

Private Works Act Performance Bonds Is the Prescriptive Period Enforceable in Louisiana?

By Jeffrey N. Boudreaux

Introduction

In recent years, I have logged many hours researching and briefing legal issues that seem to have become commonplace to my veteran colleagues of construction litigation. At times, my task seems designed to illustrate why certain arguments lack merit rather than why certain arguments could and may succeed. Recently, I learned precisely why such seemingly mundane tasks are not only necessary but occasionally uncover or rediscover issues that, over time, have slipped through the cracks.

My goal in this article is to highlight a particular issue that construction litigators have faced for years and will face for many more. Specifically, the possibility that the contractual agreement limiting the time within which an owner must file suit to enforce a private works performance bond may be unenforceable in Louisiana. I cannot predict how a judge or jury would decide the issue but humbly suggest it is this type of gray area that warrants more consideration than it typically receives.

The standard prescriptive period of a performance bond.

The Private Works Act of La. R.S. 9:4801 is a body of law with which we are all familiar as its impact reaches all aspects of private construction. Typically, the general contractor provides the owner with a payment bond and a performance bond which are attached to and filed with the notice of contract. If there are no problems, the surety is never called upon to honor either bond.

When problems do arise (specifically construction defects), the owner naturally turns to the general contractor, among others, to pay for the remedial work. If the defects arise two or more years after substantial completion, the owner usually files suit against the general contractor and its commercial general liability provider(s), but not the surety on the performance bond.

The surety is typically not sued because of a now standard provision in the performance bond that limits the time period within which the owner may seek to enforce the performance bond. Such language usually provides, "Any suit under this bond must be instituted before the expiration of two years from the date on which final payment is due," or, "Any suit under this bond must be instituted before the expiration of two years from the date on which substantial completion is reached."¹

While this contractual provision may be rock solid in the other forty-nine states, in Louisiana its enforceability is less than certain. On this issue, the basic principle of contractual freedom which otherwise allows the self-imposed prescriptive period is at odds with Louisiana's all important Civil Code and its ancillaries. The effect of statutory law, as interpreted and applied in a handful of reported opinions, suggests that the surety on a performance bond may not be as insulated as it would like. The relevant statutes and jurisprudence interpreting and applying the statutes suggest that the prescriptive period under a performance bond cannot be limited by the parties.

Statutory Law

The Louisiana Private Works Act is found at La. R.S. 9:4801 *et seq.* La. R.S. 9:4812 entitled "Bond required; terms and conditions" provides in pertinent part:

C. The condition of the bond shall be that the surety guarantees: (2) To the owner, the complete and timely performance of the contract unless such guarantee is expressly excluded from the terms of the bond.

D. The bond of a legal surety attached to and filed with the notice of contract of a general contractor shall be deemed to conform to the requirements of this part notwithstanding any provision of the contract to the contrary, but the surety shall not be bound for a sum in excess of the total amount expressed in the bond.

Comment (d) to La. R.S. 9:4812 provides:

Subsection C recognizes the differences between a "performance and payment" bond and a "payment" bond. The courts have recognized that only the latter is required to comply with the act. It

¹ Some performance bonds contain language that purports to limit this prescriptive period to one year.

establishes a presumption that a bond given to a contractor comprehends both by requiring the express exclusion of the performance conditions.

Comment (e) to La. R.S. 9:4812 provides:

Subsection D is new. It resolves the continuing controversy as to whether a bond is a “legal” one or not. It adopts the policy that the bond given to comply with the act is in effect a legal suretyship. It also creates a presumption that a bond for a contractor is intended to comply with the act if it is filed with the notice of contract.²

Jurisprudence

The jurisprudence that has interpreted and applied the Private Works Act suggests that a combined reading of the Act’s statutes requires courts to read out any contractual provision that seeks to limit the otherwise applicable prescriptive period for enforcing performance bonds.

The judicial analysis begins with the overriding premise that bonding statutes are not intended to benefit and should not be construed to the interest of the surety company. *Continental Casualty Co. V. Associated Pipe & Supply Co.*, 447 F2d. 1041 (5th Cir. 1971).

In *Bowles & Edens Co. V. H&H Sewer Systems, Inc.*, 324 So.2d 528 (La. App. 1 Cir. 1975), the Court stated:

It should be put to rest, for the security of lien holders within the terms of the statutes, that where the requirements of R.S. 9:4802 have been complied with by the owner, the surety bond is a statutory bond entitled to the same status now accorded a bond furnished under the Public Works Act, R.S. 38:2241 *et seq.* Considering the mandatory language of these Private Works statutes, it is resorting to artificial distinction to hold that a bond furnished in compliance with R.S. 9:4801 *et seq.* is not a statutory bond. Our conclusion is that the bond furnished [to the owner] who complied with the mandatory provisions of the applicable law is a statutory bond. **The interpretive precept of reading into the**

² Under La. R.S. 9:4813, the same rationale should apply even if the bond is not attached to and filed with the notice of contract. La. R.S. 9:4813 provides in pertinent part, “The liability of the surety is not extinguished by . . . the failure to attach the bond to the notice of contract.”

bond that which is lacking for security of those protected by the bond . . . and reading out of the bond those provisions not required by the statute, is applicable to a statutory bond furnished under and recorded with the contract between the owner and the contractor

Id. at 532.

In *Peter Trapolin & Associates v. Twin City Federal Savings and Loan Ass'n*, 488 So.2d 1191 (La. App. 4 Cir. 1986), the issue was whether the performance bond's two-year limitation was enforceable considering the contract as a whole and the law governing private works contracts. The court held:

[W]e have concluded that the Private Works Act, R.S. 9:4801 et seq. prevents the interpretation [the surety] would place on its contract. We recognize that the owner of a private work is under no duty to supply a bond in the first instance. In the final analysis he must decide if the risk of liens warrants the expense of purchasing the bond. Thus, **it would seem that the owner, not obliged to furnish any bond, could furnish one with limited protection to suppliers. But the law provides otherwise.** R.S. 9:4812(D) provides:

The bond of a legal surety attached to/and filed with the notice of contract of a general contractor shall be deemed to conform to the requirements of this part notwithstanding any provision of the bond to the contrary

The words "this part" refer to the entire Private Works Act which is Part I of Chapter 2 of Code Title XXI of Code Book III of Title 9 of the Louisiana Revised Statutes.

Id. at 1192 and 1193. (Emphasis added.)

In *H. G. Angle Co., Inc. v. Talmadge*, 410 So.2d 1151 (La. App. 3 Cir. 1981), the court explained that the parties lacked the contractual freedom to limit the surety's potential liability by the terms of the bond.

[O]nce a contract and bond have been properly entered into and recorded in compliance with the Private Works Act, the bond is considered as being a statutory bond, and incorporates by reference all of the provisions of the Private Works Act. As such, **the parties are not free to delimit liability of the surety on the bond.**

Id. at 1154. (Emphasis added.)

The Private Works Act was inapplicable in *Congregation of St. Peter's Roman Catholic Church of Gueydan v. Simon*, 497 So.2d 409 (La. App. 3 Cir. 1986) because the sub-contractor provided the general contractor with a performance bond rather than the general contractor supplying the owner with the bond. The case is relevant to this discussion because the court rejected the surety's argument that the nature of the performance bond does not include negligence or poor workmanship. The surety argued that the condition of its bond was limited to the completion of the subcontract to build the roof, and that the quality of the performance was not guaranteed.

The court held that the obligation of a surety on a performance bond is coextensive with the principal obligation. The court explained, "The concept of a breach or a default on a contract is not limited to the obvious case of the contract's not being performed but extends to any major departure from the contract, even though the building itself, or other construction itself, is actually physically completed." *Id.* at 413 and 414.

In *Sanders v. Zeagler*, 95-1344 (La. App. 3 Cir. 3/6/96) 670 So.2d 748, the court recognized that the applicable period of time within which an owner can file suit to enforce a performance bond is the ten-year preemptive period set forth in La. R.S. 9:2772.

For now, La. R.S. 9:2772 provides:

A. No action, whether *ex contractu*, *ex delicto*, or otherwise, . . . shall be brought against any person performing . . . the construction of immovables, or improvement to immovable property . . . :

(1)(a) More than five years after the date of registry in the mortgage office of acceptance of the work by owner.

(b) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, more than five years after the improvement has been thus occupied by the owner.

Conclusion: Putting it together.

When the general contractor provides an owner with a performance bond in accordance with the Private Works Act, the bond is a statutory or "legal" bond.

As a statutory bond, all relevant provisions of the Civil Code and Revised Statutes that are not included in the bond are read into the bond and all provisions not contemplated by the statute are read out. The commonly used provision that purports to provide a two-year prescriptive period to file suit is not contemplated by the Private Works Act so it is read out.

The surety may be sued for defective performance for a period of five years because its obligation is co-extensive with the general contractor. An owner should be able to recover from the surety well after the two-year anniversary of acceptance of the work.

It remains unclear whether a particular owner can successfully recover from a surety on a claim filed after the applicable performance bond's contractual prescriptive period. What is clear is that the sureties should be considered as a potential defendant when a party is identifying who it can look to for assistance in remediating construction defects.

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