

NORTH CAROLINA GENERAL ASSEMBLY
1973 SESSION

CHAPTER 1194
HOUSE BILL 904

AN ACT TO AMEND CHAPTER 44A OF THE GENERAL STATUTES RELATING TO A
MODEL PAYMENT AND PERFORMANCE BOND.

The General Assembly of North Carolina enacts:

Section 1. Chapter 44 A of the General Statutes is hereby amended by inserting immediately after Article 2, Part 3, and G.S. 44A-24 a new Article to read as follows:

"Article 3.

"Model Payment and Performance Bond.

"§ 44A-25. **Definitions.** — Unless the context otherwise requires in this Article:

- (1) 'Claimant' includes any individual, firm, partnership, association or corporation entitled to maintain an action on a bond described in this Article and shall include the 'contracting body' in a suit to enforce the performance bond.
- (2) 'Construction contract' means any contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highways.
- (3) 'Contracting body' means any department, agency, or political subdivision of the State of North Carolina which has authority to enter into construction contracts.
- (4) 'Contractor' means any person who has entered into a construction contract with a contracting body.
- (5) 'Labor or materials' shall include all materials furnished or labor performed in the prosecution of the work called for by the construction contract regardless of whether or not the labor or materials enter into or become a component part of the public improvement, and further shall include gas, power, light, heat, oil, gasoline, telephone services and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in the construction contract.
- (6) 'Subcontractor' means any person who has contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a construction contract.

"§ 44A-26. **Bonds required.** — (a) A contracting body shall require of any contractor who is awarded a construction contract which exceeds the amount of ten thousand dollars (\$10,000) the following bonds:

- (1) A performance bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such bond shall be solely for the protection of the contracting body which awarded the contract.
- (2) A payment bond in the amount of one hundred percent (100%) of the Construction contract amount, conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable. The

payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor or subcontractor is liable.

(b) The performance bond and the payment bond shall be executed by one or more surety companies legally authorized to do business in the State of North Carolina and shall become effective upon the awarding of the construction contract.

"§ 44A-27. Actions on payment bonds; service of notice. — (a) Subject to the provision of subsection (b) hereof, any claimant who has performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond has been given pursuant to the provisions of this act, and who has not been paid in full therefor before the expiration of 90 days after the day on which the claimant performed the last such labor or furnished the last such materials for which he claims payment, may bring an action on such payment bond in his own name, to recover any amount due him for such labor or materials and may prosecute such action to final judgment and have execution on the judgment.

(b) Any claimant who has a direct contractual relationship with any subcontractor but has no contractual relationship, express or implied, with the contractor may bring an action on the payment bond only if he has given written notice to the contractor within 90 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.

(c) The notice required by subsection (b), above, shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business or served in any manner provided by law for the service of summons.

"§ 44A-28. Actions on payment bonds; venue and limitations. — (a) Every action on a payment bond as provided in G.S. 44A-27 shall be brought in a court of appropriate jurisdiction in a county where the construction contract or any part thereof is to be or has been performed.

(b) No action on a payment bond shall be commenced after the expiration of the longer period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the contractor.

"§ 44A-29. Limitation of liability of a surety. — No surety shall be liable under a payment bond for a total amount greater than the face amount of the payment bond. A judgment against any surety may be reduced or set aside upon motion by the surety and a showing that the total amount of claims paid and judgments previously rendered under such payment bond, together with the amount of the judgment to be reduced or set aside, exceeds the face amount of the bond.

"§ 44A-30. Variance of liability, contents of bond. — (a) No act or agreement between a contracting body, a contractor or a surety shall reduce the period of time for giving notice under G.S. 44A-27(b) or commencing action under G.S. 44A-28(b) or otherwise reduce or limit the liability of the contractor or surety as prescribed in this Article.

(b) Every bond given by a contractor to a contracting body pursuant to this Article shall be conclusively presumed to have been given in accordance herewith, whether or not such bond be so drawn as to conform to this Article. This Article shall be conclusively presumed to have been written into every bond given pursuant thereto.

"§ 44A-31. Certified copy of bond and contract. — (a) Any person entitled to bring an action or any defendant in an action on a payment bond shall have a right to require the contracting body to certify and furnish a copy of the payment bond and of the construction contract covered by the bond. It shall be the duty of such contracting body to give any such person a certified copy of the payment bond and construction contract upon not less than 10

days notice and request. The contracting body may require a reasonable payment for the actual cost of furnishing the certified copy.

(b) A copy of any payment bond and of the construction contract covered by the bond certified by the contracting body shall constitute prima facie evidence of the contents, execution and delivery of such bond and construction contract.

"§ 44A-32. Designation of official; violation a misdemeanor. — Each contracting body shall designate an official thereof to require the bonds described by this Article. If the official so designated shall fail to require said bond, he shall be guilty of a misdemeanor."

"§ 44A-33. Form. — (a) A performance bond form containing the following provisions shall comply with this act: the date the bond is executed; the name of the principal; the name of the surety; the name of the contracting body; the amount of the bond; the contract number; and the following conditions:

'KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL AND SURETY above named, are held and firmly bound unto the above named Contracting Body, hereinafter called the Contracting Body, in the penal sum of the amount stated above for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the principal entered into a certain contract with the Contracting Body, numbered as shown above and hereto attached:

NOW THEREFORE, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Contracting Body, with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.'

Appropriate places for execution by the Surety and Principal shall be provided.

(b) A payment bond form containing the following provisions shall comply with this act: the date the bond is executed; the name of the Principal; the name of the Surety; the name of the Contracting Body; the contract number; and the following conditions:

'KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL and SURETY above named, are held and firmly bound unto the above named contracting body, hereinafter called the Contracting Body, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the principal entered into a certain contract with the Contracting Body, numbered as shown above and hereto attached;

NOW THEREFORE, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may

hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.'

Appropriate places for execution by the Surety and Principal shall be provided."

Sec. 2. G.S. 143-129 is hereby amended by rewriting the tenth paragraph, which begins with the clause "all contracts to which this section applies...", to read as follows:

"All contracts to which this section applies shall be executed in writing, and the board or governing body shall require the person to whom the award of contract is made to furnish bond as required by Article 3 of Chapter 44A; or require a deposit of money, certified check or government securities for the full amount of said contract to secure the faithful performance of the terms of said contract and the payment of all sums due for labor and materials in a manner consistent with Article 3 of Chapter 44A; and no such contract shall be altered except by written agreement of the contractor, the sureties on his bond, and the board or governing body. Such surety bond or deposit required herein shall be deposited with the board or governing body for which the work is to be performed. When a deposit, other than a surety bond, is made with the board or governing body, said board or governing body assumes all the liabilities, obligations and duties of a surety as provided in Article 3 of Chapter 44A to the extent of said deposit. In the case of contracts for the purchase of apparatus, supplies, materials, or equipment, the board or governing body may waive the requirement for a surety bond or other deposit."

Sec. 3. The addition of this Article shall not be construed as making the provisions of Articles 1 and 2 of Chapter 44A of the General Statutes apply to public bodies or public buildings.

Sec. 4. The first sentence of subsection (c) of G.S. 136-28.1 is amended by striking "G.S. 136-28.3" and inserting in lieu thereof "Chapter 44A".

Sec. 5. Subsection (c) of G.S. 136-28.1 is hereby amended by striking the last sentence thereof.

Sec. 6. G.S. 44-14, G.S. 136-28.3 and all other laws and clauses of laws in conflict with this act are hereby repealed.

Sec. 7. This act shall become effective on and after September 1, 1974, and shall apply to all construction and repair contracts awarded on or after that date, but this act shall not apply to any contract awarded prior to the effective date nor any contract bond securing its performance or the payment of labor and material thereof.

In the General Assembly read three times and ratified, this the 8th day of April, 1974.