

PUBLIC OFFICIALS LIABILITY UNDER THE LITTLE MILLER ACT

Construction Law Section

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As has been discussed in this column before, Florida's "Little Miller Act," Section 255.05 of the Florida Statutes, requires a payment bond for all public projects in excess of certain relatively low dollar amounts. Because a subcontractor cannot have a lien on public lands and buildings, the statutory 255.05 payment bond typically provides the only security for payment of the subcontractor. However, despite the law, some of us have encountered public projects where the required bond cannot be found.

Fortunately, Florida law provides unpaid subcontractors the right to recover directly from the members of the public authority where those public officials failed to do their duty to ensure that the required bonds were obtained. In the key case on point, *Hughes Supply Co. v. Glens Falls Indemnity Co.*, the Florida Supreme Court holds that a public authority, and by implication the individual public officials have a ministerial duty to ensure the required bonds are posted and that the failure to "faithfully perform" such duty subjects the individual public officials to personal liability in tort for payment of the unpaid subcontractor. 66 So. 2d 54, 57-58 (Fla. 1953). The Court's holding unequivocally states,

"We wholly disagree with this argument [that the statute, 255.05, does not place a ministerial duty on the board to require the bond]. The provision in the statutes that the bond shall be required before commencing work is patently and clearly the same as saying that the school board shall see to it that the contractor does not begin work until the bond is executed, posted and duly approved. Only it [the school board] would have such authority. The purpose is quite obviously to protect those who incorporate their labor or material in the structure. If there is any doubt as to the duty of the board in this respect, such doubt is completely dissipated by the concluding two sentences of the section making it the duty of the public body to furnish a copy of such bond to interested persons."

This statement of the law by the Florida Supreme Court has not been revised or supplanted in more than 50 years, so it remains the law of Florida.



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There are not many Florida cases on point, but you can expect the public authority to argue that it and its members have no such duty. Likely, it will rely upon *I.W. Phillips & Co. v. Board of Public Instruction of Pasco County*, which previously held that "... no duty is imposed on the board of public instruction to require a bond..." 122 So. 793, 794 (Fla. 1929). However, the *I.W. Phillips* case was decided 25 years before the *Hughes Supply* case and was based upon an even earlier version of the public contracts law that has since become known as Florida's Little Miller Act. Put more formally, the Florida Supreme Court's holding in

the *Hughes Supply* case superseded its holding in the *I.W. Phillips* case. Therefore, under Florida law, the individual members of a public authority are exposed to personal liability in tort where they fail to fulfill their ministerial duty of ensuring the posting of a public payment bond.



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