A payment bond is a contract between the contractor and the owner that all persons supplying labor and materials for the prosecution of the work will be paid. The contractor’s obligation under the bond is guaranteed by the surety, which is normally an insurance company. The contract is for the benefit of unpaid suppliers and subcontractors, and in that sense the payment bond is a third party beneficiary contract. The beneficiaries—subcontractors and suppliers—can sue directly on the bond just as if they were parties to the payment bond contract.

The payment bond is a requirement of the owner, who is either required to obtain a payment bond (public owners) or desires to do so as protection against liens and claims by unpaid subcontractors and suppliers. A payment bond is always written in connection with a performance bond. The performance bond is a bond of the contractor in which the surety guarantees to the owner that the work will be performed in accordance with the contractual specifications.

Because foreclosure on public land is prohibited by statute, the remedy that mechanic’s liens usually provide is unavailable. Recognizing this deficiency, Congress passed the Miller Act, which requires a payment bond to be issued on all federal construction projects. Since the passage of the Miller Act, virtually all states have passed their own statutes, “Little Miller Acts,” requiring payment bonds on state construction.

Miller Act bonds have their own requirements, as do Little Miller Acts. Also, the private sector payment bonds tend to mirror the Miller Act bonds. Therefore, a certain degree of uniformity has been developed by virtue of practice and tradition. Most bond forms provide generally as follows: Anybody supplying or working for the principal (contractor) or a subcontractor of the principal is covered by the bond; if you do not have a contract with the principal, you must give certified mail notice of your claim within 90-180 days (check your state statutes for time limitations) of your last shipment, to any two of the owner, surety, or principal; suit to enforce the bond claim must be brought within one year of last furnishing, and must be brought in the county or court district where the project is located.

Note that a supplier who supplies to a sub-subcontractor or another supplier is NOT covered by the bond. However, on many large projects, bonded general contractors require that their major subcontractors be bonded. If a supplier does supply a subcontractor and the subcontractor is also bonded, the supplier will be covered by both bonds. The best source for a copy of the bond is the architect, or, on public work, the construction owner through the Freedom of Information Act.

The supplier must take certain steps in order to preserve their rights against the contractor’s payment bond. First, the supplier must document the fact that the material was sold for a particular project. Also important, but not quite as critical, is to show that those materials and equipment went to the project, and that they were installed into the work. The supplier without a contractual relationship with the contractor must give written notice to the contractor. See your state statute for time limitations; time begins to run 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. Lastly, a suit must be brought within one year in the county or judiciary district encompassing the project.