



Payment Protection on P3s: Bridging the Gap

by Sean Hanlon and AJ Martinez



Depending on the type of construction project, the payment owed to private entities such as contractors, subcontractors and material suppliers engaged in Colorado for the construction, improvement, repair or maintenance of real property is generally protected under Colorado law. For public projects, those private entities are protected through payment bonds. For private projects, those private entities are protected through mechanic's liens.

But what about projects delivered through a public-private-partnership ("P3") model? The State of Colorado is among several states leading the charge in the use of the P3 project delivery model to design, construct, operate, finance and/or maintain public works. Until recently, Colorado law had a gap in payment protection for contractors, subcontractors and material suppliers engaged on P3 projects.

Enter Senate Bill 19-138 ("SB 138"). Under SB 138, the Colorado Legislature seeks to bridge that gap to "ensure that current payment and performance bonding requirements for public construction projects apply to construction projects" using a P3 delivery model. Governor Polis signed SB 138 on April 16, 2019, and it is expected to take effect on or about August 2, 2019.

When SB 138 takes effect, the bonding requirements previously only applicable to public projects will apply to all construction contracts awarded to private entities for P3 projects "for construction that is situated or located on publicly owned property using any public or private money or public or private financing." Colo. Rev. Stat. §24-105-202(4).

The types of P3 projects that will qualify under SB 138 for public bonding protection are summarized in Table 1. The qualifying P3 project will require that the entity entering into the contract will execute a penal bond with good and sufficient surety to be approved by the appropriate governmental authorities (Colo. Rev. Stat. §38-26-106). The penal bond will be conditioned on the premise that: (i) that the contractor will promptly make payments to subcontractors for labor and materials used on the project; and (ii) the contractor will indemnify the governmental entity (Colo. Rev. Stat. §38-26-106).

The legislature has also included a method of calculation for the penal bond, which is as follows:

[S]um not less than one-half of the total amount payable under the terms of the contract; except that, for a public works contract having a total value of five hundred million dollars or more, a bond or other acceptable surety, including but not limited to a letter of credit, may be issued in a penal sum not less than one-half of the maximum amount payable under the terms of the contract in any calendar year in which the contract is performed (Colo. Rev. Stat. §38-26-106).

Consequently, contractors, subcontractors and material suppliers may look directly to the bond sureties for the applicable bonds for amounts lawfully due to them from the contractor or subcontractor. Such action must be brought within six months after the completion of the work (Colo. Rev. Stat. §38-26-105).

Contract Amount:	P3 Project for:
More than \$50,000	Any political subdivision of the state (e.g. county, city, municipality or school district) (Colo. Rev. Stat. §38-26-106(3)(a))
More than \$150,000	The State of Colorado (Colo. Rev. Stat. §38-26-106(3)(b))
More than \$150,000	Publicly owned property using any public or private money or financing (Colo. Rev. Stat. §38-26-106(3)(c))