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Notice Regarding Citation of these Laws

[Forward to IC § 5-16-5](#) > [IC § 5-16-5.5](#)

The Indiana "Little Miller Act"

Indiana Code, Title 4, State Offices and Administration, Article 13.6, State Public Works, Chapter 7, Bonding, Escrow and Retainages, sections 4-13.6-7-5 through 4-13.6-7-12

Title 5, State and Local Administration, Article 16, Public Works, Chapter 5, Withholding and Bond to Secure Payment of Subcontractors, Labor and Materialmen; Chapter 5.5, Retainage, Bonds, and Payment of Contractors and Subcontractors, sections 5-16-5.5-1 through 5-16-5.5-8

IC 4-13.6-7-5

Bid bonds

Sec. 5. (a) The director:

(1) may require each contractor of a public works project with an estimated cost of not more than two hundred thousand dollars (\$200,000); and

(2) shall require each contractor of a public works project with an estimated cost of more than two hundred thousand dollars (\$200,000); to submit a good and sufficient bid bond with the bid. The bid bond may equal any percentage of the estimated cost of the public works project that the director requires.

(b) The division may accept bonds provided on forms specified by the department or on forms given by surety companies.

IC 4-13.6-7-6

Payment bonds

Sec. 6. (a) If the estimated cost of the public works project is more than two hundred thousand dollars (\$200,000), the division shall require the contractor to execute a good and sufficient payment bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price. The bond shall include at least the following provisions:

(1) The contractor, its successors and assigns, whether by operation of law or otherwise, and all subcontractors, their successors and assigns, whether by operation of law or otherwise, shall pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work.

(2) The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.

(3) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(4) The provisions and conditions of this chapter shall be a part of the terms of the

contract and bond.

(b) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price.

(c) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(d) The division shall hold the bond of a contractor for the use and benefit of any claimant having an interest in it and entitled to its benefits.

(e) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

(f) If the estimated cost of the public works project is less than or equal to two hundred thousand dollars (\$200,000), the director may require one (1) of the following:

(1) The contractor must execute a good and sufficient payment bond. The director may determine the amount of the bond to be any percentage, but no more than one hundred percent (100%), of the cost of the project.

(2) The division will withhold retainage under this chapter in an amount of ten percent (10%) of the dollar value of all payments made to the contractor until the public work is substantially completed.

IC 4-13.6-7-7

Performance bonds

Sec. 7. (a) If the estimated cost of the public works project is:

(1) at least two hundred thousand dollars (\$200,000), the division shall; or

(2) less than two hundred thousand dollars (\$200,000), the division may; require the contractor to execute a good and sufficient performance bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price.

(b) The bond required under subsection (a) shall include at least the following provisions:

(1) The contractor shall well and faithfully perform the contract.

(2) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(3) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

(c) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price.

(d) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(e) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

IC 4-13.6-7-8

Final settlement with contractor

Sec. 8. (a) Except for amounts withheld from the contractor under section 3 of this chapter for uncompleted minor items, the division may make a full, final, and complete settlement with a contractor, including providing for full payment of all escrowed principal and escrowed income, within sixty-one (61) days following the date of substantial completion if:

(1) the contractor has materially fulfilled all of its obligations under the public works contract;

(2) the division has received no claims from subcontractors or suppliers under this chapter; and

(3) the contractor has furnished satisfactory evidence showing full payment of all subcontractors and suppliers in the performance of the contract.

(b) After the division makes a final settlement with a contractor, all claims by subcontractors and suppliers to funds withheld from that contractor under section 2 of this chapter are barred.

IC 4-13.6-7-9

Payment of subcontractors and suppliers by division; proration of claims; disputed claims

Sec. 9. (a) If a subcontractor or a supplier files a claim with the division under section 10 of this chapter, and the claim is undisputed, the division shall:

(1) pay the claimant from the amounts retained from the contractor under section 2 of this chapter;

(2) take a receipt for each payment; and

(3) deduct the total amount paid to subcontractors and suppliers from the balance due the contractor.

(b) If there is not a sufficient amount owing to the contractor to pay all subcontractors and suppliers making undisputed claims under section 10 of this chapter, then the division shall prorate the amount withheld from the contractor and shall pay the prorated amount to each subcontractor and supplier entitled to a portion of the amount.

(c) If there is a dispute among the contractor, the subcontractors, and the suppliers to the funds withheld by the division, the division shall retain sufficient funds until the dispute is settled and the correct amount to be paid to each person is determined. When the dispute is resolved, the division shall make payments to persons making claims as provided in this section.

IC 4-13.6-7-10

Claims of subcontractors and suppliers; verification; notice to contractors and sureties; actions upon bond

Sec. 10. (a) In order to receive payment under section 9 of this chapter or to proceed against the bond of the contractor required under section 6 of this chapter, any subcontractor or supplier making a claim for payment on account of having performed any labor or having furnished any material or service in relation to a public works project must file a verified claim with the division within sixty (60) days from the last labor performed, last material furnished, or last service rendered. The claim shall state the amount due and owing to the person and shall give as much detail explaining the claim as possible. The division shall notify the contractor of any filed claims before taking action under section 9 of this chapter.

(b) In order to proceed against the bond of the contractor required under section 6 of this chapter, the claimant must notify the surety of the contractor by sending a copy of the claim required by subsection (a) to the surety company. The claimant shall also inform the division that the surety has been notified. The division shall supply the claimant with any information the claimant requires to notify the surety.

(c) The claimant may not file suit against the contractor's surety on the contractor's bond until the expiration of thirty (30) days after filing of the claim with the division. If the claim is not paid in full at the expiration of the thirty (30) day period, the claimant may bring an action in a court of competent jurisdiction in the claimant's own name upon the bond.

IC 4-13.6-7-11

Limitation of actions against sureties

Sec. 11. Unless the bond provides a greater period of time, all suits must be brought against a surety on a bond required by this chapter within one (1) year after final settlement with the contractor under section 8 of this chapter. All suits against the surety after this time are barred.

IC 4-13.6-7-12**Construction of chapter with other laws**

Sec. 12. This chapter is intended to supplement all other laws protecting labor, subcontractors, or suppliers and shall not be construed as conflicting with them.

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IC 5-16-5 – Chapter 5. Withholding and Bond to Secure Payment of Subcontractors, Labor, and Materialmen**IC 5-16-5-1****Withholding final payments; filing claims for payment; release of surety; definitions**

Sec. 1. Except as hereinafter otherwise provided, when any public building or other public work or public improvement of any character whatsoever is being constructed, erected, altered or repaired under contract at the expense of the state or a commission created by law, it shall be the duty of any such board, commission, trustee, officer or agent acting on behalf of the state or commission created by law, to withhold final payment to the contractor until such contractor has paid to the subcontractor or subcontractors, materialmen for material furnished, labor employed in such construction or those furnishing any service in relation to or in connection with such construction, erection, alteration or repair, all bills due and owing the same; Provided, That there is a sufficient sum owing to the contractor to pay all such bills, and if there is not a sufficient sum owing to such contractor on such contract to pay all such bills, then the sum owing on such contract shall be prorated in payment of all such bills among the parties entitled thereto; Provided, That such subcontractor or subcontractors, materialmen, laborers or those furnishing service as herein provided shall file with any such board, commission, trustee, officer, or agent acting on behalf of such state or commission created by law, their claim within sixty (60) days from the last labor performed, last material furnished, or last service rendered by them, as provided in section 2 of this chapter. Where no dispute shall arise between any parties interested in such funds so withheld, the board, commission, trustee, officer or agent acting on behalf of said state or commission created by law, shall pay said claim or claims out of the funds due such contractor and take receipt therefor, which sum or sums shall be deducted from the contract price. Where there is a dispute between any of the parties claiming to be entitled to such funds so withheld, or any part thereof, sufficient funds shall be retained by such board, commission, trustee, officer or agent acting on behalf of said state or commission created by law until such dispute is settled and the correct amount is determined, when payment shall be made as aforesaid; Provided, however, That nothing in this chapter contained shall prevent or preclude a full, final, and complete settlement upon a contract with the contractor or contractors after thirty (30) days from the date of the completion and acceptance of the work as completed upon the furnishing of satisfactory evidence showing the payment in full of all subcontractors, materialmen, laborers or those furnishing services in the performance of said contract; Provided, further, That the surety of said contractor or contractors shall not be released until the expiration of one (1) year after the final settlement with said contractor or contractors. The terms "public building," "public work" and "public improvement," or combinations thereof, as used in this chapter, shall be construed to include all buildings, work or improvements the cost of which is paid for by funds derived from taxation.

IC 5-16-5-2**Contract provisions for payments; deposit of bonds; filing verified statements of amount due; suit against sureties**

Sec. 2. (a) In all contracts awarded contractors for the construction, erection, alteration, or

repair of a public building or other public work or improvement as provided in section 1 of this chapter, the contract must provide for the payment of subcontractors, labor, materialmen, and those performing service in connection with the construction, erection, alteration, or repair. The contract must provide for the payment of subcontractors by withholding by the board, commission, trustee, officer, or agent acting on behalf of the state or commission, funds sufficient from the contract price to pay the subcontractor, labor, materialmen, and those furnishing service in relation to or in connection with construction, erection, alteration, or repair. A bond shall be executed by the contractor to the state, approved by the board, commission, trustee, officer, or agent acting on behalf of the state or commission, in an amount equal to the total contract price. The bond shall be conditioned for payment by the contractor, the contractor's successors and assigns, and by the subcontractors, their successors and assigns, of all indebtedness, which may accrue to any person, firm, limited liability company, or corporation on account of any labor or service performed, materials furnished, or service rendered in the construction, erection, alteration, or repair of a building, work, or improvement, including all road, highway, street, alley, bridge, sewer, drain, or other public improvement. The bond by its terms shall be conditioned to directly inure to the benefit of subcontractors, laborers, materialmen, and those performing service who have furnished or supplied labor, material, or service for the construction of any public work or improvement.

(b) The bond required under subsection (a) shall be deposited with the board, commission, trustee, officer, or agent acting on behalf of the state or commission for the benefit of a person, firm, limited liability company, or corporation interested in and entitled to the bond. The bond shall be conditioned that:

(1) a change, modification, omission, or addition in and to the terms or conditions of the contract, plans, specifications, drawings, or profile; or

(2) any irregularity or defect in the contract or in the proceedings preliminary to the letting and awarding of the contract; shall not affect or operate to release or discharge the surety.

(c) The provisions of this chapter shall become a part of the terms of a contract awarded under this chapter. A bond for a public work or improvement is subject to the provisions of this chapter.

(d) A person, firm, limited liability company, or corporation to whom money is due on account of having performed labor or having furnished material or service in the construction, erection, alteration, or repair of a building, work, or improvement under this chapter shall, within sixty (60) days after the completion of the labor or service or within sixty (60) days after the last item of material has been furnished, file with the board, commission, trustee, officer, clerk, or agent of the state or commission that entered into contract with the principal contractor for the public work or improvement duplicate verified statements of the amount due to the subcontractor. The board, commission, trustee, officer, authorized clerk, or agent of the state shall deliver to the surety or sureties on the bond one (1) of the duplicate statements. The failure to deliver a duplicate statement by a board, commission, trustee, officer, authorized clerk, or agent of the state does not affect or invalidate the rights of the person, firm, limited liability company, or corporation to whom money is due on account of having performed labor or service or having furnished material, nor does the failure to deliver a duplicate statement operate as a defense for the surety.

(e) No suit shall be brought against a surety or sureties on a bond under this section until the expiration of thirty (30) days after the filing of the verified duplicate statement. If the indebtedness is not paid in full at the expiration of thirty (30) days, the person, firm, limited liability company, or corporation may bring an action in a court of competent jurisdiction upon the bond. The action must be commenced within sixty (60) days from the date of the final completion and acceptance of the public building or public work, and unless commenced within

sixty (60) days, action on the bond against the surety or sureties is barred.

(f) On state highway road and bridge contracts the provisions of the Indiana department of transportation law (IC 8-23-9) with respect to the bond shall govern.

IC 5-16-5-3

Conflicting laws

Sec. 3. This chapter shall not be construed as conflicting with any other laws for the protection of labor, subcontractors, or materialmen, but is supplemental to those laws.

IC 5-16-5.5 – Chapter 5.5. Retainage, Bonds, and Payment of Contractors and Subcontractors

IC 5-16-5.5-1

Definitions

Sec. 1. As used in this chapter:

"State agency" means the state of Indiana or any commission or agency created by law.

"Agent" shall include any board, commission, trustee, officer or agent which acts on behalf of a state agency.

"Public building", "public work" and "public improvement" or combinations thereof shall be construed to include all buildings, work or improvements the cost of which is paid for from public funds but shall not include highways, roads, streets, alleys, bridges and appurtenant structures situated on streets, alleys, railroad projects (as defined in IC 8-5-15-1) and dedicated highway rights-of-way.

"Substantial completion" shall be construed to mean the date when the construction of a structure or building is sufficiently completed, in accordance with the plans and specifications, as modified by any completed change orders agreed to by the parties, so that the state agency can occupy the structure or building for the use for which it was intended. Furthermore, the warranty period shall commence no later than the date of substantial completion.

"Contractor" shall mean any person, firm, limited liability company, or corporation who is party to a contract with a state agency to construct, erect, alter or repair any public building or is any way involved in public work or public improvement.

"Subcontractor" shall mean and include any person, firm, limited liability company, or corporation who is a party to a contract with the contractor and who furnishes and performs on-site labor on any public building, work or improvement. It also shall include materialmen who supply contractors or subcontractors as contained herein.

"Retainage" means any amount to be withheld from any payment to a contractor or subcontractor pursuant to the terms of a contract until the occurrence of a specified event.

"Escrowed principal" shall mean the value of all cash and securities or other property at the time placed in an escrow account.

"Escrowed income" shall mean the value of all property held in an escrow account over the escrowed principal in such account.

IC 5-16-5.5-2

Contracts governed by this chapter

Sec. 2. To the extent that this chapter is applicable, all contracts between a contractor and a state agency concerning any public building, work, or improvement entered into after May 1, 1972, and which contracts are in excess of two hundred thousand dollars (\$200,000) are to be governed by the provisions of this chapter, as are the rights and duties among the parties to the contract and any subcontractors who do any work under the contract. A state agency may elect to have a contract that is for not more than two hundred thousand dollars (\$200,000) be governed

by this chapter. All contracts governed by the provisions of this chapter shall include provisions for the retainage of portions of payments by a state agency to contractors, by contractors to subcontractors, and for the payment of subcontractors.

IC 5-16-5.5-3

Retainage; escrow agreement

Sec. 3. Any state agency which enters into a contract for any public building, work or improvement, and any contractor subcontracting portions of such contract, which contracts contain provision for retainage shall include in their respective contracts a provision that at the time any retainage is withheld, the state agency and/or contractor shall place such retainage in an escrow account, with a bank, savings and loan institution, or the State of Indiana or an instrumentality thereof, as escrow agent selected by mutual agreement between the affected contract parties, pursuant to a written agreement among the bank or savings and loan institution, the state agency, and the contractor as appropriate. The escrow agreement shall provide as follows:

(a) The escrow agent shall promptly invest all escrowed principal in such obligations as shall be selected by the escrow agent in its discretion.

(b) The escrow agent shall hold the escrowed principal and income until receipt of notice from the state agency and the contractor, or the contractor and the subcontractor, specifying the portion or portions of the escrowed principal to be released from the escrow and the person or persons to whom such portion or portions are to be released. Upon receipt of such notice the escrow agent shall promptly remit the designated portion of escrowed principal and the same proportion of then escrowed income to such person or persons.

(c) The escrow agent shall be compensated for its services as the parties may agree on a commercially reasonable fee commensurate with fees then being charged for the handling of escrow accounts of like size and duration. The fee must be paid from the escrowed income of the escrow account.

(d) The agreement may include such other terms and conditions not inconsistent with the foregoing paragraphs (a), (b) and (c) including but not limited to provisions authorizing the escrow agent to commingle the escrowed funds with funds held pursuant to other escrow agreements and limiting the liability of the escrow agent.

IC 5-16-5.5-3.1

Escrow accounts; establishment and maintenance; fee; schedule

Sec. 3.1. The treasurer of state may charge a reasonable fee for services that the treasurer renders in connection with the establishment and administration of escrow accounts. If the treasurer charges such fee, the treasurer shall prepare a fee schedule and make it available to the contractor. Any fee must be paid by the contractor at the time the escrow account is established.

IC 5-16-5.5-3.5

Retainage; options to determine amount

Sec. 3.5. (a) To determine the amount of retainage to be withheld, a state agency shall elect one (1) of the following options:

(1) Withhold no more than ten percent (10%) nor less than six percent (6%) of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) complete, and nothing further after that.

(2) Withhold no more than five percent (5%) nor less than three percent (3%) of the dollar value of all work satisfactorily completed until the public work is substantially complete.

(b) If upon substantial completion of the work there are any remaining uncompleted minor items, an amount computed under section 6 of this chapter shall be withheld until those items are completed.

IC 5-16-5.5-4**Performance bond; incremented bonding; release or discharge of surety**

Sec. 4. At the time of entering into any contract covered by the provisions of this chapter, the contractor shall furnish a valid performance bond which is acceptable to the state agency involved in an amount equal to his total contract price. If it is acceptable to the state agency involved, this performance bond may provide for incremental bonding in the form of multiple or chronological bonds which, when taken as a whole, equal the total contract price. The surety on the bond shall not be released for a period of one (1) year after final settlement with the contractor. No change, modification, omission or addition in and to the terms or conditions of said contract, plans, specifications, drawings or profile or any irregularity or defect in said contract or in the proceedings preliminary to the letting and awarding thereof shall in any way affect or operate to release or discharge the surety.

IC 5-16-5.5-5**Payment of subcontractor; certification of receipt**

Sec. 5. Within ten (10) days of the receipt of any payment by the state agency or escrow agent, the contractor or escrow agent shall pay all subcontractors with whom he has contracted their share of the payment the contractor received based upon the service performed by the subcontractor. The contractor shall furnish upon request a sworn statement or certification at the time of payment to him that the subcontractor has received his share of the previous payment to the contractor. The making of an incorrect certification may be considered a breach of contract by the state agency, and it may exercise all of its prerogatives set out in the contract in addition to the remedies for falsifying an affidavit. Such an action may also result in a suspension of prequalification with the certification board established under IC 4-13.6-3-3.

IC 5-16-5.5-6**Payment of contractor; uncompleted minor items**

Sec. 6. The contractor shall be paid in full including all escrowed principal and escrowed income by the state agency and escrow agent within sixty-one (61) days following the date of substantial completion, subject to IC 1971, 5-16-5. If at that time there are any remaining uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until said item or items are completed.

IC 5-16-5.5-7**Suit against surety; time limitation**

Sec. 7. All suits must be brought against a surety on a bond required by this chapter within one (1) year after the completion of the work or service in question.

IC 5-16-5.5-8**Conflicting laws**

Sec. 8. This chapter shall not be construed as conflicting with any other laws for the protection of labor, subcontractors or materialmen, but is supplemental thereto.

[Back to IC § 4-13.6-7-5](#) < [IC § 5-16-5](#) < [IC § 5-16-5.5](#)

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