



# THE LEGAL PAD

A Newsletter of Current Business and Legal Matters

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## Performance and Payment Bond Threshold Increases



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On July 22, 2010, Governor Perdue signed into law a bill which increases the performance and payment bond threshold on most state projects from \$300,000.00 to \$500,000.00. In other words, most state projects which are smaller than half a million dollars provide no payment or performance bond protections. The threshold increase does not apply to all public projects, but it impacts most State-administered projects: "State departments, State agencies, and The University of North Carolina and its constituent institutions".

Democrats argued in favor of the bill stating that, in difficult budgetary times, the change will save the State millions in construction overhead. Republicans argued in opposition to the measure citing the lack of protections for subcontractors as a major problem.

Subcontractor and Surety representatives strongly opposed the bill and cite particular frustration with the manner in which it was passed. The bill is the result of a direct request from the Governor's office and passed along party lines.

Over a three-day period, July 7-9, 2010, the bill expanded from University contracts only to basically every state contract. No public discussion occurred. A movement is currently underway to repeal the changes, but no repeal is expected this year.

Suppliers may take a bit of solace in a late amendment offered by Senator Berger. The amendment requires that Government Operations conduct an annual review of all non-bonded state projects. State review may now represent the strongest protection for payment irregularities after a project is underway.

In practical terms, suppliers on a \$450,000.00 project with the Department of Agriculture should now proceed with extreme caution. These types of public projects no longer require a payment bond. Suppliers cannot file Claims of Lien on Real Property on public projects. Claims of Lien upon Funds and private bonds are still possibilities. However, as always, sound credit practices provide the strongest protection for suppliers on these types of public projects.

~V&S

# Bond and Credit Risk

- by *Richard Prosser*



No matter the industry, the decision to extend credit to a new customer or borrower is a calculated risk. You collect and survey the available information (e.g.,

income, credit score, etc.) and make a decision as to whether the person or business measures up against certain criteria.

But the consideration does not always stop with the numbers. In borderline situations, other factors are often taken into account.

Among our construction industry clients, we know that one such factor is the status of the project as public or private. The public project with its statutorily required labor and material payment bond presents an added measure of security that can tip the scales in

favor of extending credit. If you give preference to public projects, be advised that there is hidden peril for suppliers and subcontractors who rely on the presence of a payment bond without verifying their ability to state a claim.

The presence of a payment bond does not guaranty a claim. Your claim depends upon your relationship to the prime contractor – the party required to obtain the payment bond. Unless your contract is with the prime contractor or its subcontractor (i.e., first-tier subcontractor), your claim may be limited.

On federal projects, under the Miller Act (40 U.S.C. § 3131 et seq.), this is certainly true. The Miller Act restricts claims to those who contract with the prime contractor or its subcontractor. In other words, if more than one party separates you from the prime contractor, you will find yourself without a claim on a federal project.

Under North Carolina's equivalent of the Miller Act, the so called "Little Miller Act" (N.C. Gen. Stat. § 44A-25

et seq.), the limitation is not as restrictive. North Carolina's law extends claims one step further than its federal counterpart to parties who contract with second-tier subcontractors. *HSI North Carolina, LLC v. Diversified Fire Protection of Wilmington, Inc.*, 169 N.C.App. 767, 611 S.E.2d 224 (2005). This means that on state projects there is protection for parties up to two steps removed from the prime contractor.

Practically speaking, the majority of suppliers and subcontractors fall within the range afforded protection under North Carolina law. But it is important to understand that there are limitations. And because federal law is more restrictive, part of understanding the limitations is understanding the distinctions.

Before relying on the presence of a payment bond, verify your ability to state a claim. A determination without this consideration is an uncalculated risk.

~ V&S

## Could Your Contracts Be Doing More for You?

Our attorneys come across a wide variety of contracts on a daily basis, from credit applications to payment plan agreements to promissory notes. If there is one thing they have in common, it is that each contract is unique. That is why it is important that you make sure you read and fully understand any contract that you sign on your own behalf or on behalf of your business. Never sign a contract with terms that you do not understand or understand how those terms will affect you or your business. It is better to figure these things out on the front end, so you do not find yourself in a bad situation down the road.

People will often sign a contract without knowing what it really means, perhaps because it seems like a standard contract or because they think it cannot be negotiated. However, in most cases you can work with the opposing party to tailor the deal to meet your needs. Remember, each deal is different, and the only purpose of a form (or standard boilerplate contract) is to give you a starting point.

An issue we often encounter is that many of our client's credit applications have not been updated in a decade or were drafted by a client's corporate office for use in multiple states. The problem is that laws change constantly and vary by state. The terms and conditions of your credit applications need to be in compliance with the law of the state in which you are operating. For example, in North Carolina, there is specific language that must be included on a signed credit application if you want past due accounts to accrue interest at the contract rate post-judgment, or if you want to recover some or all of the attorneys' fees you spend to collect the account.

By carefully considering each proposed contract that comes across your desk, you are better able to determine the terms of your business deals. Your attorneys can help you understand and negotiate the terms of your contracts to enable you to protect your interests as you seek favorable business associations.

~ V&S

# Collecting a Judgment

## The Sheriff/Deputy Is Of Vital Importance

A vital benefit the legal process of obtaining a judgment affords you is the ability to utilize the services of the local Sheriff's Office in an effort to collect the debt. Once a judgment is recorded, the appeal period has passed, and, if required, Notice of Right to Claim Exempt Property has been served, your attorney can obtain a Writ of Execution from the Clerk of Court in the county in which the judgment was obtained. Once issued, the writ is forwarded to the Sheriff in the county in which the debtor resides or where the debtor maintains property.

Once the writ is issued and transmitted to the Deputy, along with the service fee, the writ is assigned to a Deputy for collection. Each county has its own policies and procedures. Generally, there are several deputies assigned to serve papers and pursue Writs of Execution. The incentive for the Sheriff's Department to pursue writs of execution is that it is a Court Order as well as a commission earned by the Sheriff, which does not go to the individual Deputy, but is part of the department's budget. Different departments assign different priority levels to collections, but when our office encounters a really good Deputy, we cultivate, praise and encourage their efforts as they are the best means our clients have of success. A motivated Deputy is a treasure.

Once the writ is assigned to a Deputy, most departments have a form letter which is sent to the debtor notifying the debtor of the balance due and owing and giving them a fairly short period of time to respond.

The next step, barring immediate response, is for the Deputy to go to the debtor's residence or business. This visit serves several purposes. First, and most obvious, they want to speak with the debtor face-to-face to work on getting payment. While at the residence or business, most deputies will list visible assets which may include motor vehi-

cles, recreational vehicles, tools, or equipment. If no one is home or at the business, they will leave a notice and card requesting a call. Many Deputies will subsequently check with the Department of Motor Vehicles, the County Tax Department, the Register of Deeds, and other public resources to check the status of vehicles listed in the name of the debtor.

If the Deputy finds assets which appear to be subject to levy, they inform us of the nature and condition of the asset as well as the levy fee (the fee required to cover the costs of towing, storage, or the like). If no assets are readily apparent, the Deputy will report that and seek information we may have. If either we or the Deputy believe that there may be bank accounts in the debtor's name, we will obtain a judicial Order in Supplement of Execution which allows the Deputy to freeze bank accounts. Some deputies have developed the necessary relationships with their local bankers to be able to ascertain the status of accounts without an order, but the order is usually required to actually freeze the funds.

If assets are found, our office will contact our client to explain what has been located, the cost of levy, and the possibility that levying on the asset will generate funds. If the client agrees, the funds are advanced and the Deputy seizes the asset for public sale. In the sage words of a wise old lawyer (Nan Hannah's father), you generally do not want to seize anything you have to feed or house (think: a horse).

Creditors occasionally, and inadvertently, cause problems which can sour a relationship with a Deputy. Many debtors, upon receipt of the Sheriff's letter do a relatively natural thing, they call the person with whom they are comfortable and who they believe can make the Deputy go away – that being their salesperson with the creditor company. All too often, the salesperson, wanting to

get the credit department off their back, is more than willing to accept a partial payment and discuss payment terms. This is a “no-no” without including the Deputy in the process.

First and foremost, the Deputy has earned the commission because it was the Deputy's action that spurred the debtor's call. Second, any payment accepted alters the amount due on the face of the writ requiring that the writ be recalled. Third, it sours relations with deputies who feel like people are undermining their efforts. Fourth, and possibly most important, the creditor's employee who accepts the payment has no way of knowing what the Deputy has found and may be giving up the opportunity for a full recovery in a single effort. Remember, that to get back to a writ, we will need to wait for the return of the first writ, then send out Notice of Right to Claim Exempt Property, and then await the issuance of the Writ. The debtor may have wised up and may exempt property in the second round that was not claimed in the first round.

It defies logic to turn down money offered to pay on a past due balance, but it is essential that once a writ is issued the Deputy be allowed to take the lead. The best thing to do once a writ is issued is to notify anyone in your organization who might hear from the debtor and make sure everyone knows that if payment is to be made it must go through the Deputy. If the debtor wants to make a payment plan, that can be negotiated through the Deputy. Do not put anything in writing to be signed by the debtor. This could constitute a new agreement and void your judgment. The best thing to do once a writ is issued is to contact your attorney if a debtor contacts you. This could save you money in the long run.

~V&S

# Managing Your Company's Financial Strength in a Slower Economy



Every company encounters challenging economic times due to the economy. Managing the receivables, payables and cash flow of your business are key components to the overall financial health of your business. It can be difficult but it is possible to manage the unexpected issues which arise from time to time as well as the impact from our economy.

**Stay Focused on the Good News:** Often, businesses, business owners and the management team get caught in focusing on the bad news circulated in the media regarding the economic environment. It is important to listen and study the economic news and to respond to it accordingly. It is even more important to focus on the positive as-

pects of your business and not allow the negative news to divert your attention from growing and managing your revenue and financial strength.

**Focus on Profitable Service to Your Customer:** Make certain that the higher profit areas of the business remain focused on providing "memorable service to the customer". There may be areas of the business which generate only a small portion of profit compared with other areas. Make certain that the business remains focused on servicing the customer.

**Manage Payables and Receivables More Often:** If cash flow becomes a challenge, it may be necessary to bill faster (15 days instead of the end of the month) in order to generate reve-

nue faster. Likewise, if you notice customers are paying slower, it may be necessary to touch base with the customer earlier than normal to determine the facts for the slower pay and respond accordingly.

Remaining focused on generating revenue, increasing profit, managing payables and receivables will surely increase your financial strength. Do your best to remain positive and focus on the good economic news! Avoid the temptation to get pulled into the negative news. Now is a great time to improve your financial strength!

~ V&S

## How Can We Help You?

We all hear from others and may say to our customers from time to time, "how can we help you?" Well, when we ask you that question, we really mean it. We enjoy helping our clients with legal challenges, developing options for you and designing creative solutions for the particular question or issue you may be facing.

So often people ask us, "what type of law do you practice?" Well, here is a partial list of the areas of law that we practice:

- Commercial Creditor's Rights (Collecting Money Due)
- Representing Creditors in Bankruptcy Court
- Construction Litigation
- Lien and Payment Bond Claims
- Business Disputes and Litigation
- Employment Law for the Employer
- Buying/Selling Businesses or Assets
- Corporate Law
- Incorporating and Starting New Businesses
- Estate Planning/Business Succession

Please let us know how we can help you. Thank you for the trust you place in us to work with you!

~ V&S

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