

ROHLFING & OBERHOLTZER

ATTORNEYS & COUNSELORS AT LAW

1 East Wacker Drive, Suite 2420, Chicago, Illinois 60601

Telephone: 312.923.7100 Facsimile: 312.923.9023

www.rolaw.net

On August 20, 2003, Illinois Governor Rod Blagojevich signed into law, as Public Act 93-0562, an amendment to the Public Construction Bond Act that favors Subcontractors in Illinois. James Rohlfing participated in drafting the legislation, presented testimony on behalf of IMSCA and Illinois subcontractors to the House Judiciary Committee, and prepared the following position paper.

Amendment to Public Construction Bond Act

This proposal to amend the Public Construction Bond Act is intended to prevent a contractor's unknowing waiver of rights under the Bond Act when the contractor settles or releases a lien on public funds. Subcontractors who furnish labor or materials and are not paid for their work on public construction projects in Illinois have two laws that help them to get paid. First, they have a lien against the public funds appropriated by the governmental entity contracting for the improvement under section 23 of the Mechanic's Lien Act. 770 ILCS 60/23 (2001). This right is limited, however, as appropriated funds for construction projects are too easily exhausted by a financially destitute contractor. Were this the only remedy, other builders and suppliers would then be without a remedy.

Therefore, the legislature implemented a second and more useful safeguard for subcontractors in the Public Construction Bond Act. 30 ILCS 55/2 (2002). This Act requires a prime contractor to furnish a payment bond to a public entity, as a condition of any contract for a public improvement to real estate. Subcontractors who furnish materials or labor for that public improvement can make a claim against the bond principal (the general contractor) and the bond surety (an insurance company) for unpaid services and materials. The bond remedy and the lien against public funds were intended to be two separate remedies for a subcontractor to obtain payment.

Unfortunately, Illinois courts have held that a subcontractor's lien waiver on a public project is not just a waiver of that subcontractor's lien against public funds, but of all rights under the Bond Act as well. *See, e.g., Chicago Bridge & Iron Co. v. Reliance Insurance Co., 105 Ill. App.2d 91, 245 N.E.2d 127 (1st Dist. 1969); Northbrook Supply Co. v. Thumm Construction Co., 39 Ill.App.2d 267, 188 N.E.2d 388 2nd Dist. 1963).* Absent waiver, when a surety pays a subcontractor under the Bond Act, that surety then inherits the rights of the subcontractor to pursue any lien on public funds. By releasing a public fund lien, the courts reason that a subcontractor prejudices a surety's subrogation right to pursue those funds. The result has been that subcontractors, who are pressured to release their liens with assurance of payment, unwittingly release their bond claim as well, leaving them without remedy.

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Though the legislature intended two separate remedies for subcontractors on public projects, the above cases severely limit those rights. In practice, a bond surety is not harmed by a subcontractor's lien waiver, as the surety usually has other means of recovering payment made to a subcontractor. Strong payment remedies for public construction contractors encourage public improvements and benefit the public generally. Keeping the Bond Act as an independent remedy would reinforce this public benefit.

The proposal to amend the Bond Act would not prohibit or even curtail the rights of parties to **knowingly** waive rights. Instead, it would merely protect the unwitting waiver of a bond claim.

Prepared for the Illinois Mechanical & Specialty Contractor's Association (IMSCA) by James T. Rohlfig.

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Public Act 93-0562

HB2493 Enrolled

LRB093 05938 SJM 11716 b

AN ACT concerning bonds.

Be it enacted by the People of the State of Illinois,
represented in the General Assembly:

Section 5. The Public Construction Bond Act is amended
by changing Section 2 as follows:

(30 ILCS 550/2) (from Ch. 29, par. 16)

Sec. 2. Every person furnishing material or performing labor, either as an individual or as a sub-contractor for any contractor, with the State, or a political subdivision thereof where bond or letter of credit shall be executed as provided in this Act, shall have the right to sue on such bond or letter of credit in the name of the State, or the political subdivision thereof entering into such contract, as the case may be, for his use and benefit, and in such suit the plaintiff shall file a copy of such bond or letter of credit, certified by the party or parties in whose charge such bond or letter of credit shall be, which copy shall, unless execution thereof be denied under oath, be prima facie evidence of the execution and delivery of the original; provided, however, that this Act shall not be taken to in any way make the State, or the political subdivision thereof entering into such contract, as the case may be, liable to such sub-contractor, materialman or laborer to any greater extent than it was liable under the law as it stood before the adoption of this Act. Provided, however, that any person having a claim for labor, and material as aforesaid shall have no such right of action unless he shall have filed a verified notice of said claim with the officer, board, bureau or department awarding the contract, within 180 days after the date of the last item of work or the furnishing of the last item of materials, and shall have furnished a copy of such verified notice to the contractor within 10 days of the filing of the notice with the agency awarding the contract.

The claim shall be verified and shall contain (1) the name and address of the claimant; the business address of the claimant within this State and if the claimant shall be a foreign corporation having no place of business within the State, the notice shall state the principal place of business of said corporation and in the case of a partnership, the notice shall state the names and residences of each of the partners; (2) the name of the contractor for the government; (3) the name of the person, firm or corporation by whom the

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claimant was employed or to whom he or it furnished materials; (4) the amount of the claim; (5) a brief description of the public improvement sufficient for identification.

No defect in the notice herein provided for shall deprive the claimant of his right of action under this article unless it shall affirmatively appear that such defect has prejudiced the rights of an interested party asserting the same.

Provided, further, that no action shall be brought until the expiration of 120 days after the date of the last item of work or the furnishing of the last item of materials, except in cases where the final settlement between the officer, board, bureau or department of municipal corporation and the contractor shall have been made prior to the expiration of the 120 day period, in which case action may be taken immediately following such final settlement; nor shall any action of any kind be brought later than 6 months after the acceptance by the State or political subdivision thereof of the building project or work. Such action shall be brought only in the circuit court of this State in the judicial circuit in which the contract is to be performed.

The remedy provided in this Section is in addition to and independent of any other rights and remedies provided at law or in equity. A waiver of rights under the Mechanics Lien Act shall not constitute a waiver of rights under this Section unless specifically stated in the waiver.

(Source: P.A. 86-333.)

Section 99. Effective date. This Act takes effect upon becoming law.

Effective Date: 08/20/03