



CLAIMS ON LABOUR AND MATERIAL PAYMENT BONDS

Tyler Galbraith¹

A standard form labour and material payment bond provides that the surety will not be liable on the bond:

1. unless the subcontractor provides written notice to the general contractor, the owner and the surety stating with substantial accuracy the amount claimed within 120 days after the date upon which the subcontractor performed its last work or labour or furnished its last materials for which its claim is made under its subcontract with the general contractor; and
2. unless the subcontractor commences a lawsuit to enforce its claim on the bond within one year following the date on which the general contractor ceased work on the general contract, including work performed under the guarantees provided in the general contract.

Missing the 120 day written notice deadline may be fatal to a claim on a labour and material payment. Missing the one year limitation to commence a lawsuit to enforce the claim will be fatal to the claim.

A subcontractor who has missed the 120 deadline to give written notice of its claim has at law forfeited its claim on the bond. However, where a surety refuses to consider a claim based on the missed notice deadline, a subcontractor can seek relief from forfeiture from the court under the *Law and Equity Act* in order to substantiate its claim. In these circumstances, unless relief from forfeiture is granted a claim on the bond cannot be made. In determining whether to grant relief from forfeiture the court will consider the prejudice suffered by the surety, the subcontractor's knowledge and awareness of the bond, the experience and knowledge of the subcontractor and the length of delay in giving notice.²

The central question on an application for relief from forfeiture is whether or not the surety has actually been prejudiced by the late notice. The primary issue before the court is whether the surety lost a realistic opportunity to do anything it might otherwise have done by reason of the late notice. Relief from forfeiture will generally be granted where the surety can only point to a potential for prejudice based on late notice or a general loss of opportunity to manage the risk due to late notice without providing a precise indication of what it could have done if notice had been given within the 120 day period.

As set out above, a failure to commence a lawsuit to enforce a claim on a labour and material bond within the one year limitation will be fatal to the claim.³ Relief from forfeiture cannot be granted in these circumstances. The courts have held that the failure to bring a lawsuit within the time required is a more serious breach than failure to give timely notice. Notice of a claim is seen by the courts as simply informing the surety of the possibility of a future action, thereby allowing the surety some time to investigate the merits of the claim and to negotiate a settlement; whereas, the actual bringing of a lawsuit on the bond is the legal crystallization of the claim which sets the claim's parameters and magnitude.

The moral of the story is that it is in all parties' interests that timely written notice be given so that a claim on a bond can be dealt with effectively. However, where a subcontractor has not given timely notice of its claim, it may, depending on the circumstances, have a "lifeline" through relief from forfeiture.

¹ Tyler Galbraith is a partner at Jenkins Marzban Logan LLP. His practice is primarily focused on construction law. If you have any questions or comments please contact Tyler directly. He can be reached at 604.895.3159 or tgalbraith@jml.ca.

² *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (C.A.)

³ *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778