contractors, subcontractors, materialmen, suppliers, other persons, and/or owners. It is almost a cardinal rule that when the owner furnishes defective plans or specifications, the contractor will not be liable for any damage that may be caused by the defective aspects of such plans or specifications.[91] In one case, the court found that the state highway department gave an implied warranty of the sufficiency of its plans and specifications for the construction; therefore, the contractor, who was not aware of any defect in the construction, was not liable for defective work that was in accordance with the specifications.[92] With the increased use of consultants, extreme care should be devoted to ensuring the accuracy of plans and specifications and the adequacy of constructability reviews.

VII. LEGAL RESTRICTIONS ON ACTIONS AGAINST CONSULTANTS AND CONTRACTORS

A. Statutes of Limitation or Repose

There are statutes of limitations or repose that act as time bars in actions against consultants, architects, professional engineers, contractors, subcontractors, materialmen, suppliers, other persons, and/or owners. In many instances such statutes are the major barrier to the government agency protecting itself against unlimited liability.

A statute of limitation begins to run when a cause of action accrues, and at the end of the statutory period the remedy is barred. A statute of repose, on the other hand, does not bar a cause of action that has arisen, but prevents what otherwise would be a cause of action from arising. The date that triggers the commencement of the running of a statute of repose is not an accident or injury, but the sale of a product or the acceptance of a construction project. At a set time thereafter, no cause of action can arise based on defects in the product or project.

The case of *Turner Construction Co. v. Scales*[93] sets forth the difference between statutes of repose and statutes of limitations:

> A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is *damnum absque injuria*, a loss without a remedy.
>
> In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

With respect to statutes of repose, the Wyoming Supreme Court stated in *Phillips v. ABC Builders, Inc.*[94]:

> The challenges [to the statutes of repose] have almost uniformly questioned the constitutionality of the statute. In each instance, the statutes vary in wording somewhat from state to state but the wording variations appear to play no significant role in making the statutes distinguishable. The statutes also vary in the length of the limitation from four to twenty years, a distinguishing factor of no importance. This is all to suggest that, although the words of the statutes vary and the lengths of times vary, all the decisions which have been reached in the various jurisdictions we shall consider have some bearing and provide us with guidance. Beyond these superficial considerations, we note as well that some of these statutes have withstood the challenge to their constitutionality and some have not.

However, statutes of limitations or repose have been carefully considered by courts in most jurisdictions, and generally these statutes have been upheld. Courts view the purpose of the statute as protecting those furnishing architectural or design work, inspections of construction, or other construction services from indefinite liability,[95] provided that the statute does not violate due process or equal protection provisions of constitutions.[96] Other courts have determined that such statutes were invalid on the basis that the state constitution requires that all courts shall be open[97] or that there was a lack of equal protection provided for in the statute.[98] Most of the equal protection cases were decided that way because the class of protected persons or entities was restricted. In considering statutes of repose, one legal analyst made the following major point about open courts:

> As with damage caps, a statute of repose is a limit on common law rights of action: Some injured individuals will not be able to recover. Unlike damage caps, however, statutes of repose, when they do operate, totally foreclose any recovery. As expected, courts that read the remedies provision [open courts provision in the Constitution] as a substantive limitation on the legislature find this effect unconstitutional. [cases footnoted] Other courts find no remedies provision violation on the ground that the legislature has the power to place reasonable limits on liability. [cases footnoted][99]

The court decisions provide no clear instructions on the conflict between the right to have an opportunity to seek redress and statutes that bar such opportunity. For example, in the case of *School Board. of Volusia v. Fidelity Co. of Maryland*,[100] the surety was relieved of liability on performance bonds when the statute of limitations for contract actions had run, even though there were latent defects discovered that had resulted from the contractor's poor performance.

The 1916 case *MacPherson v. Buick Motor, Co.*[101] established the principle that "privity of contract" was not essential to maintain a tort action. Thereafter, when the 1957 case of *Inman v. Binghamton Housing Authority*[102] found that liability of a builder or contractor did not depend on privity with the one injured, the potential liability of consultants, architects, professional engineers, contractors, subcontractors, materialmen, suppliers, or owners in actions by third parties who were injured was greatly expanded.

Forty-seven states have passed statutes of limitations or repose that protect some or all of the involved consultants, architects, professional engineers, contractors, subcontractors, materialmen, suppliers, sureties, or owners.[103] These statutes have been held valid in 34 states and the District of Columbia[104] and held invalid in 10 states.[105] The statutes protect consultants in 33 states and the District of Columbia and they protect contractors in 31 states and the District of Columbia.

B. Indemnification Restrictions

There are instances where a state statute will restrict a government entity from requiring indemnification. A few examples of such situations are discussed here.

The Louisiana statute (LA. REV. STAT. ANN. § 9:2771) has provisions that excuse a contractor for destruction or deterioration of work if it occurs while the contractor is constructing the work in accord with plans and specifications furnished to him and for which there is no negligence on his part.

States statutorily prohibit requiring a contractor, in connection with construction, to indemnify an indemnitee, its agents, or employees against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by, or resulting from the negligence of the indemnitee.[106] The term "sole negligence" has generally been construed strictly against the indemnitor and therefore favorably toward the indemnitee.[107] In a Louisiana case,[108] despite the contractor's agreement to hold the State Department of Transportation and Development harmless from damages caused by negligence, no recovery was allowed when the court determined that the damage was due to the Department's "sole negligence." A similar New York statute[109] renders void and unenforceable any provision or agreement in connection with building construction "purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injuries to persons ... *contributed to*, caused by or resulting from the negligence of the promisee, his agents or employees (emphasis added)."[110]

A Washington State statute[111] imposes liability on the municipality for the payment of claimants set forth in the statute when its contracting officer fails to require the payment bond as provided by the statutes.

The terms of the "agreement" are frequently read and interpreted by the court in a strict way against the drafter. Since government agencies usually draft the agreements, they tend to lose cases that are close calls for the courts.

C. Estoppel or Waiver

There are several cases where estoppel or waiver of rights to claim damages or indemnity was involved.

In *Crane Co. v. Park Construction Co.*,[112] acts of its agent estopped the supplier from collecting under the payment bond.

In *All State Etc. Agency v. Turner Construction. Co.*,[113] the subcontractor's insurer was estopped from denying coverage for acts of the contractor where it had issued a certificate of insurance to the general contractor reflecting that the subcontractor was covered for contractual liability between the parties and the subcontractor had assumed liability for all claims. However, in *Warren v. Hudson Pulp & Paper Corp.*,[114] the owner was not estopped from enforcing the indemnity agreement when the court found that the owner was not the intentional wrongdoer

even though the owner permitted the contractor to allow its workers to perform under dangerous conditions.

In *Zurich Insurance Co. v. White*,[115] the contractor's insurance carrier was estopped from enforcing a deductible against the contractor when the insurance certificate rendered to the state showed no deductibles.

In *Wisconsin Electric Sales Co. v. Fidelity & Deposit Co.*,[116] the subcontractor waived its nonpayment claim as to the school board and general contractor's surety by giving a false receipt of payment.

In *Salem Realty Co. v. Batson*,[117] the court found that the owner's acceptance of the project had not waived its rights to recovery for defective performance where the defects were "latent" or hidden.

VIII. CONCLUSION

The suretyship and insurance areas for construction contracts are relatively stable, with little change over a period of years. Indemnification is in greater use and developing on a continuing basis.

When the consultant contract process and the ability to clearly define the consultant's responsibilities for a project fails, there will be little hope of recovery from the design and/or construction inspection consultant when mistakes are made. Where the state commingles its responsibilities with those of the consultant, then the state may have assumed part or all of the risks for any failure. Therefore, the major area where careful consideration must be given is the consultant agreement itself. The scope of the design services and/or construction inspection services purchased by the government must be clearly defined. Such tasks must be defined discretely if less than the whole product is requested from the consultant. Any interaction with or input to each task by the governmental agency must be clearly set forth if it is expects to hold the consultant liable for failure. The greater use of consultants requires careful review of the consultant-government relationship and the contract documents to ensure that the anticipated goals will be accomplished.

ENDNOTES

[1] 48 C.F.R. §§ 28.301-28.313 applies to federal contracts for transportation or transportation related services.

[2] 23 C.F.R. § 635.116 (1996), for federal contracts, requires the contractor to have provisions in the subcontracts that hold the subcontractor to substantially the same provisions and requirements as are imposed on the contractor.

[3] *E.g.*, Virginia, VA. CODE ANN., § 11-58(F) ; states of Michigan, New York, Oklahoma, and Wyoming permit contractor to require a hold harmless from subcontractors.

[4] *E.g.*, Arkansas requires the contractor to assist the DBE in obtaining insurance and bonds.

[5] *See, e.g.*, Vankirk v. Green Const. Co., 466 S.E.2d 782 (W.Va. 1995), where the court found that the express contract obligation to indemnify was a clear requirement that bound not only the contractor but also the surety. *Also see*, Zurich Insurance Co. v. White, ___ A.D.2d ____, 633 N.Y.S.2d 415 (1995), leave to appeal denied, 88 N.Y.2d 804 (1996).

[6] 465 N.W.2d 614 (N.D. 1991).

[7] 76 N.Y.2d 215, 556 N.E.2d 1090 (1990).

[8] N.J. STAT. ANN., § 2A:44-143(b) (1996).

[9] Work on railroad property is an exception.

[10] 158 Cal. App. 3d 145, 204 Cal. Rptr. 387 (1984).

[11] Oregon by and through State Highway Com. v. De Long Corp., 9 Or. App. 550, 495 P.2d 1215 (1972), *cert. denied*, 411 U.S. 965, 36 L.Ed. 2d 684, 93 S.Ct. 2142, rehearing denied, 412 U.S. 944, 37 L.Ed. 2d 405, 93 S.Ct. 2771.

[12] 386 Mass. 820, 438 N.E.2d 68 (1982).

[13] *See, e.g.*, Construction Contracting & Management, Inc. v. McConnell, 112 N.M. 371, 815 P.2d 1161 (1991); and Boston v. New England Sales & Mfg. Corp., 386 Mass. 820, 438 N.E.2d 68 (1982).

[14] *See, e.g.*, City of Elmira v. Larry Walter, Inc., 76 N.Y.2d 912, 564 N.E.2d 655 (1990).

[15] 486 N.W.2d 819 (Minn. 1992), *review denied*.

[16] Trio Forest Products, Inc. v. FNF Const., Inc., 182 Ariz. 1, 893 P.2d 1 (1994).

[17] 40 U.S.C. §§ 270a–270f.

[18] COLO. REV. STAT. ANN. § 38-26-105 & 38-26-106.

[19] *See*, to pay wages to workers *e.g.*, OR. REV. STAT., § 279.354 (00170.72); VT. STAT. ANN. *tit*. 19, § 10(8).

[20] N.J. REV. STAT., § 2A:44–143(b).

[21] Governor Thomas Kean's 1989 Reconsideration and Recommendation Statement on an earlier proposed law (Senate Bill No. 3805-L. 1989, C. 316) in part states:

> For the efficient construction of public works projects, it is necessary that companies providing surety bonds be required to guarantee all aspects of the agreement that the contractor enters into with the public entity sponsoring the project. Specifically, if the contractor agrees to maintain liability insurance on the project, the risk of loss occasioned by any lapse of liability insurance must be on the surety company and not on the governmental unit undertaking the project.
>
> This bill [to restructure the scope of bond coverage] promises to subtly, but significantly, erode these protections that governmental entities receive from the posting of a surety bond.... I determined that it was necessary that surety companies continue to be required to guarantee all

aspects of the agreement to maintain liability insurance on the project.

(Reproduced at Annot. to N.J.S.A. 2A:44–143, 1996 Suppl.)

[22] *See, e.g.,* Can-Tex Industries v. Safeco Ins. Co. of America, 460 F. Supp. 1022 (W.D. Pa. 1978).

[23] *E.g.*, Alabama, ALA CODE, § 39-1-1; Arizona, ARIZONA REV. STAT. ANN., § 34-222(B); Louisiana, LA. REV. STAT. ANN., § 38:2246(A); N.C. GEN. STAT., § 44A-35; and Texas, TEX. GOV'T CODE ANN., §§ 2253.073 and 2253.074. *Also, see*, Colorado Standard Agreement, Special Provision No. 4; and Montana Standard Contract Provisions.

[24] *See, e.g.*, Long v. City of Midway, 311 S.E.2d 508, 512 (Ga. 1983).

[25] WIS. STAT. § 779.14 (1) (b).

[26] N.Y. LIEN LAW, § 12, and N.Y. STATE FIN. LAW § 137.

[27] *See, e.g.,* SaBell's Inc. v. City of Golden, 832 P.2d 974 at 978 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

[28] 35 Ohio St. 3d 203, 519 N.E.2d 837 (1988).

[29] *See, e.g.,* Wyoming Statutes, §§ 16-6-112, 16-6-115, requiring that the bond also be conditioned "for the payment of all taxes, excises, licenses, assessments, contributions, penalties and interest lawfully due the state or any political subdivision."

[30] *See, e.g.*, Serraino v. Mar-D, Inc., 228 N.J. Super. 482, 550 A.2d 178 (1988), where general contractor's surety was liable under the bond for the subcontractor's violation of the Prevailing Wage Act. However, *cf.*, Rogers v. Speros Constr. Co., 119 Ariz. 289, 580 P.2d 750, 754 (1978) where the court found that the penalty applied in an employee-employer situation should be strictly construed and would not apply to the surety who was not the employer; Coates v. United States Fidelity & Guaranty Co., 525 S.W.2d 654 (Mo. Ct. App. 1975) where the court similarly held to a strict construction of a "penal" statute; and Strong v. C.I.R., Inc., 184 Wis. 2d 619, 516 N.W.2d 719 (1994), where wage violation penalties could not be imposed on a surety.

[31] Zurich Insurance Co. v. White, ___ A.D.2d ____, 633 N.Y.S.2d 415 (1995), leave to appeal denied, 88 N.Y.2d 804 (1996).

[32] For a discussion on the subject of such conflicts, see CONTRACTUAL RISK TRANSFER INSURANCE CERTIFICATES, *Legal Aspects of Insurance Certificates*, Copyrighted August 1995, International Risk Management Institute, Inc.

[33] Forty-two states reported information about consultants.

[34] *E.g.*, Contractually required: California, Colorado, New York, and Oregon.

[35] *E.g.*, Contractually required: Colorado. *Compare* California, where it specifically is not required.

[36] *See, e.g.,* California Standard Agreement, Par.1; Colorado, Consultant Agreement, Special Provisions Number 4; Iowa Standard Agreement § XIII; Missouri Standard Agreement § 15; Nebraska Standard Agreement § XIII; New Hampshire Standard Agreement Art. IV, § J; and Virginia Standard Agreement, § 8.03.

[37] 727 P.2d 758 (Alaska 1986).

[38] I d., at 759.

[39] Maryland Department of Transportation, General Provisions for Construction Contracts, GP-7.13, Responsibility for Damage Claims.

[40] 48 CFR 52.236-23 (1995). This clause is required by 48 C.F.R. § 36.609-2(b).

[41] Factual information about this project supplied in an interview with Eric Kerness, Assistant Counsel, New York State Department of Transportation.

[42] Nebraska has "informally" collected from several consultants for State costs associated with correcting work related to design errors. No specific case was cited. Virginia has not brought any legal actions against designers for defects in designs, although the state did recover from the design consultants when their defects resulted in claims from contractors. Usually a letter to the consultant was all that was necessary. No specific case was cited. New York had several instances where collection from consultants was considered. In some of these situations collection was made, and for some others, they are still outstanding. The factual information about New York State was provided from an interview with Eric Kerness, Assistant Counsel, New York State Department of Transportation, 1220 Washington Avenue, Albany, NY 12232.

[43] Consult Eric Kerness, Assistant Counsel, Legal Affairs, New York Department of Transportation, for information about the Manhattan Bridge Project, a contract under which the state recovered $1 million from the design consultant after asserting a claim, and the Midtown Tunnel Approach Viaduct Project in New York City, under which the state had to pay the contractor's claim for damages resulting from alleged defective design. However, there still remains an unresolved question as to both the design consultant's and construction inspection consultant's responsibilities and possible errors and omissions.

[44] R.I. GEN. LAWS, § 37-12-1.

[45] 444 N.W.2d 865 at 871 (Minn. 1989), *review denied*. However, *cf.*, Cement Asbestos Prods. Co. v. Hartford Accident & Indem., Inc., 592 F.2d 1144 at 1148 (10th Cir. 1979).

[46] TEX. GOV'T CODE ANN., § 2253.072.

[47] TEX. GOV'T CODE ANN., § 2253.074. *See, e.g.*, S.A. Maxwell Co. v. *R.C. Small & Associates, Inc.*, 873 S.W.2d 447 (Tex. 1994), *rehearing denied*.

[48] *See, e.g.,* Code of Maryland Regulations § 21.06.07.13 (a) (1987).

[49] 529 F. Supp. 1234 (E.D. La. 1982).

[50] *Id.* at 1245.

[51] OHIO REV. CODE ANN., § 5525.16(B).

[52] Helle d/b/a Circus Car Wash v. Peerless Constr. Co., No. 91. WD-069 (6th Dist.) 1992, Ohio App. LEXIS 2675 dismissal reported at 597 N.E.2d 167 (1992).

[53] 158 Cal. App. 3d 145, 204 Cal. Rptr. 387 at note 3 (1984).

[54] *Also, see*, Sparks Constr. Inc. v. Newman Bros., 51 Ala. App. 690, 288 So.2d 749 (1974).

[55] Metro Builders Hardware, Inc. v. Burko Const., Inc., 633 So. 2d 838 (La. 1994), writ denied, 637 So.2d 1049 (1994) *cf.*, Reliance Ins. Co. v. Trane Co., 212 Va. 394, 184 S.E.2d 817 (1971) where the court found that broader bond coverage than required by the statute was not prohibited.

[56] TEX. GOV'T CODE ANN. § 2253.023.

[57] *See, e.g.,* Petition of Keyser, Inc., 97 N.H. 404, 89 A.2d 917 (1952), where the court permitted broader conditions in the surety bond, but they had to be enforced by the statutory procedure for contract claims.

[58] 172 Ariz. 564, 838 P.2d 1325, 1330 (1992), *review denied.*

[59] 832 P.2d 974, 979 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993).

[60] 460 F. Supp. 1022, 1025 (W.D. Pa. 1978).

[61] *Also, see*, Lite-Air Products, Inc. v. Fid. & Dep. Co. of Md., 437 F. Supp. 801, 803, & 804 (E.D. Pa. 1977), where the federal court did not permit recovery from the surety for claims for "lost profits," "cancellation charge," "delay damages," "escalated material costs," and "finance charges and interest on claims."

[62] 449 So.2d 872, 873 (Fla. 1984).

[63] 416 So.2d 30, 32 (Fla. 1982).

[64] 247 N.E.2d 591 (Mass. 1969).

[65] 191 Wis. 645, 211 N.W. 670 (1927).

[66] For statutory examples, *see*, DEL. CODE ANN., tit. 29 § 6909; MINN. STAT., 574.26; N.D. CENT. CODE, § 24-02-23; OR. REV. STAT., § 279.027(3); R.I. GEN. STAT.,37-12-1; VT. STAT. ANN. tit. 19, § 10(8). For Standard Specifications examples, *see*, Arkansas State Highway and Transportation Dept., Standard Specs., § 107.14 (1993); California, Standard Specs., § 7-1.12; West Virginia, Standard Specs., § 107.14; Maine Standard Specs., § 107.15; Missouri, Standard Specs., § 107.12; New Hampshire, Standard Specs., § 107.14; and Wisconsin Department of Transportation, Standard Specs., § 107.12.

[67] *See, e.g.*, Hauskins v. McGillicuddy, 175 Ariz. 42, 852 P.2d 1226 (1992), review granted in part, denied in part, order granting review vacated, review denied, 177 Ariz. 279, 867 P.2d 849 (1994), where the court upheld indemnity and hold harmless; Vankirk v. Green Const. Co., 466 S.E.2d 782 (W.Va. 1995); and Barrons v. J.H. Findorff & Sons, 89 Wis. 2d 444, 278 N.W.2d 827 (1979).

[68] Dystra v. Arthur G. McKee & Co., 100 Wis. 2d. 120, 301 N.W. 2d. 201 (1981).

[69] 731 P.2d 1188 (Wyo. 1987).

[70] Alabama: Indus. Tile, Inc. v. Stewart, 388 So. 2d 171 (Ala. 1980), *cert. denied*, 66 L.Ed. 2d 805, 101 S.Ct. 864; Alaska: Manson-Osberg Co. v. State, 552 P.2d 654 (Alaska 1976) and Burgess Constr. Co. v. State, 614 P.2d 1380 (Alaska 1980); Delaware: Cumberbatch v. Bd. of Trustees, 382 A.2d 1383 (Del. 1978); Missouri: Hays-Fendler Constr. Co. v. Traroloc Inv. Co., 521 S.W.2d 171 (Mo. App. 1975); West Virginia: Riggl v. Allied Chem. Corp., 378 S.E.2d 282 (W.Va. 1989).

[71] *See, e.g.*, Kreider v. F. Schumacher & Corp., 816 F. Supp. 957 (D. Del. 1993); Leadership Hous. Systems, Inc. v. T & S Elec, Inc., 384 So.2d 733 (Fla. 1980); and Mattila v. Minnesota Power & Light Co., 363 N.W.2d 842 (Minn. 1985).

[72] ARIZ. REV. STAT. § 34-226(A), amended 1996, effective June 30, 1998. Subsection (B) of the amendment will allow indemnification of a non-party to the contract who merely enters into an agreement that allows the contractor to enter onto the indemnitee's adjacent property to perform the contract.

[73] *E.g.*, Redford v. Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1980).

[74] MISS. CODE ANN., § 31-5-41; for other similar examples, see, LA. REV. STAT. ANN. § 9:2780; NEB. REV. STAT., § 25-21,187; N.Y. GEN. OBLIG. LAW, § 5-322.

[75] American Cyanamid Co. v. Campbell Constr. Co., 864 F. Supp. 580 (S.D. Miss. 1994).

[76] 199 A.D.2d 973, 608 N.Y.S.2d 25 (4th Dept. 1993).

[77] 764 S.W.2d 293 (Tex. App., Houston 1988).

[78] *E.g.*, LA. REV. STAT. §§ 38:2216(G) and 38:2195; and NEB. REV. STAT. § 25-21,187.

[79] 76 N.Y.2d 215, 556 N.E.2d 1090 (1990).

[80] *See, e.g.*, Mitchell Maintenance v. State Dept. of Transp., 442 So. 2d 276 (Fla. App. 4th Dist. 1983); and Redford v. Seattle, 94 Wash. 2d 198, 615 P.2d 1285 (1980).

[81] 36 Mass. App. Ct. 608, 634 N.E.2d 134 (1994). Note: This case also found void the provision that obligated the subcontractor to indemnify any party for injury which is "not caused by subcontractor or its employees, agents or subcontractor."

[82] *E.g.*, Prater v. Luhr Bros., Inc., 51 Ill. App. 3d 685, 9 Ill. Dec. 142, 366 N.E.2d 399 (1977).

[83] *See, e.g.*, New Amsterdam Casualty Co. v. F. Redondo & Co., 158 S.W.2d 334 (Tex. 1942).

[84] 529 F. Supp. 1234 (E.D.La. 1982).

[85] *Id.* p. 1244.

[86] New Amsterdam Casualty Co. v. F. Redondo & Co., 158 S.W.2d 334 (Tex. 1942).

[87] 206 F.2d 57 (1953).

[88] 480 F.2d 1095 (Neb. 1973).

[89] 21 F. Supp. 831 (Minn. 1937).

[90] 379 F.2d 207 (2d Cir. 1967).

[91] *See, e.g.*, Ridley Inv. Co. v. Croll, 192 A.2d 925 (Del. 1963). Also note that if the contractor saw a defect and proceeded with the project, it could not recover.

[92] Barnhill Bros. Inc. v. Louisiana Dept. of Highways, 147 So.2d 650 (La. 1962).

[93] 752 P.2d 467, at 469 note 2, (Alaska 1988).

[94] 611 P.2d 821 at 824 (Wyo. 1980).

[95] *See, e.g.*, Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. Supr. 1984); Magee v. Blue Ridge Professional Bldg. Co., 821 S.W.2d 839 (Mo. 1991); and Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

[96] *See, e.g.*, Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. Supr. 1984); Cross v. Ainsworth Seed Co., 199 Ill. App. 3d 910, 145 Ill. Dec. 927, 557 N.E.2d 906 (1990); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Harmon v. Angus R. Jessup Assoc., Inc., 619 S.W.2d 522 (Tenn. 1981); Sowders v. M.W. Kellogg Co., 663 S.W.2d 644 (Tex. Ct. App. 1983); and Gibson v. West Virginia Dept of Highways, 406 S.E.2d 440 (W.Va. 1991).

[97] *See, e.g.*, Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983); Horton v. Goldminer's Daughter, 118 Utah Adv. Rep. 37, 785 P.2d 1087 (1989); and Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).

[98] *See, e.g.*, Turner Constr. Co. v. Scales, 752 P.2d 467 (Alaska 1988); Shibuya v. Architects Hawaii, Ltd., 65 Haw. 26, 647 P.2d 276 (1982); Henderson Clay Products, Inc v. Edgar Wood & Assoc. Inc., 122 N.H. 800, 451 A.2d 174 (N.H. 1982); and Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978).

[99] *See* John H. Bauman, "Remedies Provision in State Constitutions and The Proper Role of State Courts", 26 Wake Forest L. Rev. 237, 267 (1991).

[100] 468 So. 2d 431 (Fla. 1985).

[101] 217 N.Y. 382, 111 N.E. 1050 (1916).

[102] 3 N.Y.2d 137, 143 N.E.2d 895 (1957).

[103] Except Iowa and Vermont. The Kansas and New York statutes do not specify coverage for architects and professional engineers.

[104] Arkansas; California; Colorado; Connecticut; Delaware; Georgia; Idaho; Illinois; Indiana; Kentucky; Louisiana; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Jersey; New Mexico; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; Tennessee; Texas; Virginia; Washington; and West Virginia.

[105] Alabama, Alaska, Florida, Hawaii, New Hampshire, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming.

[106] *See, e.g.*, Champagnie v. W.E. O'Neil Constr. Co., 77 Ill. App. 3d 136, 32 Ill. Dec. 609, 395 N.E.2d 990 (1979); and Robertson v. Swindell-Dressler Co., 82 Mich. App. 382, 267 N.W.2d 131 (1978).

[107] *See, e.g.*, Mitchell Maintenance v. State Dept. of Transp., 442 So. 2d 276 (Fla. 1983), where the contractor unsuccessfully argued that Florida DOT was not entitled to indemnification if it too was in part negligent.

[108] Pearce v. L. J. Earnest, Inc., 411 So. 2d 1276 (La. 1982), *writ denied*, 414 So. 2d 377. It should also be noted that LA REV. STAT. ANN. §§ 38:2216(G) and 38:2195 provide that hold harmless or indemnity agreements by the contractor for negligence of the public body, from the contractor to the design professional, or from the public body to the contractor for the negligence of the others are prohibited.

[109] N.Y. GEN OBLIG. LAW § 5-322.1.

[110] *See, e.g.*, Arbusto v. Fordham University, 160 A.D.2d 191, 554 N.Y.S.2d 2, (1st. Dept. 1990).

[111] WASH. REV. CODE § 39.08.015.

[112] 247 N.E.2d 591 (Mass. 1969).

[113] 301 A.2d 273 (Del. 1972).

[114] 477 F.2d 229 (2nd Cir. 1973).

[115] ___A.D.2d ___, 633 N.Y.S.2d 415 (1995), *leave to appeal denied*, 88 N.Y.2d 804 (1996).

[116] 211 N.W. 670 (Wis. 1927).

[117] 256 N.C. 298, 123 S.E.2d 744 (1962). *Also see*, City of Osceola v. Gjellefald Construction Co., 225 Iowa 215, 279 N.W. 590 (1938); Town of Tonawanda v. Stappell, Mumm & Beals Corp., 240 A.D. 472, 270 N.Y.S. 370 (1934); City of Seaside v. Randles, 92 Or. 650, 180 P. 319 (1919); and Mayor of Newark v. New Jersey Asphalt Co., 68 N.J.L. 458, 53 A. 294 (1902).

APPENDIX A

TABLE 3. STATE LAWS RELATING TO SCOPE AND COVERAGE OF CONTRACTOR BONDS (UPDATED 1996)

State Statute Specification	*Scope of Bond Obligation*	*Amount of Coverage*	*Special Requirements*
Alabama ALA. CODE §39-1-1 & Stand. Specs. §103.05	Performance Bond: faithful performance of contract. Payment Bond: labor, materials, feedstuffs, or supplies for or in the prosecution of the work provided for. Exemption: contracts under $20,000.	100% of contract price. 50% of contract price.	Payment Bond must provide for payment of reasonable attorney fees for successful claimant on the bond.
Alaska ALASKA STAT. §36.25.010 & Stand. Specs. §103-1.04	Performance Bond: perform and complete all obligations and work under the contract. Payment Bond: payment of all claims for labor performed and materials and supplies furnished. Applies to contracts over $100,000.	50% of amount of contract less than $1,000,000. 40% over $1,000,000. Same.	Bonds shall remain in effect for 12 months after final payment. Corporate surety must be authorized to do business in State.
Arizona ARIZ. STAT. §§34-221 - 34-222 (1992) & Stand. Specs. §103-05	Performance Bond: "faithful performance of the contract." Payment Bond: "for the payment of all labor, materials and supplies furnished therefor and the payment of all workman's compensation, occupational disease and unemployment compensation premiums."	100% of contract amount. Same.	Surety must have authority to transact surety business in State. Bond must provide for payment of attorney fees, for successful claimant.
Arkansas Stand. Specs. §103.05 (1993)	Performance Bond: In form acceptable to Department. Payment Bond: In form acceptable to Department.	100% of contract amount. 80% of contract amount.	
California Calif. PUB. CONTRACT CODE §§ 7103, 10221 - 10225	Performance Bond: Guarantee faithful performance of contract by the contractor. Payment Bond: For the payment of claims of laborers, mechanics or materialmen employed on the work under the contract.	At least 50% of contract price. Same.	
Colorado COLO. REV. STAT. §§38-26-105, 38-26-106, 24-105-202 (1985)	Performance Bond: "faithful performance of the contract." Payment Bond: Payment for any labor, materials, provisions, provender, or other supplies used or consumed by contractor or his subcontractors in performance of the work contracted, and supplies, rental machinery, tools or equipment in the prosecution of the work. Exceptions: Contracts under $50,000.	50% of contract amount. Same.	Performance and payment bonds may be required for contracts of less than $50,000 when determined to be in the best interest of the state or political subdivision. Certified or cashier's check or bank money order may be accepted in lieu of surety bond.
Connecticut CONN. GEN. STAT. ANN., §49-41 Stand. Specs. §1.03.04	Performance Bond: For satisfactory completion of the work. Payment Bond: "for the protection of persons supplying labor or material in the prosecution of the work." Exceptions: Contracts under $25,000.	Full amount of contract. Same.	
Delaware DEL. CODE ANN. tit. 29, §6909 (1985)	Performance Bond: faithful compliance and performance of each and every term and condition of the contract and proposal and plans and specifications, "including payment in full, to every person furnishing material or performing labor in the performance of the contract, of all sums of money due him for such labor or material." Exemptions: bond may be waived for material under $50,000.	100% of contract price.	Surety must be authorized to do business in State. In purchase of materials, contracting agency may reduce or waive bond requirements.
Florida FLA. STAT. ANN., §255.05	Payment and Performance Bond: Performance of contract in the time and manner prescribed in the contract, and prompt payment of claims by laborers, materialmen, subcontractors or sub-subcontractors whose claims derive directly or indirectly from prosecution of the work provided for in the contract. Exemptions: State contracts of $100,000 or less. Department of Management Services may delegate to state agencies authority to exempt between $100,000 and $200,000.	Equal to amount of contract.	In lieu of surety bond, contractor may give security in the form of cash, money order, certified or cashier's check, irrevocable letter of credit, or other acceptable security.
Georgia GA. CODE ANN. §§32-2-70, 36-82-101, 13-10-1 (1996 Suppl.)	Performance Bond: Payable "to, in favor of, and for the protection of the state, county, municipal corporation, or public board or body thereof for which the work is to be done." Payment Bond: "for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the contract." Exceptions: Contracts under $5,000.	Total amount of contract. Same.	
Hawaii[1] HAW. REV. STAT., §103D-324 (1993)	Performance Bond: Faithfully perform, and fully complete the contract in strict accordance with its terms. Payment Bond: For every person who furnishes labor or material to the contractor for the work provided in the contract. Exceptions: Contracts under $25,000.	100% of contract price. Same.	Surety must be authorized to do business in State.
Idaho IDAHO CODE §54-1926 (1992) Stand. Specs. §103.04	Performance Bond: Faithful performance of the contract in accordance with its plans, specifications, and conditions. Bonds shall be solely for the protection of the contracting agency. Payment Bond: Solely for protection of persons supplying labor materials, or renting, leasing, or otherwise supplying equipment to the contractor or his subcontractor in prosecution of the work provided for in the contract.	Not less than 50% of contract amount. Same.	Government obligations may be given in lieu of surety bond if they meet statutory criteria of IDAHO CODE, §54-1901.

[1] Hawaii uses both Contractor Performance and Payment Bonds and Surety Performance and Payment Bonds.

Illinois ILL. COMPILED STAT. ch 30, §550/1 (1991) Stand. Specs. §103.04 (1994)	Performance and Payment Bond: "for the completion of the contract, for the payment of material used in such work and for all labor performed in such work, whether by subcontractor or otherwise."	Fix by DOT. Specs. set amount at 100% of contract amount.	Sureties shall be subject to the right of reasonable approval or disapproval.
Indiana IND. CODE §8-23-9-8 (1990) Stand. Specs. §101.32	Performance Bond: "faithful performance of work, in accordance with the profile, plans, and specifications ... and conditioned also upon the payment ... for all labor performed or materials furnished or other services rendered in construction of the highway." Department may waive bond requirements on contracts of $100,000 or less, provided other requirements assure payment of subcontractors, suppliers, and employees by the contractor.	Amount of Performance Bond is set by Commissioner, but it may not be less than the bidder's proposal or the contract amount.	Surety must be authorized to do business in the State, and is subject to the Commissioner's approval.
Iowa IOWA CODE §§573.2 - 573.5 (1988) Stand. Specs. §1103.05	Contract Bond: "faithful performance of the contract, and for fulfillment of other requirements as provided by law." Payment requirements include payment of all claims for labor and materials not otherwise covered by retainage. Exceptions: Exception from bond requirement may be allowed for contracts of less than $25,000 (Standard Specifications state for contracts under $3,000).	Not less than 75% of the amount of the contract unless contract provided that no payments are due until completion, in which case only 25% of the contract amount must be covered by the bond.	Bonding company must be authorized to do business in the State. In lieu of surety bond, the contractor may deposit cash, certified check, or Federal or State bonds.
Kansas KAN. STAT. ANN. §§68-410, 68-704 (1986) Stand. Specs. §103.05	Performance Bond: "faithfully perform such contract in every respect." Payment Bond: "pay all indebtedness incurred for supplies, materials, or labor furnished, used or consumed in connection with or in or about the construction of the project for which the contract has been let, including gasoline, lubricating oils, fuel oils, greases, coal, and similar items used or consumed and used directly in carrying out the provisions of the contract." Exceptions: Contracts under $1,000.	Amount not less than contract price.	Surety must be authorized to do business in State.
Kentucky KY. REV. STAT. ANN. §176.080 (1986) Stand. Spec. §103.05	Performance Bond: Performance of the contract. Payment Bond: Payment of proper compensation under the labor and wage terms of the contract payment of claims against the contractor for labor, materials and supplies, and reimbursement of the contracting agency for overpayment made on the contract.	100% of the contract amount.	Surety must be approved by Department of Highways.
Louisiana LA. REV. STAT. ANN. §§38-2216, 38-2241 (1995), 48:255	Performance Bond: "for faithful performance of his duties." Payment Bond: for payment to claimants as defined in §38:2242. Exceptions: Contracts under $5,000. For contracts under $200,000, SBAs need bonds for 50% of contract price.	Not less than 50% of contract amount.	Good and solvent bonds.

Maine ME. REV. STAT. ANN. tit. 14, §871 (1985) (1995 Suppl.) Stand. Specs. §103.05 (1995)	Performance Bond: "faithful performance of the contract in accordance with the plans, specifications and conditions thereof." Payment Bond: "solely for the protection of claimants supplying labor or materials to the contractor or the contractor's subcontractor in the prosecution of the work provided for in the contract." Exemptions: Contracts under $100,000.	100% of contract amount. Same.	
Maryland MD. CODE ANN., STATE FIN. & PROC., §13-216 (1995)[1] (1996 Suppl.) Code of Maryland Regulations §21.06.07.03 (1987)	Performance Bond: well and truly perform the contract. Payment Bond: Payment to every claimant, as defined. Exceptions: Contracts under $100,000. Unless required by federal law	100% of contract amount. Same.	Surety must be authorized to do business in the State.
Massachusetts MASS. GEN. L. ch. 149, §29 (1987) Mass. High. Dept. Stand. Specs. §2.04	Performance Bond: "faithful performance of the contract." Payment Bond: Payment by contractor or subcontractor for labor performed or furnished and material used or employed in the work, including lumber not incorporated into or wholly consumed, specially fabricated material, transportation costs, equipment rental charges, and sums due under collective bargaining agreements regarding labor performed under the contract, as authorized by statute. Exceptions: State contracts under $5,000 and local contracts under $2,000.	1/2 of total contract price.	
Michigan MICH. COMP. LAWS §129-201 et. seq. (1987)	Payment Bond: For payment by the contractor of all subcontractors, and all labor performed and materials and certain supplies furnished and used in the work.	For public contracts sufficient security, but not less than 25% of contract amount.	
Minnesota MINN. STAT. §574.26 (1986) Stand. Specs. §	Performance Bond: "for the use and benefit of the public body to complete the contract according to its terms, and conditioned on saving the public body harmless from all costs and charges that may accrue on account of completing the specified work." Payment Bond: "for the use and benefit of all persons furnishing labor and materials engaged under, or to perform the contract, conditioned for the payment, as they become due, of all just claims for labor and materials."	100% of contract price. DOT may set amount between 75 & 100%.	

[1] 13-216 applies to "procurement contracts for construction". Construction contracts are covered by §17-103 of MD. Code, under which a $50,000. contract requires a bond.

Mississippi MISS. CODE ANN. §31-5-51 (1982)[1] Stand. Specs. §103.05	Performance Bond: "full and faithful performance of the contract." Payment Bond: "prompt payment of all persons supplying labor or material used in the prosecution of the work under said contract..."	Full amount of contract. Same.	Surety must be authorized to do business in State.
Missouri RSMO § 107.170 Stand. Specs. §103.41 (1993)	For the payment of any and all material, insurance premiums, and labor for the work. Contract Bond: conditioned on "prompt and proper completion of the work in accordance with the contract, plans, and specifications"; and payment for "all labor performed and materials consumed or used in the work."	Sufficient Security.	Surety may be out-of-State company, but if so bond must be countersigned by resident agent in State.
Montana MONT. CODE ANN. §18-2-201 (1995)	Performance Security: Faithfully perform all of the provisions of the contract and pay all persons who supply contractor or subcontractor with provisions, provender, material, or supplies for performing the work. Exceptions: Bonds may be waived for contracts under $5,000.	100% of contract price.	
Nebraska NEB. REV. STAT. §52-118	Payment Bond: "for the payment for material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract." Exceptions: Contracts under $15,000.	Full amount of contract price.	Must be corporate surety.
Nevada NEV. REV. STAT., §408.357 (1987) Stand. Specs. §§101.11, 103.05	Performance Bond: "Guarantee faithful performance of the contract in accordance with the plans, specifications and terms of the contract." Payment Bond: Conditioned on payment of State and local taxes, Nevada Industrial Insurance Act premiums, Unemployment Compensation Law contributions, claims for labor, materials, provisions, implements, machinery, means of transportation or supplies furnished upon or used for performance of contract.	Sum equal to full or total amount of contract.	Surety must be incorporated, approved by department, and be authorized to do business in State.
New Hampshire N.H. REV. STAT. ANN. §§447.16 (1986) Stand. Spec. §103.05 (1990)	Payment Bond: "for all labor performed or furnished, for all equipment hired, including trucks, for all material used and for fuels, lubricants, power, tools, hardware and supplies purchased ... and used in carrying out said contract, and for labor and parts furnished upon the order of said contractor for the repair of equipment used in carrying out said contract." Exception: Contracts under $25,000.	100% of contract amount.	

New Jersey N.J. REV.STAT. §2A:44-143 (1996) Stand. Spec. §103.05 (1983)	Payment and Performance Bond: "for the payment by the contractor, and by all subcontractors, for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair...." Exceptions: Bonds may be waived for projects up to $200,000.	Up to 100% of contract price.	Strict surety requirements. See, §2A:44-143 a (1)
New Mexico N. MEX. STAT. ANN. §§13-4-18, 13-4-19, & 13-4-20 (1987) Stand. Specs. §103.6 (1994)	Performance Bond: conditioned on performance and completion of the contract according to its terms, compliance with all requirements of law. Payment Bond: For payment of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. For all taxes due arising out of construction services rendered under the contract. Additional Bond: For the case of insolvency of the surety. Exceptions: Contracts under $25,000, the agency may waive bonds.	100% of contract price.	Corporate surety must be authorized to do business in State and appear on the U.S. Treasury Dept list. Certified Disadvantaged Business and Women's Business Enterprises need furnish only 50% of contract amount if permitted by agency.
New York N.Y. HIGH. LAW §38 (McKinney 1995) N.Y. STATE FIN. LAW §137 (McKinney 1995)	Performance Bond: "perform the work in accordance with the terms of the contract and the plans and specifications, and... will commence and complete the work within the time prescribed"; and provide "against any direct or indirect damage..., suffered or claimed on account of such construction or improvement during the time thereof." Labor and Material Bond: contractors and subcontractors shall promptly pay all moneys due for furnishing labor and material to the project. Exceptions: For contracts under $50,000 the Performance Bond may be waived. In lieu of bonds, contractor may agree to have 20% of the contract price retained until the entire job is completed and accepted.	100% of contract price. Same.	Sureties must be approved by highway department.

[1] Mississippi: MISS CODE ANN. §31-5-3 requires a bond for the payment of taxes, licenses, etc.

North Carolina N.C. GEN. STAT. §44A-26 (1995)	Performance Bond: "faithful performance of the contract ... solely for the protection of the contracting body which awarded the contract." Payment Bond: "solely for the protection of the persons furnishing materials or performing labor for which a contractor or subcontractor is liable." Exceptions: Contracts under $100,000.	100% of contract amount. Same.	Surety must be authorized to do business in State.
North Dakota N.D. CENT. CODE §24-02-23 (1987) Stand. Spec. §103.5 (1983)	Contract Bond: conditioned on (1) performance of all terms, covenants and conditions of the contract; (2) protection of State against loss or damage from any cause arising out of the contract; (3) payment of all bills against principal or subcontractor for labor or services performed, and materials, equipment, or supplies furnished directly or indirectly arising out of performance of the contract; (4) payment of insurance premiums; (5) payment and reporting of workman's compensation premiums and payments; (6) payment of contributions to State Unemployment Compensation Division; and (7) payment of State and local taxes against contractor or subcontractor.	Total amount of the contract.	Surety must be a "responsible surety" approved by the State DOT.
Ohio OHIO REV. CODE ANN. §5525.16 (1992)	Performance Bond: "will perform the work upon the terms proposed..." Payment Bond: "payment by the contractor and all subcontractors for labor or work performed or materials furnished in connection with the work, improvement, or project involved."	100% of estimated cost. Same.	Surety must be authorized to do business in State.
Oklahoma OKLA. STAT. tit.61, §§1, 113 (1992)	Performance Bond: Proper and prompt completion of work in accordance with the contract. Payment Bond: Payment of all indebtedness incurred for labor, material, rental of machinery or equipment, and repair of and parts for equipment as are used or consumed in the performance of the contract. Exceptions: Contracts under $13,500.	Sum equal to contract prices. Same.	Contractor must have liability and workman's compensation insurance during construction. For contracts greater than $13,500, contractor may deposit an irrevocable letter of credit issued by a financial institution insured by FDIC or FSLIC in lieu of surety bond.
Oregon OR. REV. STAT. §279.029 (1987)	Performance Bond: Faithful performance of the contract and statutory obligations. Payment Bond: Prompt payment of all persons supplying labor or materials to contractor or subcontractor for prosecution of work provided in the contract, and contributions to Industrial Accident Fund and State Unemployment Compensation Fund, and wage deductions for State personal tax.	100% of contract price. Same.	

Pennsylvania PA. STAT. ANN. Tit. 8, §193 Tit. 8, §191	Performance Bond: Conditioned on faithful performance of contract in accordance with plans, specifications, and conditions. Payment Bond: Conditioned on prompt payment of all claims for materials or labor against prime contractor or his subcontractors. Labor and materials include public utilities services and reasonable rentals of equipment, but only for periods when equipment is actually in use on work site.	100% of contract amount.	Surety must be authorized to do business in the State.
Rhode Island R.I. GEN. LAWS §37-12-1 (1994)	Contract Bond: conditioned that contractor "shall in all things, well and truly keep and perform the covenants, conditions, and agreements in the contract... at the time and manner therein specified, and in all respects according to their true intent and meaning..." indemnify and save State harmless; and promptly pay for all labor performed or furnished and for all materials and equipment furnished in carrying out the contract. Exceptions: For contracts under $50,000 bond may be waived.	Not less than 50% nor more than 100% of contract price.	
South Carolina S.C. CODE ANN., §57-5-1660 (1993)	Performance and Indemnity Bond: For the protection of the DOT. Payment Bond: For the protection of all persons supplying labor and materials in the prosecution of work provided for in the contract for the use of each such person. Exception: contracts less than $10,000.	100% of contract amount. 50% of contract amount.	Surety must be satisfactory to agency.
South Dakota S.D. CODIFIED LAWS ANN., §§5-21-1, 31-23-1	Performance Bond: "faithful performance of such contract ...."	100% of contract price.	
Tennessee TENN. CODE ANN. §54-5-119	Contract Bond: "for the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work."	100 % of contract amount.	Bond must be approved by Dept.
Texas TEX. GOV'T CODE ANN. §2253.021 (1995)	Performance Bond: "faithful performance of the work in accordance with the plans, specifications, and contract documents." Payment Bond: "solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor and material. Exceptions: Performance bonds: Contracts under $100,000. Payment bonds: Contracts under $25,000.	In the amount of contract. Same.	

Utah UTAH CODE ANN. §§14-1-18, 14-1-19, 63-56-13 (1987)	Performance Bond: For performance of contract. Payment Bond: Payment to persons who furnish labor or supplied materials to the contractor or subcontractor for the work of the contract.	100% of contract amount. Same.	
Vermont VT. STAT. ANN. tit.19, §10(8) & (9) (1992)	Performance Bond: Compliance with all matters and things set forth and specified and at the time specified in the contract. Labor and Materials Bond: conditioned on "payment, settlement, liquidation and discharge of the claims of all creditors for material, merchandise, labor, rent, hire of vehicles, power shovels, rollers, concrete mixers, tools and other appliances, professional services, premiums and other services used or employed in carrying out the terms of the contract ... for the payment of taxes both state and municipal, and contributions to the Vermont commissioner of employment and training...." Exceptions: For contracts under $100,000 requirement of a performance bond may be waived.	Full amount of contract.	Surety must be authorized to do business in State.
Virginia VA. CODE ANN. §11-58 (1984)	Performance Bond: "faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract." Payment Bond: "for protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work." Exceptions: Contracts under $100,000.	Equal to sum of contract.	Surety must be legally authorized to do business in State.
Washington WASH. REV. CODE §39.08.010 (1989)	Contract Bond: conditioned on faithful performance of all provisions of the contract, and payment of all laborers, mechanics, subcontractors, materialmen, and all persons who supply contractors and subcontractors with provisions and supplies for carrying out the contract.	Full contract price. (municipalities may fix amount of bond and designate obligee, but amount must be at least 25% of contract price.)	

West Virginia W.VA. CODE §§17-4-20, 33-19-1 (1986) Stand. Spec. §103.5	Contract Bond: Conditioned that contractor will "well and truly perform his contract and shall pay in full to the persons entitled thereto for all material, gas, oil, repairs, supplies, tires, equipment, rental charges for equipment, and charges for use of equipment, and labor used by him in and about the performance of such contract, or which reasonably appeared at the time of delivery or performance would substantially consume in... performance of such contract."	100% of contract price.	Bond must be provided through an agent licensed in the State.
Wisconsin WIS. STAT. ANN. §779.14 (1995)	Performance Bond: "faithful performance of the contract...." Payment Bond: Promptly make payment to every person, including every subcontractor or supplier, of all claims that are entitled to payment for labor performed and materials furnished to the contractor for the purpose of making the public improvement or performing the public work. Exceptions: Contracts under $2,500.	Not less than the contract price.	Surety must be licensed to do business in State.
Wyoming WYO. STAT. §§16-6-112 (1987) Stand. Spec. §103.05 (1980)	Contract Bond: "for use and benefit of any person performing any work or labor or furnishing any materials or goods of any kind which were used in the execution of the contract, conditioned for the performance and completion of the contract according to its terms, compliance with all the requirements of law and payment as due of all just claims for work or labor performed, material furnished...." Exceptions: Contracts under $7,500.	100% of contract price.	
District of Columbia D.C. CODE ANN. §1-1185.5 (1985)	Payment Bond: "Every person who has furnished labor or materials to the contractor or a subcontractor..."		

APPENDIX B

TABLE 4. STATE REQUIREMENTS FOR FILING NOTICE OF CLAIMS AND SUITS ON CONTRACTORS' PAYMENT BONDS (UPDATED 1996)

State	Statute or Specification	Maximum Time for Notice	Party Notified	Form of Notice	Limit on Filing Suit Waiting Period	Time Limit
Alabama	ALA CODE §39-1-1 (1975)		Surety	Registered or certified mail	45 days after notice to surety	1 year after settlement
Alaska	ALASKA STAT. § 36.25.020 (1987)	90 days	Prime Contractor	Registered mail	90 days after labor performed or materials furnished	1 year after final settlement
Arizona	ARIZ. REV. STAT. ANN. §34-223	90 days	Prime Contractor	Registered or certified mail	90 days after work performed	1 year after work performed
Arkansas[1]						
Calif.						
Colorado	COLO. REV. STAT. § 38-26-107	90 days after date of final settlement[2]	Contract Agency	Written		6 months after work completed
Conn.	CONN. GEN. STAT. §49-41a & §49-42	30 days after payment to contractor or sub-contractor	Surety, Prime Contractor	Registered or certified mail	180 days after work performed or labor or supplies furnished	1 year after applicable payment date
Delaware	Del. Code Ann. 29-6909 & 6962		Prime Contractor, Surety, Contract Agency	Written		3 years after last work performed
Florida	FLA. STAT. §255.05	45 days after beginning to furnish labor, materials or supplies	Prime Contractor, Surety		90 days after work performed	1 year after completion and acceptance of project
Georgia	GA. Code Ann. §36-82-104	90 days	Prime Contractor		90 days after work performed	1 year after project completion
Hawaii	103D-324 & 325				60 days after final settlement	1 year after final settlement
Idaho	IDAHO CODE §54-1927	90 days	Prime Contractor	Registered or certified mail	90 days after work last performed	1 year after last performed labor
Illinois	ILL. COMP. STAT., ch. 30, §550	180 days after work performed 10 days later with contractor	Contract Agency	Verified notice	120 days after last work performed	6 months after acceptance of project
Indiana	IND. CODE §§ 8-23-9-10 & 8-23-9-11	60 days	Surety		60 days after notice to surety	18 months after acceptance of project
Iowa	IOWA CODE §§573.10, 573.16 & 573.6	30 days	Contract Agency			1 year after acceptance of project
Kansas	KAN. STAT. ANN. §68-410	6 months	Contract Agency			1 year after completion of project
Kentucky						
Louisiana	LA REV. STAT. ANN. §38-2247	45 days	Prime Contractor	Registered or certified mail		1 year after registry of project acceptance
Maine	ME. REV. STAT. ANN. §1487(3) & (4)	90 days	Prime Contractor	Registered or certified mail	90 days after work performed or materials delivered	1 year after work performed or materials delivered
Maryland	Ann. Code of MD §17-108	90 days	Prime Contractor		90 days after final acceptance of completed project	1 year after performance of work or delivery of materials
Mass.	MASS. GEN. LAWS ch. 149, §29	65 days Notice required only for sub-contractors ordinary sub-contractor has no notice requirement	Prime Contractor	Registered or certified mail		1 year after last performed labor
Michigan	MICH. COMP. LAWS §129-201	60 days	Board of Contracting Agency	Written notice in duplicate		1 year after completion of contract and acceptance of project
Minn.	MINN. STAT. §574.31	90 days	Surety, Comm. of Commerce		120 days	1 year after notice of claim
Miss.	MISS. CODE ANN. §31-5-51	90 days	Prime Contractor or Surety	Certified mail	90 days after last work performed or material furnished	1 year after notice of contract settlement
Missouri[3]		60 days	Surety, Prime Contractor			10 years after claim accrues
Montana	MONT. CODE ANN. §18-2-204 & 205	30 days	Contract Agency			90 days after final acceptance of work
Nebraska	NEB. REV. STAT. §§ 52-118.01 & 52-118.02	4 months for those supplying sub-contractors	Prime Contractor		90 days after last work done or material furnished	1 year after final acceptance of work

[1] Arkansas requires a payment bond under its Standard Specifications. These specifications do not provide a specific procedure for actions under the bond.

[2] See Rocky Mountain Association of Credit Management v. Marshall, 615 P2d 68 (Colorado)

[3] Missouri requires a payment bond under its standard specifications, but does not provide a procedure for actions under the bond.

Nevada	NEV. REV. STAT. §408.363	30 days from date of final acceptance of project	Prime Contractor, Contract Agency, Surety	Verified claim in triplicate		6 months after final acceptance of project
New Hampshire	N.H. REV. STAT. ANN. §§ 447:17 - 447:18	90 days	Highway Agency, Surety, Contract Agency	Mail	90 days after completion and acceptance of project	1 year after notice
New Jersey	N.J. REV. STAT. §2A:44-145	80 days	Surety		80 days after acceptance of project	1 year after acceptance of project
New Mexico	N.M. STAT. ANN. §13-4-19	90 days	Contractor Surety	Registered mail No special form	90 days after work performed	1 year after final settlement of contract
New York	N.Y. STATE FIN. §137 N.Y. LIEN LAW §12	120 days 60 days after acceptance	Prime Contractor Contract Agency, State Comptroller	Registered mail		1 year from date of claimant's subcontract became due 60 days after acceptance of contract
North Carolina	N.C. GEN. STAT. §§ 44A-27, 44A-28	90 days	Prime Contractor	Registered or certified mail	90 days after work performed	1 year from last labor performed
North Dakota	N.D. CENT. CODE §§ 24-02-25.1 & 24-02-25.2	90 days	Surety, Prime Contractor	Registered or certified mail		1 year from last labor or material supplied by claimant
Ohio	OHIO REV. CODE ANN. §5525.16	90 days after project acceptance	Surety	Statement of amount due	60 days after notice to surety	1 year after acceptance of project
Okla.	OKLA. STAT. tit. 61 §2	90 days	Prime ContractorSurety	Registered or certified mail		1 year after last labor or material furnished
Oregon	OR. REV. STAT. §§ 279.526, 279.528, 279.536	120 days	Contract Agency	Registered or certified mail		2 years after work performed
Penn.	PA. P.S. CONS. STAT. 8§194	90 days	Prime Contractor or Surety	Registered or certified mail	90 days	1 year after settlement of contract
Rhode Island	R.I. GEN. LAWS §37-12.2 & 37-12.5 (1994 suppl.)	90 days	Prime Contractor	Certified mail	90 days after work performed	2 years after last work performed or period of bond, whichever is longer
South Carolina	S.C. CODE ANN. 57-5-1660(b)	90 days	Prime Contractor Surety Contract Agency	Written	90 days	1 year after settlement of contract
South Dakota	S.D. CODIFIED LAWS §31-23-2	6 months	Prime Contractor	Registered or certified mail		1 year following settlement of contract
Tenn.	TENN. CODE ANN. § 54-5-119	30 days	*	2	2	1 year after first publication of notice for submission of claims
Texas	TEX. GEN. GOV. CODE ANN. §§ 2253.041 to 2253.078	15 days after 3rd day of month following supply of labor and materials	Prime Contractor and Surety	Certified or registered mail	60 days after filing notice of claim	1 year after notice of claim
Utah	UTAH CODE ANN. §§ 14-1-19, 14-1-20	90 days	Prime Contractor	Registered or certified mail	90 days after last work performed	1 year after last work performed or materials delivered
Vermont	VT. STAT. ANN. tit. 19 §10		Secretary of Contracting Agency	Sworn Statement	90 days after final acceptance of project	1 year after filing claim notice
Virginia	VA. CODE ANN. §11-60	90 days	Prime Contractor	Registered or certified mail		1 year after work performed
Wash.	WASH. REV. CODE § 39.08.030	Within 30 days of project acceptance	Contract Agency		80 days after project acceptance	6 years after acceptance of project
West Virginia	W.VA. CODE §17-4-20		Contract Agency or Surety			10 years after work performed
Wisconsin	WIS. STAT. §779.14 (2)(a)	60 days after supplying labor or materials	Contractor and Surety			1 year after work performed
Wyoming	WYO. STAT. § 16-6-115 & 16-6-116		Contract Agency			1 year after notice of final payment

* Tennessee: Determined by terms of the bond.

APPENDIX C

TABLE 5. STATUTE OF LIMITATIONS OR REPOSE THAT AFFECT RECOVERY AND/OR BRINGING OF LEGAL ACTIONS

State and Statute	S/L	Court Held	No. Years	Case	Parties Protected
Alabama ALA. CODE §6-5-218 (1977)	Yes	Invalid	7	*Jackson v. Mannesmann Demag Corp.*, 435 So.2d 725 (Ala. 1983)	Any person performing or furnishing the design, planning, supervision or observation of construction, or the construction.
Alaska ALASKA STAT. §09.10.055	Yes	Invalid	6	*Turner Construction Co. v. Scales*, 752 P.2d 467 (Alaska 1988)	Any person performing or furnishing the design, planning, supervision or observation of construction, or construction.
Arizona ARIZ. REV. STAT. ANN. §12-552	Yes		8		
Arkansas ARK. STAT. §16-56-112	Yes	Valid	5	*Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901, 95 S.Ct. 185, 42 L.Ed.2d 147 (1971)	Any person performing or furnishing the design, planning, supervision or observation of construction, or the construction.
California CIV. PROC. C. §337.15 (1982)	Yes	Valid	10	*Bamhouse v. City of Pinole*, 133 Cal. App.3d 171, 183 Cal. Rptr. 881 (1982).	Any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction.
Colorado COLO. REV. STAT. §13-80-104 (1986)	Yes	Valid	6	*Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982) (Rehearing denied 1983)	Any architect, contractor, builder or builder vendor, engineer or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction.
Connecticut GEN. STAT. §52-584a (1991)	Yes	Valid	7	*Zapata v. Burns*, 207 Conn. 496, 542 A.2d 700 (1988)	Architect & Professional Engineer
Delaware DEL. CODE, tit. 10, §8127	Yes	Valid	6	*Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413 (Del. Supr. 1984)	Any person involved in the construction or manner of construction ... design, planning, supervision and/or observation of any such construction or manner of construction
Florida FLA. STAT. ANN. §95.11(3)(c)[1]	Yes	Invalid	12	*Overland Construction Co., Inc. v. Simmons*, 369 So.2d 572 (1979)	Architects, professional engineers, and licensed contractor.
Georgia GA. CODE ANN. §9-3-51 (1982)	Yes	Valid	8	*Mullis v. Southern Co. Services, Inc.*, 250 Ga. 90, 296 S.E.2d 579 (1982)	Any person involved in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction
Hawaii HAW. REV. STAT. §657-8 HAW. REV. STAT. §657-8[2]	Yes	Invalid	6 10	*Shibuya v. Architects Hawaii, Ltd.*, 65 Haw. 26, 647 P.2d 276 (1982)	The owner of the real property, surety, or any other person having an interest therein or the improvement, any registered or duly licensed person performing or furnishing professional or licensed services in the design, planning, supervision, or observation of construction, or construction, manufacturers, materialmen and persons constructing or repairing. Except for owners and other person having an interest in the real property,and surveyors for boundary errors, any person in planning, design, construction, supervision and administering of construction, and observation of construction.
Idaho IDAHO CODE §5-241 (1990)	Yes	Valid	6	*Twin Falls Clinic & Hospital Bldg. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982)	Architects and builders.
Illinois ILL. REV. STAT., Ch.110, para. 13-214(b) (1981)	Yes	Valid	10	*Cross v. Ainsworth Seed Co.*, 199 Ill. App.3d 910, 145 Ill. Dec. 927, 557 N.E.2d 906 (1990)	Any person involved in the design, planning, supervision, observation or management of construction, or construction.
Indiana IND. CODE §34-4-20-2 (1968)	Yes	Valid	12	*Beecher v. White*, 447 N.E.2d 622 (Ind. Ct. App. 1983)	Any person involved in design, planning, supervision, construction, or observation of construction.
Iowa		No			
Kansas KAN. STAT. ANN. §60-511	Yes[3]		5		
Kentucky KY. REV. STAT. & R. §413.120(14)	Yes	Valid	5	*Carney v. Moody*, 646 S.W.2d 40 (1983)	Contractor.

[1] Florida: FLA STAT. ANN. §95.11(c) was amended in 1995. At this time there are no reported cases challenging the amended statute. The amended statute provides "An action founded on the design, planning, or construction by a ... professional engineer, registered architect, or licensed contractor and his or her employer ... when the action involves a latent defect ... must be commenced within 15 years ..."

[2] Hawaii REV. STAT. §657-8, in 1994 was amended and there are no reported cases on its constitutionality as this time.

[3] Kansas: Statute relates to unspecified actions and is not limited to architects and contractors.

Louisiana[a] LA. REV. STAT. ANN. §9:2772 (1991)	Yes	Valid	10	*Burmaster v. Gravity Drainage District No. 2*, 366 So.2d 1381 (La. Supr. 1978)	Any person performing or furnishing design, survey, planning, supervision, inspection or observation of construction, or construction.
Maine REV. STAT. §14-752-A (1980)	Yes		10		Design professionals.
Maryland MD. CODE ANN. CTS. & JUD. PROC. §5-108 (1991)	Yes	Valid	10	*Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 499 A.2d 178 (1985)	Architect, professional engineer and contractor.
Massachusetts MASS. GEN. L. ch.260, §2B	Yes	Valid	6	*Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982)	Any person performing or furnishing design, planning, construction or general administration.
Michigan MICH. COMP. LAWS §600.5839(1)	Yes	Valid	6	*O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980)	"any state licensed architect or professional engineer performing or furnishing the design or supervision of construction..."
Minnesota MINN. STAT. §541.051 (1990)	Yes	Valid	10	*Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. Supr. 1982)	Any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction.
Mississippi MISS. CODE. ANN. §15-1-41 (Supp. 1991)	Yes	Valid	6	*Reich v. Jesco, Inc.*, 526 So.2d 550 (Miss. 1988)	"... any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction..."
Missouri MO. REV. STAT. §516.097 (1976)	Yes	Valid	10	*Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo.1991)	Any person performing or furnishing, in whole or in part, the design, planning or construction, including architectural, engineering or construction services.
Mont. Rev. Code §27-2-208 Montana MONT. CODE ANN. §93-2619	Yes	Valid	10	*Reeves v. Ills Electric Co.*, 170 Mont. 104, 551 P.2d 647 (1976)	Any action arising out of design, planning, supervision, inspection, construction, or observation of construction of, or land surveying.
Nebraska NEB. REV. STAT. §§25-222 & 25-223 (1989)	Yes	Valid	10	*Williams v. Kingary Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987)	Sec. 25-222, architects and engineers. Sec.25-223, contractor.
Nevada NEV. REV. STAT. ANN. §11.204 (1991)	Yes	Valid	8	*Wise v. Bechtel Corporation*, 104 Nev. 750, 766 P.2d 1317 (1988)	Any owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or construction.
New Hampshire N.H. REV. STAT. ANN. §504:4-b	Yes	Invalid	6	*Henderson Clay Products, Inc v. Edgar Wood & Associates, Inc.*, 122 N.H. 800, 451 A.2d 174 (N.H. 1982)	Architects.

[a] See also, Louisiana Civil Code Art. 2762 that provides a 10 year prescriptive period from completion of the project for contractors and design professionals of building for defective design or construction.

New Jersey N.J. REV. STAT. §2A:14-1.1 (1987)	Yes	Valid	10	*Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972)	Persons performing or furnishing designs, planning, supervision of construction, or construction
New Mexico N.M. STAT. ANN. §37-1-27 (1990)	Yes	Valid[b]	10	*Howell v. Burk*, 90 N.M. 688, 568 P.2d 214, *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977)	Any person performing or furnishing construction, design, planning, supervision, inspection or administration of construction.
New York	No[c]				
North Carolina N.C. GEN. STAT. §1-50(5)	Yes	Valid	6	*Lamb v. Wedgewood South Corporation*, 55 N.C. App. 685, 286 S.E.2d 876 (1982)	Any person performing or furnishing the design, planning, supervision of construction, or construction.
North Dakota N.D. CENT. CODE §28-01-44 (1991)	Yes	Valid	10	*Bellemare v. Gateway Builders, Inc.*, 420 N.W.2d 733 (N.D. 1988)	Any person performing or furnishing the design, planning, supervision, or observation of construction, or construction.
Ohio OHIO REV. CODE ANN. §2305.131 (1990)	Yes	Valid	10	*Elizabeth Gamble Deaconess Home Assoc. v. Turner Constr. Co.*, 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984)	Any person performing services for or furnishing design, planning, supervision of construction, or construction.
Oklahoma OKLA. STAT. tit. 12, §109 (1981)	Yes	Valid	10	*St. Paul Fire & Marine Insurance Company v. Getty Oil Company*, 782 P.2d 915 (Okla. 1989)	Any "person owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction..."
Oregon OR. REV STAT. §12.115(1)	Yes	Valid	10	*Josephs v. Burns*, 260 Or. 493, 491 P.2d 203 (1971)	Contractor, architect, and engineer.
Pennsylvania 42 PA. CONS. STAT. §5536 (1981)	Yes	Valid	12	*Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715 (1978)	Any "person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction..."
Rhode Island General Laws §9-1-29 (1985)	Yes	Valid	10	*Walsh v. Gowing*, 494 A.2d 543 (R.I. 1985)	Architects, Professional Engineers, Contractors, Subcontractors, & Materialmen involved in the design, planning, supervision, or observation of construction or construction.
South Carolina S.C. CODE ANN. §15-3-640	Yes	Invalid	10	*Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978)	Architect, engineer, or contractor for design, planning, supervision, observation of construction or construction.

[b] New Mexico: In the case, *Terry v. New Mexico State Highway Commission*, 98 N.M.119, 645 P.2d 1375 (1982), the court held that if the incident occurs within three(3) months of the expiration of the ten(10) year period the statute is a violation of due process.

[c] New York: General Obligations Law, §5-322.1 prohibits certain agreements from exempting owners and contractors from liability; and §5-324 provides: Every covenant, agreement or understanding in, or in connection with any contract or agreement made and entered into by owners, contractors, subcontractors or suppliers whereby an architect, engineer, surveyor or their agents, servants or employees are indemnified for damages arising from liability for bodily injury to persons or damage to property caused by or arising out of defects in maps, plans, designs or specifications, prepared, acquired or used by such architect, engineer, surveyor or their agents, servants or employees shall be deemed void as against public policy and wholly unenforceable.

South Dakota S.D. CODIFIED LAWS ANN. §§15-2-9 & 15-2-12.1	Yes	Invalid	6	*Daugaard v. Babc Co-Op Building Supply Assn.*, 349 N.W.2d 419 (S.D. 1984)	Any person furnishing design, inspection or construction
Tennessee TENN. CODE ANN. §§28-3-201 - 28-3-205	Yes	Valid	4	*Harmon v. Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522 (Tenn. 1981)	Architects, engineers, contractors and others engaged in construction of improvements to real property.
Texas TEX. CIV. PRAC. & REM. §16.008 [1] (1986)	Yes	Valid	10	*Suburban Homes v. Austin-Northwest Development Co.*, 734 S.W.2d 89 (Tex. Ct. App. 1987)	Architects, Engineers, and any person performing or furnishing the design, planning, or inspection of construction or repair.
Utah UTAH CODE ANN. §78-12-25.5 (1977)	Yes	Invalid	7	*Horton v. Goldminer's Daughter*, 118 Utah Adv. Rep. 37, 785 P.2d 1087 (1989)	Any person performing or furnishing the design, planning supervision of construction or construction.
Vermont	No.				
Virginia VA. CODE ANN. §8.01-250 (1984)	Yes	Valid	5	*Hess v. Snyder Hunt Corp.*, 240 Va. 49, 392 S.E.2d 817 (1990)	Any person performing or furnishing the design, planning, surveying, supervision of construction, or construction.
Washington WASH. REV. CODE §4.16.310 (1988)	Yes	Valid	6	*Yakima Fruit & Cold Storage v. Central Heating & Plumbing Co.*, 81 Wash.2d 528, 503 P.2d 108 (1972)	Any person having constructed, altered or repaired.
West Virginia W. VA. CODE §55-2-6a	Yes	Valid	10	*Gibson v. West Virginia Dept of Highways*, 405 S.E.2d 440 (W.Va. 1991)	Persons "in the planning,design, surveying, observation or supervision of any construction or the actual construction...."
Wisconsin WIS. STAT. ANN. §893.89 (1994) [2]	Yes	Invalid	6	*Funk v. Wollin Silo & Equipment, Inc.*, 148 Wis.2d 59, 435 N.W.2d 244 (1989)	The "owner or occupier ... any person involved in the improvement to real property ...."
Wyoming WYO. STAT. §1-3-111 (1977)	Yes	Invalid	10	*Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980)	"... any person performing or furnishing the design, planning, supervision, construction or supervision of construction...."
District of Columbia D.C. CODE ANN. §12-310 (1989)	Yes	Valid	10	*Britt v. Schindler Elevator Corporation*, 637 F. Supp. 734 (D.D.C. 1986)	Bars claims involving personal injury caused by defective or unsafe improvements to real property.

[1] Texas: TEX. CIV. PRAC. & REM. CODE ANN. §16.009 does not bar an action "based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair."

[2] Following the Funk decision, the Wisconsin Legislature, effective April 29, 1994, amended WIS. STAT. §893.89 and its coverage. Through 1996 there on no reported cases challenging the revised statute, which lengthened the time for bringing an action to 10 years following the date of "substantial completion" of improvement to a property.

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