Monday, October 1, 2012
4:30 PM - 6:00 PM

1303 – Optimize Lien and Bond Processes and Case Management to Boost Company Revenue

Paul Allen
Assistant General Counsel
Contech Engineered Solutions LLC

David M. Henry
Attorney
Kohner, Mann & Kailas, S.C.

Mark La Fratta
Partner
McGuireWoods LLP

Jack O'Neil
Senior Consulting Counsel
Western Group, Inc.

Faculty Biographies

Paul Allen

J. Paul Allen is assistant general counsel at Contech Engineered Solutions LLC, a leading site solutions provider to the construction industry headquartered near Cincinnati, OH. With a background in litigation and as a member of a small, two-person legal department, Mr. Allen is intimately involved in Contech's litigation, contract management, real estate, risk management and international business.

Prior to joining Contech, Mr. Allen worked at Frost Brown Todd in Cincinnati in their litigation department, including a one year secondment at GE Aircraft Engines. After that, he moved in-house to Fortune 500 steelmaker AK Steel Corporation in Middletown, OH.

He has been involved as the president of the alumni board of his law school, as an advisor to high school mock trial teams and as a judge for We The People constitutional law programs. He is also heavily involved supporting youth sports leagues and teams in his hometown.

Mr. Allen received a BA from Transylvania University in Lexington, KY, and is a graduate of the Chase College of Law at Northern Kentucky University.

David M. Henry

David M. Henry is an AV-rated attorney with Kohner, Mann & Kailas, S.C., a business transactions, commercial finance and litigation law firm located in Milwaukee, WI. For more than 25 years, Mr. Henry has concentrated his practice on the resolution of construction, commercial bankruptcy and secured and unsecured commercial claims, including the perfection and enforcement of construction lien and payment bond claims through the United States.

Mr. Henry has represented a wide variety of construction businesses of all sizes. He has collected many millions of dollars by perfecting and enforcing construction lien and payment bond claims on projects for regional and national clients in matters across the country.

Prior to joining the legal profession, Mr. Henry was an award-winning journalist, and he worked as a daily newspaper reporter for the *Miami Herald* and the *St. Petersburg Times*.

Mark La Fratta

Mark Joseph La Fratta has a wealth of experience on energy and industrial projects such as LNG facilities, power plants and food processing facilities, including EPC and other construction contracts, power purchase and tolling agreements, thermal energy contracts, equipment purchases, fuel contracts. He has represented the owners, lenders and customers of most every type of power generation project including hydro, biomass, coal, lignite, pet coke, nuclear, natural gas, waste fired, landfill gas, wind and solar (PV and CSP) varying in size from less than 1 MW to more than 2,000 MW.

He has negotiated more than 30,000 MWs of long-term power purchase and tolling contracts on behalf of the power purchasers and developers of such projects, as well as trading contracts using EEI, ISDA, NAESB and WSPP documents. He has represented both utilities and private developers before state commissions and the FERC for regulatory approvals and rate matters, RFP and bid preparations, and siting certificates. He has worked on the development, purchase and sale of inside-the-fence energy projects for industrials, including food production plants, warehouses, chemical plants and paper mills.

He also has experience with procurement of commercial users' purchased energy needs for everything from big box retailers to grocery store chains, and from bowling alleys to shopping centers and large industrial users.

Mr. La Fratta is a graduate of the University of Notre Dame (BA in government and international studies) and the Marshall-Wythe School of Law of the College of William and Mary (JD). He has been named in the "Best Lawyers in America," of Woodward/White, Inc.

Jack O'Neil

John W. (Jack) O'Neil is the senior consulting counsel, and was general counsel for Western Construction Group, Inc. Western Construction Group, Inc. is headquartered in St. Louis, MO. Prior to joining Western, he was in private practice in St. Louis.

Mr. O'Neil served as president of ACC's St. Louis Chapter. He is active in the forum on the construction industry of the American Bar Association and is a Steering Committee member for Division 11, In-House Counsel.

He is a graduate of Saint Louis University School of Law.

September 30-October 3, Orlando, FL

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Mechanic's and Materialman's Liens

Front End Contracting Tips

Don't Give Away Collection Leverage Before You Start

Mechanic's and Materialman's Liens

Check Applicable State Law

Preliminary Deadlines

Mechanic's and Materialman's Liens

Deadlines, Deadlines, Deadlines

Start Time Definition?

Mechanic's and Materialman's Liens

Contractor /Subcontractor Differences

Effect of Owner Notice or Demand

Mechanic's and Materialman's Liens

Waivers and Releases

Conditional or Unconditional

No Receipts Before Payment

BONDS

Payment Bonds

Different Purpose than Liens

Lien Release Bonds

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McGUIREWOODS
Relationships That Drive Results

Mechanics Liens

OVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

MARK J. LA FRATTA

MCGUIREWOODS, LLP

RICHMOND, VIRGINIA

BOVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

Origin of the mechanics'/materialmens' lien in America:

- **Thomas Jefferson**:
- **British common law countries**:
- **Was it Jefferson's idea**?
- **Civil Law Countries**

BOVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

- **Typically Applies to labor and materials**:
- **Cannot repossess your work if it is incorporated into improvements to real property**:
- **Time limits for filing the liens typically expire a set number of days after last work is completed**:
- **Most states grant such lien rights to primes, subcontractors and subsubs**.

BOVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

Lien Waivers and Releases:

- **Frequently treated as synonyms in construction documents and articles; but they are not really the same**.
- **Waive a right; release a claim**.
- **Prospective waivers of lien rights**:
- **Interim waiver/releases**:
- **Final waiver/release**:
- **Formal Requirements for Recording of the release**.

OVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

Documents: What should be in the construction contract?

- **Owner should require the prime to do certain things if a sub files a lien**.
- **Bonding off the lien**.
- **Contract should include self help and set-off rights for Owner**.
- **Flowdown clause**:
- **Indemnity**:
- **Advance notices**:

BOVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

Financing Requirements

- **permitted liens:**
- **priority of mechanics liens**:
- **covenant to remove liens**

OVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

Pursestrings: Who has the money?

- **personal liability notice;**
- **Defense of Payment:**
- **Owner pays into court:**
- **Stop notices:**
- **Bonding and "No lien jobs:"**
- **Joint checks:**

OVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT

Clear Title and Liens

- Encumbers title:
- Liens and title:
- Clearing title

Questions or Comments?

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www.mcguirewoods.com

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The Federal Miller Act

Presented by

David M. Henry

dhenry@kmksc.com

KOHNER, MANN & KAILAS, s.c.
ATTORNEYS AT LAW

Theory of Statute

- Subcontractors and suppliers do not have lien rights on federally-owned construction jobs
- In lieu of lien rights, the Federal Miller Act gives certain subcontractors and suppliers a right to assert a claim against a payment bond furnished for the job by the general contractor
- Certain federal jobs, however, are exempt from the bonding requirement (some smaller jobs and some transportation and military projects)

Types of Bonds

- In addition to performance bonds which protect the job owner, payment bonds are required on most federal jobs; they are similar to an insurance policy and protect certain unpaid subcontractors and suppliers
- The court cases under the Miller Act regularly hold that a subcontractor or supplier has a bond claim right only if its contract is with the general contractor or a first tier subcontractor
- It is prudent to obtain a copy of the bond prior to the start of a federal job to ensure the job is bonded and to review it for any requirements that differ from those under the Miller Act

Amount of Bond

- Generally, the amount of the payment bond must be equal to the amount of the general contractor's contract with the federal government

Notice Before Suit

- If your contract is with a subcontractor (rather than the general contractor), you must give notice of your payment bond claim no later than 90 days from the last date you furnished materials for the job for which a balance is due
- The notice must specify the amount claimed and the name of the party supplied and, to be prudent, it should also include an explicit demand for payment

Notice Before Suit

- The notice must be given to the general contractor, but it is good practice to also send it to the job owner, the bond company and your customer
- The best method is to send the notice by certified mail, return receipt requested
- The notice needs to be delivered within 90 days of last furnishing

Notice of Claim
Page One

NOTICE OF CLAIM ON PAYMENT BOND FOR FEDERAL PUBLIC WORKS PROJECT

TO: _____
_____
_____
_____

Contractor

TO: _____
_____
_____
_____

Surety

PLEASE TAKE NOTICE as follows:

1. At the request of and pursuant to a contract with _____ _____ ("_____"), whose address is _____, _____ _____, ("_____") the claimant, whose address is _____, furnished _____ _____ (the "_____") for incorporation into the federal public work of improvement commonly known as the _____ _____ project located in or near _____ (the "Project").

2. _____ last furnished _____ for the Project to ___ _____ on _____.

3. As of the date of this Notice, _____ is owed the sum of $_____ for the _____ which it furnished to

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Notice of Claim
Page Two

_____ for the Project and _____ hereby asserts a claim in that amount against any payment bond or similar bond furnished for the Project by _____, the contractor.

4. _____ seeks payment of its $_____ _____ claim according to the Federal Miller Act, and is looking to _____ and the surety, _____, for payment of this claim.

_____
Claimant

By:_____
Printed Name:_____
Title:_____

Claimant's Address:
Telephone No.:
Facsimile No.:

STATE OF _____)
) SS
COUNTY OF_____)

_____, being duly sworn on oath, says that he/she is the _____ of _____, the claimant named above, and has knowledge of the claim, and that the claim is correct and that no part of the claim has been paid.

Signed and sworn to before me this _____ day of _____, _____, by _____, personally known to me.

_____
Notary Public, _____County, _____
My Commission expires: _____

Notice of Claim

Page Three

AFFIDAVIT OF SERVICE

STATE OF _____)
) SS
COUNTY OF _____)

The undersigned, being first duly sworn on oath, says that a true and correct copy of the foregoing Notice of Claim on Payment Bond for Federal Public Works Project was properly enclosed in a postage prepaid envelope bearing sender's name and return address and was, on the _____day of _____, _____, properly addressed and mailed by certified mail, return receipt requested, to:

[Insert Names and Addresses]

_____

Signed and sworn to before me
this ___ day of _____, 20__.

_____
Notary Public, _____County, _____
My Commission:_____

Deadline & Venue

- A lawsuit to enforce a bond claim cannot be filed any earlier than 91 days from last furnishing
- The lawsuit, however, must be filed no later than one year from last furnishing
- Both the 90-day notice and one year suit filing deadlines begin to run from the date you last furnished labor or materials which remain unpaid
- The suit must be filed in the Federal District Court where the job is located

Obtaining Copy of Payment Bond

- Submit affidavit to federal contracting agency requesting copy of bond and stating that you furnished labor or materials for the job and have not been paid (if you can't obtain it voluntarily with a few phone calls)

Affidavit
Page One

AFFIDAVIT OF _____ IN SUPPORT OF REQUEST FOR PAYMENT BOND AND CONTRACT

STATE OF _____)
) SS
COUNTY OF _____)

The undersigned, _____, being first duly sworn on oath, states as follows:

1. I am the _____ of _____ ("_____"), a _____ with its principal place of business located at _____, and in that position I have custody of and I am familiar with _____'s books, records and accounts.
2. I submit this Affidavit pursuant to Section 3133(a) of the Federal Miller Act, 40 U.S.C. Section 3133(a), in support of _____'s application for a certified copy of a payment bond and a certified copy of the contract for which it was given, as further described below.
3. At the request of and pursuant to its contract with _____ ("_____"), whose address is _____, _____ furnished certain _____ (the "_____") in connection with the federal public works project commonly known as the _____ project located at or near _____ (the "Project").
4. Upon information and belief, _____ [the general contractor] _____, whose address is _____, entered into a contract

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Affidavit
Page Two

with [contracting federal agency] _____ ("_____"), to serve as the _____'s prime contractor for the Project.

5. Upon information and belief, _____, as the prime contractor for the Project, entered into a contract with _____ pursuant to which _____, as a first tier subcontractor, would furnish certain _____ for the Project, including, but not limited to, the _____ which _____ furnished to _____ _____ for the Project and, as such, _____ is a _____ _____ to a first tier subcontractor on the Project and thus has standing under Section 3133(b) of the Federal Miller Act, 40 U.S.C. Section 3133(b), to assert a claim against any payment bond which _____, as the prime contractor, may have furnished for the Project.
6. As of the date of this Affidavit, _____ is owed the sum of $_____ by _____ for the _____ _____ which _____ furnished to _____ _____ for the Project.
7. By this Affidavit, _____ hereby requests a certified copy of any payment bond furnished by _____ for the Project and a copy of the contract between _____ and _____ for the Project.

Further your affiant sayeth not.

_____
Printed Name:_____

Subscribed and sworn to before me
this ___ day of _____, ____.

_____
Notary Public, _____ County, _____
My Commission: _____

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Pre-Performance Bond Claim Waivers

- The Miller Act prohibits a prime contractor from requiring its subcontractors and suppliers to waive their bond rights prior to commencing performance
- Written post-performance waivers, however, are enforceable

Material Suppliers

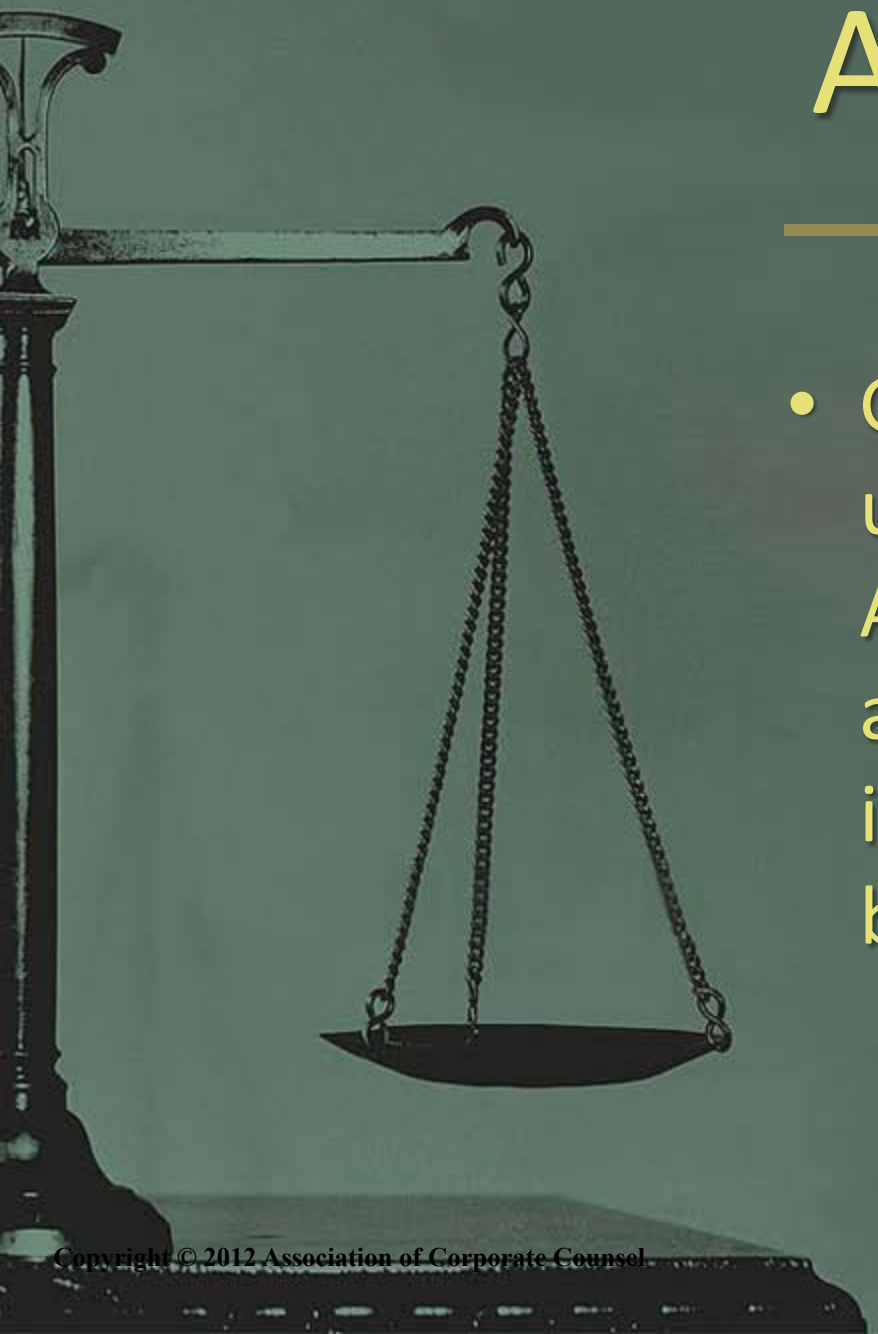
- Have bond claim rights only if they furnish materials to the general contractor or a first-tier subcontractor
- A supplier to another supplier does not have bond rights
- In some cases, a supplier who furnishes customized or fabricated materials may be deemed a subcontractor rather than a mere supplier

Straw Parties / Sham Transactions

- Under some circumstances, courts will ignore a party in the chain on the job in determining if the claimant is eligible to assert a bond claim
- For example, in some cases a supplier to another supplier to a first-tier subcontractor may have bond rights if the court concludes that the second of the suppliers merely marked up the price of the initial supplier's materials and did nothing more

"Pay-When-Paid" Clauses

- The trend in the federal courts is to hold that a "pay-when-paid" clause in a subcontractor's contract with the general contractor will not bar the subcontractor's Federal Miller Act bond claim even if the general contractor has not been paid for the subcontractor's labor and/or materials



Attorney's Fees

- Generally, a bond claimant under the Federal Miller Act is not entitled to an award of attorney's fees if it prevails in suit on its bond claim

Public Construction Projects Owned by State or Local Governments

- If the public construction project is owned by the state or local government, prospective bond claimants must satisfy the requirements of the particular state's payment bond laws (rather than the Federal Miller Act)
- While many state payment bond laws are patterned after the Miller Act, in many cases there are important differences that must be followed
- Unlike the Federal Miller Act, some states do have laws which allow certain subcontractors and suppliers to perfect a lien on funds owed by the state or local government to the general contractor

Conclusion

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dhenry@kmksc.com – 414-962-5110

A Reputation for Success,
A Tradition of Results

David M. Henry

dhenry@kmksc.com
(414) 962-5110

David M. Henry is an AV-Rated attorney who focuses on perfecting and enforcing construction liens and payment bond claims throughout the United States. Mr. Henry handles these matters directly and by managing local counsel who assist him. He also advises clients on optimizing internal lien and bond claim procedures and utilizing external counsel strategically and cost-effectively.

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KMKSC is an AV-rated law firm and a member of the International Society of Primerus Law Firms. We are also recognized as a "Go-To Law Firm for Litigation" by ALM, the publisher of the *American Lawyer*, the *National Law Journal,* and *Corporate Counsel* magazine, based upon recommendations from in-house general counsel at Fortune 500 companies.

In our 75th year, KMKSC is a business transactions and litigation law firm. Our services range from high-profile appellate representation and international business issues, to ensuring that critical everyday commercial needs, such as debt recovery, are fulfilled effectively and in a cost-sensitive manner. We continually deliver for our clients in negotiations, transactions, litigation, and alternative dispute forums across North America and beyond.

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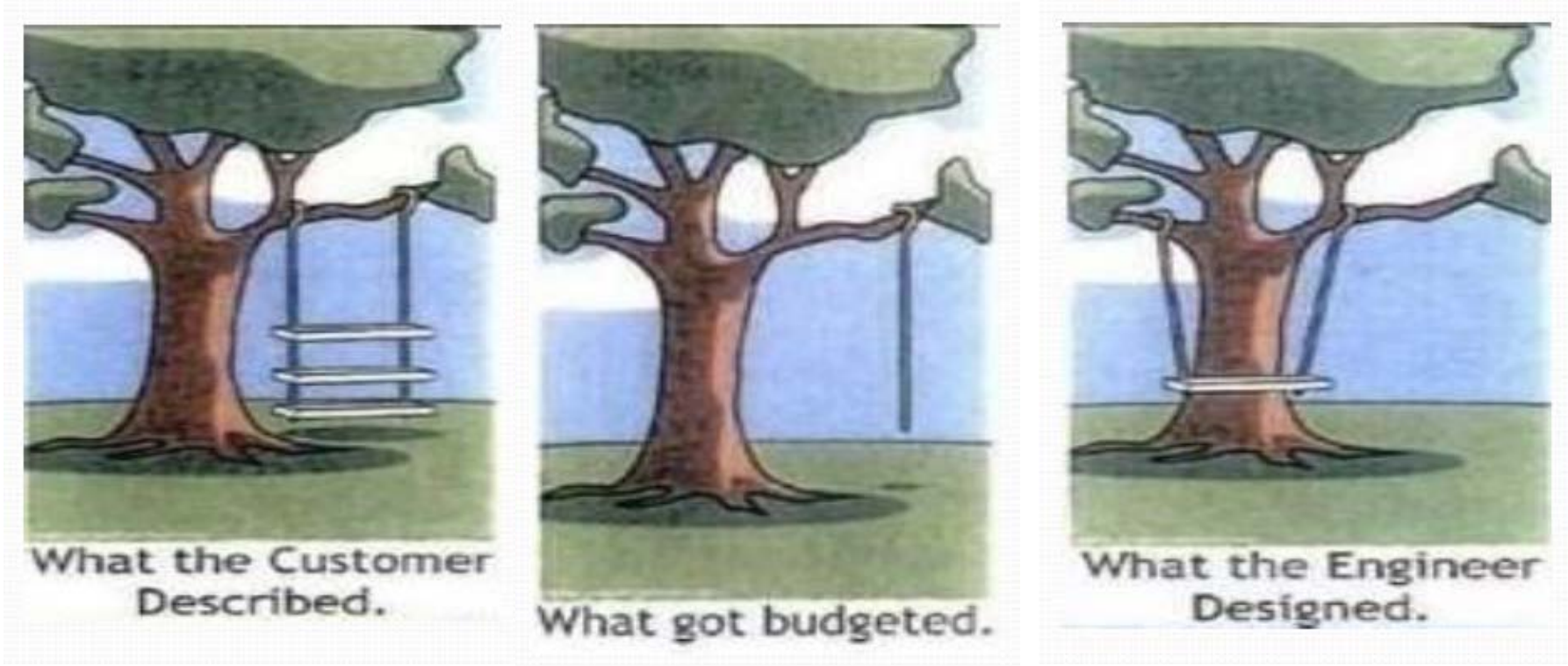
Optimize Lien and Bond Processes and Case Management to Boost Company Revenue

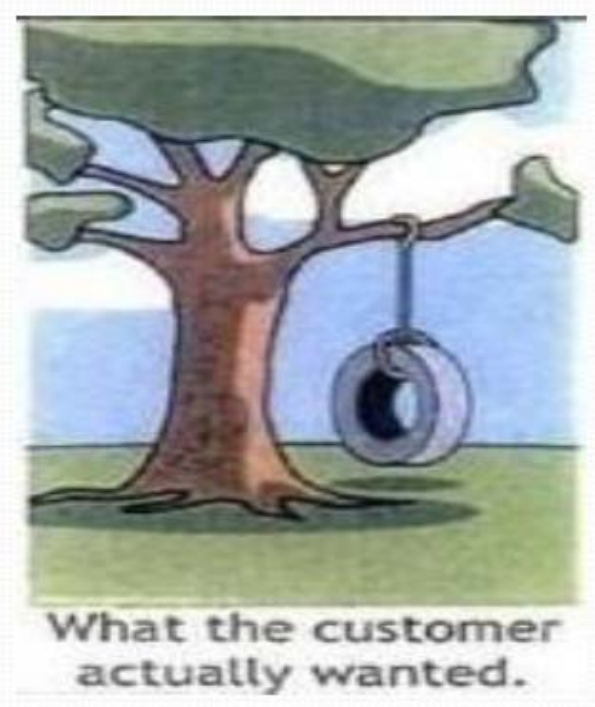
J. Paul Allen, Assistant General Counsel

What happens before you try to collect?



What happens before you try to collect?

What happens before you try to collect?



Processes (Tips, Tricks & FAQ)

- Coordination with Credit Department
  - Prior to obligation
    - Credit checks
      - Single Transaction
      - Blanket Application to All Transactions
    - Purchase Orders
  - During Collection

Processes (Tips, Tricks & FAQ)

- Coordination with Outside Vendors
  - Outside Counsel
  - Credit Companies
  - Software / Web Options

Processes (Tips, Tricks & FAQ)

- Trade or Other Groups
  - Examples
    - National Association of Credit Management (NACM)
    - ACA International, the Association of Credit and Collection Professionals
    - The Credit Research Foundation
  - Education & training
  - ACC

QUESTIONS & DISCUSSION

THE FEDERAL MILLER ACT

I. Theory of Statute

- Subcontractors and suppliers do not have lien rights on federally-owned construction jobs
- In lieu of lien rights, the Federal Miller Act gives certain subcontractors and suppliers a right to assert a claim against a payment bond furnished for the job by the general contractor
- Certain federal jobs, however, are exempt from the bonding requirement (some smaller jobs and some transportation and military projects)

II. Types of Bonds

- In addition to performance bonds which protect the job owner, payment bonds are required on most federal jobs and they are similar to an insurance policy and protect certain unpaid subcontractors and suppliers
- The court cases under the Miller Act regularly hold that a subcontractor or supplier has a bond claim right only if its contract is with the general contractor or a first tier subcontractor
- It is prudent to obtain a copy of the bond prior to the start of a federal job to ensure the job is bonded and to review it for any requirements that differ from those under the Miller Act

III. Amount of Bond

- Generally, the amount of the payment bond must be equal to the amount of the general contractor's contract with the federal government

IV. Notice Before Suit

- If your contract is with a subcontractor (rather than the general contractor), you must give notice of your payment bond claim no later than 90 days from the last date you furnished materials for the job for which a balance is due
- The notice must specify the amount claimed and the name of the party supplied and, to be prudent, it should also include an explicit demand for payment
- The notice must be given to the general contractor, but it is good practice to also send it to the job owner, the bond company and your customer
- The best method to send the notice is by certified mail with a return receipt requested

- The notice needs to be delivered within 90 days of last furnishing (not just put in the mail box by that deadline)

V. Deadline and Venue to Sue to Enforce Bond Claim

- A lawsuit to enforce a bond claim cannot be filed any earlier than 91 days from last furnishing
- The lawsuit, however, must be filed no later than one year from last furnishing
- Both the 90 day notice and one year suit filing deadlines begin to run from the date you last furnished labor or materials which remain unpaid
- The suit must be filed in the Federal District Court where the job is located

VI. Obtaining Copy of Payment Bond

- Submit affidavit to federal contracting agency requesting copy of bond and stating you furnished labor or materials for the job and have not been paid (if you can't obtain it voluntarily with a few phone calls)

VII. Pre-Performance Bond Claim Waivers

- The Miller Act prohibits a prime contractor from requiring its subcontractors and suppliers to waive their bond rights prior to commencing performance
- Written post-performance waivers, however, are enforceable

VIII. Material Suppliers

- Have bond claim rights only if they furnish materials to the general contractor or a first-tier subcontractor
- A supplier to another supplier does not have bond rights
- In some cases, a supplier who furnishes customized or fabricated materials may be deemed a subcontractor rather than a mere supplier

IX. Straw Parties/Sham Transactions

- Under some circumstances, courts will ignore a party in the chain on the job in determining if the claimant is eligible to assert a bond claim
- For example, in some cases a supplier to another supplier to a first tier subcontractor may have bond rights if the court concludes that the second of the suppliers merely marked up the price of the initial supplier's materials and did nothing more

X. "Pay-When-Paid" Clauses

- The trend in the federal courts is to hold that a "pay-when-paid" clause in a subcontractor's contract with the general contractor will not bar the subcontractor's Federal Miller Act bond claim even if the general contractor has not been paid for the subcontractor's labor and/or materials.

XI. Attorney's Fees

- Generally, a bond claimant under the Federal Miller Act is not entitled to an award of attorney's fees if it prevails in suit on its bond claim.

XII. Public Construction Projects Owned by State of Local Governments

- If the public construction project is owned by the state or local government, prospective bond claimants must satisfy the requirements of the particular state's payment bond laws (rather than the Federal Miller Act)

- While many state payment bond laws are patterned after the Miller Act, in many cases there are important differences that must be followed

- Unlike the Federal Miller Act, some states do have laws which allow certain subcontractors and suppliers to perfect a lien on funds owed by the state or local government to the general contractor.

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NOTICE OF CLAIM ON PAYMENT BOND FOR FEDERAL PUBLIC WORKS PROJECT

TO: _____
_____
_____
_____

Contractor

TO: _____
_____
_____
_____

Surety

PLEASE TAKE NOTICE as follows:

1. At the request of and pursuant to a contract with _____ _____ ("_____"), whose address is _____, _____ _____, ("_____") the claimant, whose address is _____, furnished _____ _____(the "_____") for incorporation into the federal public work of improvement commonly known as the _____ _____project located in or near _____ (the "Project").

2. _____ last furnished _____ for the Project to ____ _____ on _____.

3. As of the date of this Notice, _____ is owed the sum of $_____ for the _____ which it furnished to

_____ for the Project and _____ hereby asserts a claim in that amount against any payment bond or similar bond furnished for the Project by _____ _____, the contractor.

4. _____ seeks payment of its $_____ _____ claim according to the Federal Miller Act, and is looking to _____ and the surety, _____, for payment of this claim.

_____
Claimant

By: _____
Printed Name: _____
Title: _____

Claimant's Address:
Telephone No.:
Facsimile No.:

STATE OF_____)
) SS
COUNTY OF _____)

_____, being duly sworn on oath, says that he/she is the _____ of _____, the claimant named above, and has knowledge of the claim, and that the claim is correct and that no part of the claim has been paid.

Signed and sworn to before me this _____ day of _____, _____, by _____, personally known to me

_____
Notary Public, _____County, _____
My Commission expires: _____

AFFIDAVIT OF SERVICE

STATE OF _____)
(SS
COUNTY OF _____)

The undersigned, being first duly sworn on oath, says that a true and correct copy of the foregoing Notice of Claim on Payment Bond for Federal Public Works Project was properly enclosed in a postage prepaid envelope bearing sender's name and return address and was on the ____ ____day of _____, _____, properly addressed and mailed by certified mail, return receipt requested, to:

(Insert Names and Addresses)

_____

Signed and sworn to before me
this _____ day of _____, 2011.

_____
Notary Public, _____ County, _____
My Commission: _____

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AFFIDAVIT OF _____

IN SUPPORT OF REQUEST FOR PAYMENT BOND AND CONTRACT

STATE OF _____)
) SS
COUNTY OF _____)

The undersigned, _____, being first duly sworn on oath, states as follows:

1. I am the _____ of _____ _____("_____"), a _____ _____with its principal place of business located at _____ _____, and in that position I have custody of and I am familiar with _____'s books, records and accounts.
2. I submit this Affidavit pursuant to Section 3133(a) of the Federal Miller Act, 40 U.S.C. Section 3133(a), in support of _____'s application for a certified copy of a payment bond and a certified copy of the contract for which it was given, as further described below.
3. At the request of and pursuant to its contract with _____ ("____ ___"), whose address is _____, _____ _____ furnished certain _____ (the "_ _____") in connection with the federal public works project commonly known as the _____ project located at or near _____ _____ (the "Project").
4. Upon information and belief, ___[the general contractor]_____, whose address is _____,entered into a contract

with [contracting federal agency] _____ ("_____"), to serve as the _____'s prime contractor for the Project.

5. Upon information and belief, _____, as the prime contractor for the Project, entered into a contract with _____ pursuant to which _____, as a first tier subcontractor, would furnish certain _____ for the Project, including, but not limited to, the _____ which _____ furnished to _ _____ for the Project and, as such, _____ is a __ _____ to a first tier subcontractor on the Project and thus has standing under Section 3133(b) of the Federal Miller Act, 40 U.S.C. Section 3133(b), to assert a claim against any payment bond which _____, as the prime contractor, may have furnished for the Project.
6. As of the date of this Affidavit, _____ is owed the sum of $_____ by _____ for the _____ _____ which _____ furnished to _____ ___ for the Project.
7. By this Affidavit, _____ hereby requests a certified copy of any payment bond furnished by _____ for the Project and a copy of the contract between _____ and _____ for the Project.

Further your affiant sayeth not.

_____
Printed Name: _____

Subscribed and sworn to before me
this _____day of _____, _____.

_____
Notary Public, _____ County, _____
My Commission:_____

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THE FEDERAL MILLER ACT
TITLE 40 UNITED STATES CODE §§ 3131-3134

David M. Henry, Esq.
Kohner, Mann & Kailas, S.C.

July 25, 2012

I. THEORY OF THE STATUTE

Public buildings and public construction belong to the public-at-large. All of us. Thus, no individual, corporation or other entity can be allowed to obtain a lien in a public building or public construction. Mechanics' or construction liens, therefore, don't exist for public construction or buildings.

In order to protect laborers, material suppliers and contractors and the public "owners" of federally-owned public buildings and construction, the Miller Act was passed to require that, in most situations, bonds must be furnished by the general contractor to guarantee payment. The Miller Act specifically provides that it does not apply to a contract in an amount of $100,000.00 or less (but by regulation this amount was revised to $150,000.00 as of October 1, 2010). Federal regulations may in some cases provide payment protections to suppliers of labor and/or materials on federal construction projects between $30,000.00 and $150,000.00. Certain types of military and transportation-related construction projects can be exempted by the federal government from the Miller Act bonding requirements.

In some circumstances (e.g., on particularly large projects or in cases where a subcontractor is perceived to be a credit risk), a subcontractor may be required to furnish a bond. However, this would depend upon the contracts, not upon the Miller Act.

TIP NO. 1: Be sure to find out who owns the building or construction site.

II. TYPES OF BONDS

A. A performance bond - - amount to be fixed by the agency awarding the contract, "guarantees" that the contractor will get the work done.

B. A payment bond "for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person."

TIP NO. 2: Don't believe everything you read. The above quoted phrase does not necessarily mean what it says. The court cases regularly hold that if you don't

have a contract with the principal contractor or a first-tier subcontractor, you are not covered by the payment bond.

TIP NO. 3: You should get a copy of the payment bond since it may contain language that could affect: (a) coverage; (b) the time for giving notice; and (c) to whom notice must be given. If the notice requirements in the bond are different from those in the Miller Act, it is prudent to satisfy the requirements in the payment bond and those under the Miller Act.

III. AMOUNT OF BOND

The Miller Act was amended in August of 1999, increasing the amount of the payment bond generally required for a federal construction project.

Prior to the amendment, the bond amounts were as follows:

Contract $1,000.000 or less - - Bond is ½ of contract

Contract $1,000,000 to $5,000.000 - - Bond is 40% of contract

Contract more than $5,000,000 - - Bond is capped at $2,500,000

As amended, the Miller Act now provides that the amount of the bond generally must be equal to the contract price. This provides far greater protection to subcontractors and suppliers, particularly on projects involving large contracts well in excess of $5,000,000.00. However, the federal contracting officer may, if properly documented in writing supported by specific findings, provide for a payment bond in an amount less than the contract price. Therefore, it is important to determine if the amount of the bond is equal to or less than the contract price. If it is less than the contract price, there may be a risk that the bond proceeds won't be sufficient to pay all bond claims in full.

IV. FOREIGN COUNTRIES

Bond may be waived if it is "impracticable" for the contractor to furnish a bond.

V. RIGHT TO SUE

A. Furnished labor or
B. Supplied materials, and
C. Not paid "in full" within 90 days after furnishing last labor and/or materials for which such claim is made (i.e., the unpaid goods and/or services, even if earlier)

VI. NOTICE BEFORE SUIT

If your contract is with a subcontractor and you have no direct contractual relationship express or implied with the contractor who furnished the payment bond, you must give

written notice to the contractor who furnished the bond within 90 days after last labor or materials (not before last labor/materials), and it must be received within 90 days, stating with substantial accuracy:

A. The amount claimed, and
B. Name of the party supplied

In a 2001 decision, United States ex rel. S & G Excavating, Inc. v. Seaboard Surety Co., 236 F.3d 883 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit ruled that a claimant, in giving the 90-day notice, does not need to include an explicit demand for payment by the general contractor. However, other federal appellate courts have ruled to the contrary. Therefore, it is prudent to include in the notice a demand for payment by the general contractor.

The Miller Act was amended in August of 1999 to modernize the methods by which the notice may be served. As amended, the Miller Act now permits the notice to be served by any means which provides written, third-party verification of delivery. Prior to the amendments, the notification had to be given by registered mail through the U.S. Postal Service.

TIP NO. 4: While the new law appears to permit the notice to be given by a variety of methods whereby a third party obtains a receipt for delivery (e.g., United Parcel Service, Federal Express), the use of registered mail through the U.S. Postal Service may be the most practical and cost effective method of service available.

TIP NO. 5: The 90-day notice deadline begins to run from the date of last furnishing of labor or materials under the contract. Repairs, corrections, punch list work, or satisfying warranty obligations generally will not start running anew this deadline (unless some other party on the job caused the problems that resulted in the repairs, etc.)

VII. SUIT IN FEDERAL DISTRICT WHERE WORK PERFORMED

The suit must be filed no earlier than 91 days following the last furnishing of labor and/or materials and no later than one year after last furnishing labor and/or materials by claimant, for which payment is due.

TIP NO. 6: If you haven't been paid within 90 days, don't negotiate more than 9 months (total of more than one year), or you will miss the suit deadline.

TIP NO. 7: This does not mean after the whole job is completed. In many cases, jobs take more than a year to complete. In most construction jobs, there is a 10% retention. Many parties won't be paid in full until the job is done. Therefore, you could well be required to start suit on a bond claim before the whole job is done and before all parties are paid.

VIII. YOU ARE ENTITLED TO A COPY OF THE BOND AND CONTRACT

A. Submit an affidavit that you have supplied labor or materials and payment was not made.
B. Send affidavit and request to department secretary or head of the contracting agency.
C. You may be required to pay the costs of sending the bond and contract.

TIP NO. 8: Don't wait to request a copy of the bond until your work is done and you are not paid. You may need the bond in order to give the proper notice.

TIP NO. 9: The bonding company may not have a copy of the bond. Don't ask them unless you must. The agency (owner) must have the bond. Most agencies have a person in charge of the construction and most are helpful in supplying the bond by fax or mail.

TIP NO. 10: If you are told to submit a request under the "Freedom of Information Act," as we have been, cite Section 3133(a) of the Miller Act to support your right to the bond copy. However, if this doesn't work, make your request under both the Miller Act and the Freedom of Information Act.

IX. WAIVER OF PAYMENT BOND RIGHTS

The Miller Act was amended in August 1999 to restrict the abilities of prime contractors to obtain waiver of payment bond rights from their subcontractors and suppliers. As amended, the Miller Act prohibits a prime contractor from requiring its subcontractors and suppliers to waive their payment bond rights before commencing performance. Therefore, a waiver is valid only if it is in a writing signed by the subcontractor or supplier after the subcontractor or supplier commenced performance on the project. Prior to the amendment, the subcontractor or supplier could waive its payment bond rights in a contract or other agreement made before the job had started.

X. EQUITABLE LIENS ON NON-BONDED FEDERAL CONSTRUCTION PROJECTS

As indicated above, the federal government has the option of exempting certain military and transportation-related construction projects from the Miller Act's bonding requirements. Not unexpectedly, subcontractors and suppliers on such projects who have not been paid by the general contractor will often resort to creative remedies to get paid if they have no Miller Act payment bond claim. One such creative remedy is called an equitable lien – i.e., a lien that attaches to any funds held by the federal government that are still owed to the general contractor on the project. However, a 1999 United States Supreme Court decision, Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999), appears, at least in many cases, to block the equitable lien theory, reasoning that the sovereign immunity of the federal government bars subcontractors and suppliers from attaching federal funds.

XI. THE RIGHTS OF MATERIAL SUPPLIERS UNDER MILLER ACT

A material supplier is eligible to assert a claim against a Miller Act payment bond if the supplier's contract is with the general contractor or a first-tier subcontractor. However, if the supplier's contract is with another material supplier, the supplier generally will not have a valid Miller Act payment bond claim. If a supplier furnished materials to a first-tier subcontractor through a sales agent or manufacturer's representative, the supplier generally will be covered by a Miller Act payment bond. A supplier on a federal construction project needs to be fully cognizant of its customer's role on the job. In some cases, a supplier may superficially believe it has no Miller Act payment bond claim rights because its contract is with another supplier. However, that may not in substance be true. For example, the supplier's customer may have a contract with the general contractor and the customer may be furnishing custom-made materials built to specifications. In that case, the customer may under the Miller Act be deemed to be a subcontractor rather than a supplier and the supplier may, therefore, possess a valid payment bond claim if it complied with the Miller Act's notice and other requirements.

XII. STRAW PARTIES/SHAM TRANSACTIONS

If a subcontractor or supplier has contracted with what appears to be a second-tier subcontractor on a federal construction job, then the subcontractor or supplier generally cannot recover under the Miller Act. However, the subcontractor or supplier may not want to give up so easily.

Some federal courts have recognized that under some circumstances a party in the chain of those furnishing labor or materials on the job will be ignored for purposes of determining whether a payment bond claimant is eligible for Miller Act coverage. For example, if a third-tier subcontractor's or supplier's customer was installed only as a "straw party" to limit payment bond claims, the courts may disregard the customer and rule that the third-tier subcontractor or supplier is in substance a second-tier subcontractor or supplier, and, therefore, eligible to recover on a Miller Act bond claim. In such cases, the courts will consider a number of factors, including whether the bond claimant's customer merely passed on a markup to its customer and did not itself actually furnish any labor or materials to the project. Under such circumstances, the bond claimant's customer performed no real substantive function on the project. See e.g., Glen Falls Insurance Co. v. Newton Lumber & Manufacturing Co., 388 F.2d 66 (10th Cir. 1967), cert. denied, 390 U.S. 905 (1968); United States ex rel. Hillsdale Rock Co. v. Cortelyou & Cole, Inc., 581 F.2d 239 (9th Cir. 1978); United States ex rel. M.A. Bruder & Sons, Inc. v. Aetna Casualty & Surety Co., 480 F.Supp. 659 (D.D.C. 1979).

XIII. EFFECT OF ARBITRATION RULINGS ON STAYED MILLER ACT LITIGATION

The law appears unsettled regarding whether an arbitration award against a principal is preclusive and binding as to initial litigation against a surety. U.S. ex rel. Frontier Const., Inc. v. Tri-State Management Co., 262 F.Supp. 2d 893 (N.D. Ill. 2003). Some circuits follow the rule that "a surety is bound by any judgment against its principal . . . when the surety had full knowledge of the action against the principal and an opportunity to defend it." Id. at 895–96 (quoting Drill South, Inc. v. Int'l Fid. Ins. Co., 234 F.3d 1232, 1235 (11th Cir. 2000)). By contrast, one circuit "has questioned whether the general rule that a judgment against a principal is binding on a surety with notice and opportunity to defend is even applicable in the Miller Act context." Id. at 896; see also United States Fid. & Guar. Co. v. Hendry Corp., 391 F.2d 13, 17 (5th Cir. 1968). "At least one district court has applied Hendry to arbitration awards, holding that an arbitration proceeding between a subcontractor and a prime contractor would not have preclusive effect against the prime contractor's Miller Act surety." Frontier Const., 262 F.Supp. 2d at 896. More recently, the federal district court in Washington, D.C. mentioned—almost in passing—that were a defendant-general contractor to prevail in arbitration against its plaintiff-subcontractor, the subcontractor would "likely be bound by the result, foreclosing further litigation with [the surety]." U.S. ex rel. Milestone Tarant, LLC v. Federal Ins. Co., 672 F.Supp. 2d 92, 102 (D.D.C. 2009) ("At the very least, [the subcontractor] would likely be bound by the doctrine of collateral estoppel, also known as issue preclusion.").

XIV. "PAY-WHEN-PAID" CLAUSES AND LIABILITY OF SURETIES

While there appear to have been no federal cases within the last fifteen years dealing specifically with "pay-if-paid" clauses and liabilities of sureties, courts appear to have come to a consensus regarding such liability in light of "pay-when-paid" clauses. For instance, in U.S. for Use and Benefit of Walton Technology, Inc. v. Weststar Engineering, Inc., 290 F.3d 119 (9th Cir. 2002), the Ninth Circuit held that a "subcontractor's right of recovery on a Miller Act payment bond accrues ninety days after the subcontractor has completed its work, not 'when and if' the prime contractor is paid by the government." Id. at 1208. Accordingly, "[p]ermitting a Miller Act surety to avoid liability on the payment bond based on an unsatisfied 'pay when and if paid' clause in the subcontract would, for all practical purposes, prohibit a subcontractor from exercising its Miller Act rights until the prime contractor has been paid by the government." Id. Courts also point out that "if the government were to delay paying [the prime contractor] for over a year, then the one-year Miller Act statute of limitations would have run, thus denying [the subcontractor] any remedy under the Act." U.S. ex rel. McKenney's, Inc. v. Governmental Technical Services, LLC, 531 F.Supp. 2d 1375, 1379–80 (N.D. Ga. 2008).

XV. RECOVERING ATTORNEYS' FEES IN FEDERAL MILLER ACT SUITS

Absent a contractual provision to the contrary, the federal Miller Act does not expressly allow for recovery of attorneys' fees by subcontractors and material suppliers. Steven J. Koprince, Beating Rich: Three Ways to Recover Attorneys' Fees in Miller Act Cases, 56 Fed. Law. 36 (Feb. 2009); N. Pieter M. O'Leary, Bullies in the Sandbox: Federal Construction Projects, The Miller Act, and a Material Supplier's Right to Recover Attorney's Fees and Other "Sums Justly

Due" Under a General Contractor's Payment Bond, 38 Transp. L.J. 1 (Spring 2011). "[W]here a contract between a material supplier and a subcontractor does not provide for fees, the material supplier is not entitled to attorneys' fees as 'sums justly due' [under the Act] from either the general contractor or its surety." O'Leary, Bullies in the Sandbox, at 18. In light of this, some practitioners argue that attorneys' fees may be recovered due to a party's bad faith behavior, or under state law. Koprince, Beating Rich, at 38–40. This issue has been on the rise, as federal stimulus money issued during the Great Recession increased the number of federal construction projects, and drove up competition for such work, resulting in increased federal litigation among the parties involved. O'Leary, Bullies in the Sandbox, at 3.

XVI. STATE LAW GOVERNING PAYMENT BOND CLAIMS ON PUBLIC JOBS

A number of states have adopted statutes which govern payment bond claims on construction projects owned by the state or local government within the state. See, e.g., Wis. Stat. § 779.14 (2012); Fla. Stat. § 255.05 (2012); 30 Ill. Comp. Stat. 550/1 (2010); Ga. Code Ann. § 13-10-60 (2012). While some of the state payment bond statutes are patterned after the Federal Miller Act, in many states there are important key differences. Thus, those who endeavor to perfect payment bond claims on construction projects owned by a particular state or a local government within that state, should consult the requirements of the particular payment bond statutes in those states.

XVII. STATE LAW LIEN-ON-FUNDS CLAIMS

Under the Federal Miller Act, there is no provision which allows a subcontractor or supplier to assert a lien against any funds the federal government may owe to its general contractor on a federally-owned construction project. However, some states do allow such claims, under certain circumstances. See, e.g., Wis. Stat. § 779.15 (2012); 770 Ill. Comp. Stat. 60/23 (2012); Cal. Civ. Code § 9100 (2012). These are variably known as public improvement lien claims, stop notice claims, or lien-on-funds claims. Those who endeavor to perfect such claims on construction projects owned by a particular state or local government within that state should consult the requirements of the particular statute within that state.

* ATTACHED FORMS

- Notice of Claim on Payment Bond for Federal Public Works Project
- Affidavit in Support of Request for Payment Bond and Contract

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B. OVERVIEW FROM OWNER/LIENEE/OBLIGOR VIEWPOINT
ACC 2012 ANNUAL MEETING
REAL ESTATE SECTION

MARK J. LA FRATTA
MCGUIREWOODS, LLP
RICHMOND, VIRGINIA

1) **Origin of the mechanics'/materialmens' lien in America**:

   a) **Thomas Jefferson**: US historians record Thomas Jefferson, author of the Declaration of Independence, third President of the United States, founder of the University of Virginia, and architect as the originator of the idea of mechanics liens in America. As an architect, Jefferson was involved in the business of construction. He was the architect for the state capital building in Richmond, Virginia. Like anyone in the construction business, I expect that at some point he had a customer who did not pay him. In colonial Virginia, if you sold someone a horse or a wagon or furniture or some other personal property and he or she did not pay, the seller had remedies like actions in detinue and replevin to recover what was not paid for. If what you sold (materials or labor) was incorporated into construction, repossessing what was not paid for is a little impractical.

   b) **British common law countries**: Prior to Jefferson's introduction of the idea in Virginia, no such concept was present in any British common law countries.

   c) **Was it Jefferson's idea**? The truth is a bit more complicated. As was typical for Mr. Jefferson, he adapted an idea he learned elsewhere. He promoted legislation that resulted in what is now called a mechanic's lien. Where did he get the idea?

   d) **Civil Law Countries**: In Jefferson's lifetime, civil law jurisdictions had something like mechanics liens. Jefferson likely learned of the concept of something like a mechanics lien from contact with civil law countries and French influence in parts of America, like Louisiana. Some scholars say that such a concept dates back to Roman times.

   e) **Typically Applies to labor and materials**: Mechanics and materialmen's lien rights apply to the provision of labor and materials that are incorporated into actual construction. In some states lien rights also apply to architectural or engineering services for designs *that are actually constructed*.

f) **Cannot repossess your work if it is incorporated into improvements to real property**: Mechanics liens are a creature os statue. Such statutes in many states use phrases like work or material that is incorporated into improvements to real property "permanently affixed to the freehold." The mechanics lien gives the contractor, subs and suppliers a form of security for payment.

g) **Time limits for filing the liens typically expire a set number of days after last work is completed**: Typically it is something like 90 days after completion of the lienor's work, and not completion of the entire project. Does that include warranty work? In most states, no it does not. Most states do not allow a call back to do a warranty repair as extending the sunset of the time to file the lien. Some Owners actually define "Work" under a construction contract to include "warranty work." If you define "Work" to include warranty work, you may have extended the deadline for lien filings.

h) **Most states grant such lien rights to primes, subcontractors and subsubs**. In other words down two tiers of subs.

2) **Lien Waivers and Releases**:

a) **Frequently treated as synonyms in construction documents and articles; but they are not really the same**. Many contracts use both words or even a series of verbs making lien releases. (e.g. waive release, discharge, relinquish, etc.)

b) **Waive a right; release a claim**.

c) **Prospective waivers of lien rights**: Prospective waivers in a construction contract are enforceable in some states. This means that a contractor or sub can waive its statutory lien rights in advance by contract. This creates a "no lien" job from day one. Some states limit enforceability of such waiver clauses to small or residential construction contracts only. Most states will not enforce prospective waivers of lien rights.

d) **Interim waiver/releases**: Typically an Owner will require and interim "conditional release" of liens from the prime, and will require the prime to obtain interim conditional releases from most if not all subs of any size. The purposes is to require the prime to state what it is owed, and to release any lien rights for any work performed prior to the date of the release form, effective upon payment of the owed

amount. Some interim release forms require the contractor to certify it has no other claims or to state what claims it has. Samples of interim lien releases for primes and subs are included with the course materials.

e) **Final waiver/release**: Typically an Owner will require final lien releases from all subs and materialmen. It is typically conditional like the interim release upon the amount of final payment due. Samples of final lien releases for primes and subs are included with the course materials.

f) **Formal Requirements for Recording of the release**. In many states, it is best to require that the releases meet all formal requirements for recording, so that if liens are filed, the release can be recorded thus clearing the title records. (e.g. notarized)

3) **Documents**: What should be in the construction contract?

a) **Owner should require the prime to do certain things if a sub files a lien**. Several provisions should be included in construction contracts dealing with lien rights of the prime and how to handle subcontractors liens. Samples of many of these provisions are included with the course information.

b) **Bonding off the lien**. The Prime should be obligated to have the lien removed/released. This can be accomplished by paying the lienor, or by "bonding off" the lien. This will clear the owner's title. The prime can file a bond with the court so that the lienor/sub has security for payment once the dispute is resolved. The security is in the form of the bond, and as such the sub no longer needs a lien in the Owner's property.

c) **Contract should include self help and set-off rights for Owner**. The prime contract should provide that if the prime does not have the lien released within a reasonable time, the Owner may have it removed. Typically (depending on the state) this includes rights for the Owner to pay the sub directly in exchange for a lien release; also the Owner can typically pay the amount of the lien into the court and obtain a release from the court that can be recorded.

d) **Flowdown clause**: The prime contract should include a flowdown clause that requires subs to take similar steps to remove liens of subsubs.

e) **Indemnity**: The prime contract should include a clause whereby the prime contractor indemnifies the Owner for and against any liens filed by its subs.

f) **Advance notices**: some states require subs to file advance notices that they are going to be working on a job with the owner before work actually begins, other wise they have no right to file liens on that job.

4) Financing Requirements

a) permitted liens: Credit agreements typically speak to mechanics and other permitted liens and include provisions obligating the borrower to take certain steps with regard to liens. A sample lien clause from a credit agreement is in the attached materials**.**

b) **priority of mechanics liens**: varies state by state; some states give priority to mechanics liens relating back to the start of work. Some subordinate mechanics liens to construction loans; in some states it is a mere "race" to the recording.

c) covenant to remove liens

5) Pursestrings: Who has the money?

a) **personal liability notice**; e.g. Virginia Code Section 43-11. Som states have code provisions related to liens, or codified in the same part of the code as liens that can present other rights and obligations beyond merely a lien in the property. Virginia has something many refer to as a "43-11 letter." If a sub provides this sort of notice to the owner that it is owed money, then the Owner can be personally liable to that sub, if the Onwer pays the prime without insuring that the sub will also be paid. It can result in the Owner paying twice. A 43-11 letter overs=comes the so called "defense of payment."

b) **Defense of Payment**: In most states, a lien is only as good as the Owner's outstanding obligation to pay the prime that remains after the filing of the lien.This is typically called the "defense of payment." States that do not have such a "defense of payment" subject owners to double payment.

c) **Owner pays into court:** Suppose a sub files a lien. In many states, the Owner can pay the amount of the lien into the court and obtain a

release from the court that can be recorded. The idea here is that the Owner realizes that it owes the money to the prime and that perhaos the prime owes the money to the sub. The court holds the money over which the prime and sub are fighting, but leaves it to the court to decide whether the prime or the sub should get the funds. At that point, the sub is protected and no longer needs a lien for security and the court will release the lien.

d) **Stop notices**: in some states, Owners and in some states even construction lenders can be the recipient of "stop notices" whereby a prime or sub gives a notice that it has not been been paid and that payment is in dispute and subject to adjudication. In those states the funder of the project is then required to segregate funds to make sure sufficient money is left to pay the filer of the stop notice. The sum must remain in a separate account until trial is concluded. This is akin to an Owner paying money into a court to have a lien released.

e) **Bonding and "No lien jobs:"** In some states, if a payment bond is in place, there are ways to file a notice with the courts that such a bond is in place for a job, theoretically creating a no line job, because the filed bond creates security for payment of subs.

f) **Joint checks**: If an Owner receives a personal liability notice, or a stop notice, or is in a state where defense of payment is not available, Owners frequently resort to paying the prime with checks with the prime and the sub as joint payees.

6) Clear Title

a) Encumbers title: a mechanics lien encumbers title. The lien presents a significant obstacle to selling and financing the property**.**

b) Liens and title: Some experts allege that as many as 90% of mechanics liens filed of record are deficient in some respect and unenforceable. Even if likely unenforceable, the lien can still cloud title**.**

c) Clearing title: to remove even a defective lien may require recording of another document, e.g. a release.

Sample

FORM OF CONTRACTOR PARTIAL RELEASE AND WAIVERS OF LIENS AND CLAIMS

Date: _____

1. Contractor's name: ("Contractor").

2. The property improved by Contractor's work (the **"Property"**) is the site located at _____, [State] , (the boundaries of such Property are as more particularly described in the definition of "Project Site" in the EPC Contract defined below).

3. Contractor's work was furnished at the request of the _____ _____(the **"Owner"**) pursuant to that certain Engineering, Procurement and Construction Agreement between Owner and Contractor, dated as of [_ _____] (the **"EPC Contract"**). Capitalized terms used herein that are not defined herein have the respective meanings set forth in the EPC Contract.

4. Contractor represents and certifies to Owner that it has waived and released all lien rights, security interests or encumbrances for claims that Contractor may have had with respect to payment received for all Work by Contractor or any Subcontract completed prior to [insert date of most recent prior Lien Waiver and Release or, if it is the first Lien Waiver and Release, the Commencement Date of the EPC Contract].

5. Contractor further represents and certifies to Owner that Contractor has made full due payment of all costs, charges and expenses incurred prior to [insert date of most recent prior Lien Waiver and Release or, if it is the first Lien Waiver and Release, the Commencement Date of the EPC Contract] by it or on its behalf for work, labor, services, materials and equipment supplied to the Project and/or used in connection with its Work [insert description of any exceptions].

6. The amount to be paid to Contractor by Owner for the improvements to the Property made from [insert date of most recent Lien Waiver and Release or, if it is the first Lien Waiver and Release, the Commencement Date of the EPC Contract] up until the date of this Lien Waiver and Release is $_____.

7. Subject to Contractor's receipt of the amount set forth in paragraph 6, Contractor hereby waives and release all lien rights, security interests or encumbrances that Contractor may have against the Property or all Work performed by and all materials provided by Contractor or any Subcontractor in connection with payment received prior to the date of this Lien Waiver and Release.

8. List the name(s) of the Contractor's subcontractors and material suppliers furnishing any portion of the work being waived: _____

_____

_____

_____ (attach additional sheet if more space is required).

CONTRACTOR NAME:

_____

By: _____
(signature)

_____ Its _____
(Name) (Title)

Address _____

_____

_____

Telephone Number _____

Sample

FORM OF SUBCONTRACTOR PARTIAL RELEASE AND WAIVERS OF LIENS AND CLAIMS

Date: _____

1. Subcontractor's name: _____ (**"Subcontractor"**).

2. The property improved by Subcontractor's work (the **"Property"**) is the site located at _____, [State], (the boundaries of such Property are as more particularly described in the definition of "Project Site" in the EPC Contract defined below).

3. Subcontractor's work was furnished at the request of the _____ _____(the **"Contractor"**) pursuant to a subcontract (the "Subcontract") between Contractor and Subcontractor. The Subcontract was entered into in connection with that certain Engineering, Procurement and Construction Agreement between _____ _____(the **"Owner"**) and Contractor, dated as of [ ] (the **"EPC Contract"**). Capitalized terms used herein that are not defined herein have the respective meanings set forth in the EPC Contract.

4. Subcontractor represents and certifies to Contractor and Owner that it has waived and released all lien rights, security interests, encumbrances or claims that Subcontractor may have had with respect to all Work by Subcontractor or any subcontract completed prior to [insert date of most recent prior Lien Waiver and Release or, if it is the first Lien Waiver and Release, the Commencement Date of the Subcontract].

5. Subcontractor further represents and certifies to Contractor and Owner that Subcontractor has made full payment of all costs, charges and expenses incurred prior to [insert date of most recent prior Lien Waiver and Release or, if it is the first Lien Waiver and Release, the Commencement Date of the Subcontract] by it or on its behalf for work, labor, services, materials and equipment supplied to the Project and/or used in connection with its Work [insert description of any exceptions].

6. The amount to be paid to Subcontractor for the improvements to the Property made from [insert date of most recent Lien Waiver and Release or, if it is the first Lien Waiver and Release, the Commencement Date of the Subcontract] up until the date of this Lien Waiver and Release is $_____.

7. Subject to Subcontractor's receipt of the amount set forth in paragraph 6, Subcontractor hereby waives and release all lien rights, security interests, encumbrances or claims that Subcontractor may have against the Property (or against any other property of Owner or Contractor) for all Work performed by and all materials provided by Subcontractor or any subcontractor prior to the date of this Lien Waiver and Release.

8. List the name(s) of the Subcontractor's subcontractors and material suppliers furnishing any portion of the work being waived: _____

_____

_____

_____ (attach additional sheet if more space is required).

SUBCONTRACTOR NAME:

_____

By: _____
(signature)

_____ Its _____
(Name) (Title)

Address _____

_____

_____

Telephone Number _____

Sample

FORM OF FINAL CONTRACTOR RELEASE AND WAIVERS OF LIENS AND CLAIMS

Date: _____

1. Contractor's name: _____ (**"Contractor"**).

2. The property improved by Contractor's work (the **"Property"**) is the site located at _____, [State], (the boundaries of such Property are as more particularly described in the definition of "Project Site" in the EPC Contract defined below).

3. Contractor's work was furnished at the request of the _____ _____ (the **"Owner"**) pursuant to that certain Engineering, Procurement and Construction Agreement between Owner and Contractor, dated as of [_____] (the **"EPC Contract"**). Capitalized terms used herein that are not defined herein have the respective meanings set forth in the EPC Contract.

4. Contractor represents and certifies to Owner that it has waived and release all lien rights, security interests or encumbrances for claims that Contractor may have had with respect to payment received for all Work by Contractor or any Subcontract completed prior to [insert date of most recent prior Lien Waiver and Release].

5. Contractor further represents and certifies to Owner that Contractor has made full due payment of all costs, charges and expenses incurred prior to [insert date of most recent prior Lien Waiver and Release] by it or on its behalf for work, labor, services, materials and equipment supplied to the Project and/or used in connection with its Work [insert description of any exceptions].

6. The amount to be paid to Contractor by Owner for the improvements to the Property made from [insert date of most recent Lien Waiver and Release] up until the date of this Lien Waiver and Release is $_____.

7. Subject to Contractor's receipt of the amount set forth in paragraph 6, Contractor hereby waives and releases all past and future lien rights, security interests or encumbrances for claims that Contractor may have against the Property (or against any other property of Owner) for all Work performed by and all materials provided by Contractor or any Subcontractor in connection with payment received prior to the date of this Lien Waiver and Release.

8. List the name(s) of the Contractor's subcontractors and material suppliers furnishing any portion of the work being waived: _____ _____

_____

_____ (attach additional sheet if more space is required).

CONTRACTOR NAME:

_____

By: _____
(signature)

_____ Its _____
(Name) (Title)

Address _____

_____

_____

Telephone Number _____

SAMPLE

FORM OF SUBCONTRACTOR FINAL RELEASE AND WAIVERS OF LIENS AND CLAIMS

Date:_____

1. Subcontractor's name: _____ (**"Subcontractor"**).

2. The property improved by Subcontractor's work (the **"Property"**) is the site located at _____, [State], (the boundaries of such Property are as more particularly described in the definition of "Project Site" in the EPC Contract defined below).

3. Subcontractor's work was furnished at the request of the _____ _____ (the **"Contractor"**) pursuant to a subcontract dated as of [ ] (the "Subcontract") between Contractor and Subcontractor. The Subcontract was entered in connection with that certain Engineering, Procurement and Construction Agreement between _____ ("Owner") and Contractor, dated as of _____ (the **"EPC Contract"**). Capitalized terms used herein that are not defined herein have the respective meanings set forth in the EPC Contract.

4. Subcontractor represents and certifies to Contractor and Owner that Subcontractor has made full payment of all costs, charges and expenses incurred by Subcontractor by it or on its behalf for work, labor, services, materials and equipment supplied to the Project and/or used in connection with its Work.

5. The [remaining] amount to be paid to Subcontractor by Contractor for all improvements to the property made by Subcontractor up until the date of this Lien Waiver and Release is $_____.

6. Subcontractor hereby waives and releases all past and future lien rights, security interests, encumbrances or claims that Subcontractor may have against the Property (or against any other property of Owner) for all Work performed by all materials provided by Subcontractor or any of its subcontractors prior to the date of this Lien Waiver and Release.

7. List the name(s) of Subcontractor's subcontractors and material suppliers furnishing any portion of the work being waived: _____

_____

_____

_____ (attach additional sheet if more space is required).

SUBCONTRACTOR NAME:

_____

By:_____
(signature)

_____ Its_____
(Name) (Title)

Address _____

_____

_____

Telephone Number: _____

Sample Clause for Lien Releases to Accompany invoices for a Construction Contract

. On or about the tenth (10^{th}) Day of each calendar month, beginning with **[insert date]**, Contractor shall submit to Owner's Representative a detailed Application for Payment, in a form reasonably acceptable to Owner, which includes, for the previous month, the percentage of the Work completed and the payment amount Contractor is seeking based upon the Breakdown of Cost (during the Development Phase) or the Schedule of Values (during the Firm Price Phase). Each Application for Payment shall be accompanied by: (a) partial releases of liens (net of disputed items for the current period) in form and content acceptable to Owner from Contractor (net of disputed items for the current period) and such Subcontractors and Vendors as Owner shall require; (b) partial releases of liens from Contractor and Subcontractors and Vendors for all disputed items excluded from the lien release given by Contractor and such Subcontractors and Vendors with respect to prior Applications for Payment after the dispute has been resolved; (c) a certification by Contractor that all of its laborers, Subcontractors, and Vendors have been paid all monies due for Work performed through the previous month's payment by Owner; and (d) in the case of Materials and Equipment delivered to the Project Site, but not incorporated into the Work as of the date of such progress invoice, bills of sale, invoices, or other documents warranting that Owner has received such Materials and Equipment free and clear of all liens and encumbrances. Owner shall not be obligated to pay any progress invoice which is not accompanied by those items set forth in clauses (a), (b), (c) and (d) above. Owner shall not be obligated to pay any amounts in excess of the Cash Flow Caps in **Exhibit O** for the applicable month of such payments, even if Work progress is ahead of such Cash Flow Caps in the Schedule of Values. No payment made to Contractor shall constitute an acceptance by Owner of any of the Work to be performed hereunder.

Sample Clause for Final Payment Bonding of Mechanics' Liens in Construction Contract:

The final payment shall not become due unless the Contractor Letter of Credit complies with Section 1___, and until Contractor submits to Owner an affidavit, together with releases of liens in form and content reasonably acceptable to Owner from Contractor and from each of the Subcontractors and Vendors, representing and affirming that all indebtedness connected with the Work and any lien or rights to file any such mechanic's liens related thereto, for which Owner or its property might in any way be responsible or to which it may be subject, have been paid, waived or otherwise satisfied;

Sample Clause for Bonding of Mechanics' Liens in Construction Contract

If any indebtedness to a Subcontractor or Vendor or any lien filed by a Subcontractor or Vendor has not been satisfied within ____ Days of any notice to Owner of such indebtedness or lien, Contractor shall furnish a bond in form and substance, and with such surety, as is reasonably satisfactory to Owner, to indemnify Owner and its designees against any such outstanding indebtedness or lien. If any lien is filed against the Work before or after final payment is made, and such lien arises from or is alleged to arise from Contractor's, or any Subcontractor's or Vendor's failure to pay any obligations connected with the Work, Contractor shall indemnify Owner for all amounts that Owner may be compelled to pay in discharging such lien, including all costs, reasonable attorneys' fees, and interest. If Contractor shall fail to discharge any such lien(s) or claim(s) upon the Facility, or upon any materials, equipment, or structures encompassed therein, or upon the premises upon which they are located, Owner shall promptly provide Notice to Contractor and Contractor shall then satisfy or defend any such lien(s) or claim(s). If Contractor does not satisfy such lien(s) or claim(s) or bond around such lien(s) or claim(s) in a manner reasonably satisfactory to Owner within ten (10) Days after receipt of a demand from Owner to do so, Owner has the right, at Owner's option, without Notice to Contractor, to pay or settle such lien(s) or claim(s) by agreement and Contractor shall, within five (5) Days of request by Owner, reimburse the Owner as appropriate, for all costs incurred by the Owner to discharge such lien(s) or claim(s) including administrative costs, attorneys' fees and other expenses, plus interest on all such sums at a per annum rate equal to the Prime Interest Rate plus two percent (2%) per annum.

Sample Lien Provision from Credit Agreement for Construction Loan

(a) Each Credit Party shall preserve and maintain good and valid title to, or rights in, the Collateral and its Property and shall not create, incur, assume or suffer to exist any Lien on any of the Collateral or any of its other Property, whether now owned or hereafter acquired, except:

(i) Liens imposed by any Government Authority for Taxes that are not yet due or that are being Contested,

(ii) **Mechanics' Liens arising in the ordinary course of business or incident to any Restoration, in each case, in respect of obligations that are not yet due or that are being Contested and that do not claim an amount, individually or in the aggregate, in excess of fifty thousand dollars ($50,000) or could not reasonably be expected to result in a Material Adverse Effect,**

(iii) defects, easements, rights-of-way, restrictions and other similar encumbrances incurred in the ordinary course of business and encumbrances, licenses, restrictions on the use of Property or imperfections in title that, in each case, do not materially Impair the Property affected thereby for the purpose for which title was acquired or interfere with the operation of the Project and that individually or in the aggregate could not reasonably be expected to result in a Material Adverse Effect,

(iv) Liens created pursuant to the Financing Documents,

(v) Liens incurred in connection with Permitted Indebtedness,

(vi) Liens arising out of judgments or awards so long as an appeal or proceeding for review is being prosecuted in good faith and for the payment of which adequate reserves, bonds or other security reasonably acceptable to the Administrative Agent have been provided or are fully covered by insurance (subject to customary deductible or self-insurance);

(vii) Liens, deposits or pledges to secure statutory obligations or performance of bids, tenders, contracts (other than for the repayment of borrowed money) or leases, or for purposes of like general nature in the ordinary course of its business;

(viii) Liens incurred or deposits made in the ordinary course of business in connection with worker's compensation, unemployment

insurance or other forms of governmental insurance or benefits (other than Liens under ERISA);[1]

(ix) Liens associated with the Subordinated Security; provided that NOVEC enters into the Subordination and Intercreditor Agreement, and

Liens arising by virtue of any statutory or common law provisions relating to banker's liens, rights of set-off or similar rights arising in connection with repurchase agreements and deposit accounts that are Permitted Investments.

[1] Borrower to determine whether this is necessary given that Credit Parties will not have employees.

Liens as Collection Tools;
Training the Business Side
Jack O'Neil
Western Construction Group, Inc.

Legal Department Can't Do It All. Because of the short deadlines, preliminary notice requirements, and other variations from one state to another, keeping up with liens cannot be a Legal Department function, much as many would like it to be. Unless Legal is on top of every job, the billing progress, and payment schedule, you won't hear about it until it is a problem, and by then it may well be too late. So what you need to do is train your operations, credit, and collection departments on the basic points of first preserving the lien rights the company has, and then following up when necessary to file and enforce these liens.

Train your People. In many cases, the ability to use liens as collection leverage has been lost before anyone realizes there is a collection problem.

There is no one right way to do this, because of the many variations in company operational set up, credit and collection procedures. Add to that reluctance of many business people to get involved in what they view as a legal issue. What follows are some training ideas you can use to get the rest of the company into the lien game. It is presented in outline form, so you can use it to put together your own program.

Mechanics Lien Basics

What are Mechanics liens?

Collateral interests in real property created by statute, to secure payment of workers and material suppliers to projects which improve the property.

There are 51 different ways of doing this in the U.S. Every state plus D.C.has a different way of doing it.

Who can get a lien?

Contractors Subcontractors , Sub-subs, Suppliers, Design professionals, even individual workers, and union benefit funds. Where are you in the food chain.

> Subcontractors, there is probably a limit on how many layers down the rights go. A third tier sub may not have any lien rights
>
> For suppliers, can you tie your product to that particular project. What does the purchase paperwork show?
>
> Who has the lien rights, the manufacturer or the distributor? You may have drop shipped direct from the plant to the job site, but if the sale went through the distributor, the distributor has the lien.

Check the appropriate state to see how far it goes.

What Property is subject to a lien?

Private, Public, quasi public, leasehold.

Front End Contracting Tips. For the primary contracting team.

Who is the Owner of the property?

The company you are dealing with may just lease the building from an invisible Owner.

Property managers are not the Owner's. Contract usually says so (but not always).

Legal Description. Will an address do, or do you need to get the deed form of "Legal?"

Don't agree to waive liens up front, or indemnify from liens in advance of payment.

Many states have statutes that make such waiver unenforceable. (Check states) But why wait to get that across, until you are fighting in court.

Some are not very clear. (Florida just says the right to claim a lien cannot be waived "in advance," but it takes some interpretation to figure out in advance of what?

Liens are not self enforcing, filing a lien does not generate a check.

Foreclosure is a long way off.

BUT

They are leverage. The only thing you have that the customer wants at the end of the job is that lien waiver. You can't take the work back.

Examine Lien Waiver forms that may be Exhibits to the contract. Many have acknowledgement of receipt, but are requested with invoices.

Any waiver given in advance of payment should be conditioned upon actual receipt of payment, and perhaps also include language about the check clearing the bank..

Some states have prescribed statutory forms of both conditional and unconditional lien waivers (e.g. Texas and California). (Florida has forms but they are very bare bones) Use them.

Choice of law, and venue in some state away from the project site. How does this affect lien rights? Some states cover this in their statutes by prohibiting enforcement under anything but local law.

Required mediation and arbitration.
Deadlines are not extended.
File suit and seek stay.

Determine if Any Preliminary Actions Required.

Many states require the party seeking to preserve lien rights to serve a Preliminary Notice on the Owner and Contractor.

Some must be served before commencement.

Some with a set number of days after commencement.

Someone in addition to the Legal Department has to be on top of this. Legal can create the forms, but operations needs to be instructed on when and how to use them.

Resistance to such Notices.

Customers get upset, and call your office and want to know why you are "liening" their property.

One response "The state law requires me to send you that notice, it is not a lien (yet)."

Get the Basic Deadlines Into the Collection Process.

In many states the short deadlines mean that your lien is gone before the Legal Department even hears about a collection problem

Lien Filing Deadlines. These are strictly enforced. Reasonably close, or lack of detriment counts for nothing.

Notice of the Lien. This may be required before or within so many days after filing. Send the Owner the proper Notice when filing. You want to get their attention anyway.

At this point, consider consulting Local Counsel, to assist in checking details and local practices. You will need them eventually if a suit to enforce is required. In some states, this next step is not that far away.

Starting point of the deadline. ***See State by State Lien deadline Chart attached.***

Substantial Completion

Completion. This probably means final completion, which may be defined in the contract.

Last day that materials and/or labor provided to the site. This is a good place to start, as it is probably the earliest.

Special Rules for Residential Construction.

Shorter deadlines are often required for residential construction

Additional Notices. Some states have additional Notice requirements.

Local Differences.

Where to file? County recorder, Court Clerk, Town Clerk etc.

Payment Bond Claims.

Different protection than liens. Bonds apply when the General Contractor does not pay subcontractors, and suppliers. Liens apply when the Owner does not pay, but can be used when the GC does not pay.

Surety has all the same defenses that the Contracting party has.

Can use Bonds to get liens released. This may be a cumbersome process involving court filings.

Training Programs.

Provide basic information on Deadlines. State by state if multiple states are involved.

People responsible for Billing and Receivables should be trained on these things.

Computer warnings in receivables program? This sounds like a good idea, but it is hard to build the deadlines into the receivables programs, because the deadlines have nothing to do with billing. Easier of you only have one or a few states. Challenge your IT folks with this one.

Basic Forms. Develop your own forms, and use them.

Partial and Final Lien Waivers - Conditional forms should be used when sending invoices and payment applications.

Preliminary Notices. Make forms available, and make it a regular part of the contracting procedure to use them.

Alert people not to sign receipts for money they have not received.

Liens can be added leverage in the collection battles, but all the people in the process need to have some knowledge of how they work.

State by State Lien Deadlines

The following is intended for general deadline information only. Examination of the current state statutes must be made before using this information for legal advice.

State	Time to file after Completion Contractor	Time to File After Completion Subcontractor*	Preliminary Notice Required?	Suit to enforce, Deadline	Statutory References (et.seq. presumed.)
AL	6 months	4 months	Yes for Subs	6 months after completion.	ALA Code 35-11-1 and 35-11-201
AK	15 days after Notice of Completion, filed, or if none filed 90 days after completions	Same as Contractor	Contractor and Subcontractor must serve Notice before commencement	6 months after lien filed	AK Stat 34.35.005
AZ	45 days after Notice of Completion filed by Owner, or if none filed, 90 days after completion.	35 days after Notice of Completion filed by Owner, or if none filed, 60 days after completion.	Contractor and Subcontractor - Within 20 days after commencement	6 months after lien filed	AZ Rev Stat 33-981
AR	120 days after completion	120 days after completion	Contractor before commencement. Subcontractor 10 days before commencement	15 months after filing lien.	AR code 18-44-101
CA	60 days after Notice of Completion filed by Owner, or if none filed, 90 days after completion.	30 days after Notice of Completion filed by Owner, or if none filed, 90 days after completion.	Subcontractor – 20 days after commencement	90 days after filing lien	Cal. Civ. Code 3082
CO	2 months if labor only. 4 months if labor and material	Same as Contractor	Contractor and Subcontractor – 10 days before filing lien	6 Months after Completion	Colo. Rev. Stat. 38-22-101
CT	90 days after completion	Same as Contractor	Contractor – 15 days after commencement	1 year after filing of lien	Conn. Gen. Stat. 49-33
DE	180 days after completion if contract for labor AND materials. 120 days after completion if contract for labor or materials alone.	120 days after completion	None	3 years after action accrues	Del. Code Ann. Title. 25, Sec 2701
D.C.	90 days after comletion	Same as Contractor	None	180 days after lien filed	D.C. Code Ann. 40-301.01
FL	90 days after completion	Same as Contractor	Subcontractor – before commencement or within 45 days after commencement.	1 year after completion or 60 days after owner files a contest of lien.	Fla. Stat. 713.001
GA	3 months after completion, or 10 days after written demand from owner	Same as Contractor	Contractor – Notice of commencement within 10 days after commencement.	12 months after debt becomes due,	Ga. Code Ann. 44-14-360
HA	45 days after completion	Same as Contractor	None	3 months after Court orders that a lien attaches.	Haw. Rev. Stat. 507-41
ID	90 days after completion	Same as Contractor	None	6 months after filing of lien	Idaho Code 45-501

IL	4 Months after substantial completion	Same as Contractor	Contractor must provide Affidavit of persons furnishing labor or material prior to any payment. - Subcontractors must give nitce of claim 45 days after completion	2 Years after completion, or 30 days after owner makes written demand.	770 ILCS 60
IN	90 days after completion, 60 days for 1 or two unit rsidential	San=me as Contractor	Subcontractors must give notice of amount owed prior to filing lien.	One year after completion	Ind. Code 32-28-3
IA	90 Days after completion	Same as Contractor	Sub- Subs and materials suppliers must give Notice to Contractor within 30 days of first furnishing	2 Years after filing lien, or 30 days after written demand.	Iowa Code 572
KS	4 months after completion	3 months after completion	None	One year after filing lien	Kan. Stat. Ann. 60-1101
KY	6 months after completion	Same as Contractor	Subcontractor – 75 days after completion if less than $1,000, and 120 days if more.	12 months after filing lien	Ky. Rev. Stat. Ann. 376.010
LA	Check statute against various prerequisites, but basically 60 days	Check statute against various prerequisites, but basically 60 days	Notice of Contract filed with Court – Contractor before commencement. Subcontractor before completion	One year after filing of lien	La. Rev. Stat. Ann. 9:4801
ME	Automatic with contract	90 days after completion	Subcontractor -- before commencement, and re filed every 120 days	120 days after completion	Me. Rev. Stat. Ann. title 10 sec. 3251
MD	180 Days after completion *For renovation work, work must exceed 15% of value of building or no liens attach*	Sames as Contractor	Subcontractor must file Notice 120 days after Subs work complete	One year after Lien filed.	Md. Real Prop. Code Ann. 9-101
MA	File s Statement of Account 30 Days after Completion	Same as Contractor	Notice of Contract filed with Registry of Deeds at commencement or before completion	60 days after filing statement of Account.	Mass. Gen. L. ch. 254 sec. 1
MI	Sworn Statement of subs and suppliers with each billing. Lien filed 90 days after completion.	90 days after completion	Subcontractor Notice of Furnishing 20 days after commencement.	One year after Lien filed.	Mich. Comp. L. Ann. 570.1101
MN	120 days after completion	Same as Contractor	Contractor – Must be includedin Contract. – Subcontractor 45 days after commencement.	One year after completion.	Minn. Stat. 514
MS	As soon as possible.	No Lien Rights	File Contract with Chancery Clerk	12 months after payment Due.	Miss. Code Ann. 85-7-131

MO	6 months after completion	Same as Contractor	Contractor – before receiving any payment – Subcontractor 10 days before Lein filed.	6 months after Lien filed.	Mo. Rev. Stat. Ch. 429
MT	90 days after completion	Same as Contractor	Subcontractor (residential only) 20 days after commencement 45 days if lender involved	2 years after filing of Lien.	Mont. Code 71-3-521
NE	120 days after completion	Same as Contractor	Any time after execution of Contract	Two years after foiling of lien, or 30 days after Owner demand	Neb. Rev. Stat. 52-125
NV	30 days after Notice of Completion, or 90 days after Completion if no Notice filed.	Same as Contractor	Subcontractor – 31 days after commencement.	6 Months after filing Lien	Nev. Rev. Stat. 108.222
NH	120 days after completion	Same as Contractor	Subcontractor – before commencement, and accounting e=very 30 days thereafter.	120 days after completion	N.H. Rev. Stat. Ann. 447:1
NJ	90 days after completion	Same as Contractor	Contractor – Subcontractor Notice of unpaid balance, any time until 90 days after completion	Contractor – One year after completion. Subcontractor – One year after last day labor or material furnished.	N.J. Stat. Ann. Chap.2A:44A
NM	120 days after completion	90 after completion	Sub-Subcontractor – Within 90 days of initially furnishing labor or materials	2 years after filing of lien	N.M. Stat. 48-2-1
NY	8 months after completion, 4 months if single family residence.	Same as Contractor	None	One year after filing lien	N.Y. Lien Law Sec. 3
NC	120 days after completion	Same as Contractor	Contractor - Notice of Contract filed within 30 days after permit issued with Clerk of Superior Court. Subcontractor – after Contractor files Notice of Contract.	180 days after completion	N.C. Gen. Stat. 44A-7
ND	90 days after completion	Same as Contractor	Notice of intention to enforce, 30 days before filing action.	3 years after completion or 30 days after demand by owner.	N.D. Cent. Code § 35-27-01
OH	75 days after completion	Same as Contractor	Subcontractor – within 21 days after starting work.	6 years after filing mechanics lien or 60 days after Owner's demand.	Ohio Rev. Code Ann. 1311
OK	Four months after completion	Same as Contractor	Subcontractor – 75 days after first furnishing	One year after filing lien	Okla. Stat. Ann. tit. 42, Sec. 141
OR	75 days after completion	75 days after last furnishing of labor or material	8 days after commencement.	120 days after filing lien	Or. Rev. Stat. Sec. 87.010

PA	4 months after completion	Same as Contractor	Subcontractor – Must file a Notice before completion, and an additional notice 30 days before filing the lien.	2 years after filing Lien, or 30 days after Owner demand.	49 Pa. Cons. Stat. 1101
RI	120 days after completion – Notice of Intention	200 days after completion – Notice of Intention	Contractor-- preliminary Notice within 10 days of commencing work	40 days after filing Notice of Intention	R.I. Gen. Laws 34-28-1
SC	90 days after completion	Same as Contractor	Subcontractor – Notice of Furnishing, before lien can attach, which probably means before you do any work.	6 months after completion	S.C. Code Ann. 29-5-10
SD	120 days after completion	Same as Contractor	None	6 years after completion	S.D Stat. 44-9-1
TN	90 days after completion	90 days after completion, OR 30 days after Owner files Notice of Completion	Contractor – Prelim Notice before work starts. Subcontractor – 90 days after last day of the month in which work last performed.	Contractor – One year after completion or 60 days after Owner demand. Subcontractor – 90 days after filing Len.	Tenn. Code Ann. 66-11-101
TX	15th day of the 4th calendar month after indebtedness accrues (last day of month on which work is completed) Residential Construction is Third calendar month	Same as Contractor	Subcontractor – 15th day of each second month after labor or material furnished. (Multiple Notices)	2 years (1 for residential) after last day lien could have been filed or completion whichever is later.	Tex. Prop. Code Ch. 53
UT	90 days after completion	Same as Contractor	Contractor - Notice of Commencement Subcontractor – 20 days after commencement.	180 days after filing lien	Utah Code Ann. 38-1-2
VT	180 days after the amount becomes due.	Same as Contractor	None	180 days after the lien is filed.	Vt. Stat. Ann. tit. 9, Sec 1921
VA	90 days after the last month of performance, or completion whichever comes first	Same as Contractor	None	Later of 6 months after filing the lien, or 60 days after completion.	Va. Code Ann. 43-1
WA	90 days after completion, 60 days if Owner files Notice of Completion within 10 days of completion	Same as Contractor	Contractor – Post at job site during duration of project. Subcontractor – 60 days after commencement	8 months after filing Lien	Wash. Rev. Code 60.04
WV	100 days after commencement	Same as Contractor	Subcontractor – Before commencement	6 months after Lien claim	W.Va. Code 38-2-1

WI	6 months after completion	Same as Contractor	Contractor – Written into Contract, or 10 days after commencement. Subcontractor—within 60 days of commencement	2 years after filing lien.	Wis. Stat. 779.01
WY	120 days after substantial completion.	90 days after completion of Sub's work.	Contractor and Subcontractor – 30 days after commencement, Subcontractor also must serve notice on Cr 60 days after commencement. Both Contractor and Subcontractor must serve Notice of Intent to file 10 days prior to filing Lien.	180 days after filing Lien.	Wyo. Stat. 29-2-201

* Subcontractor may not include second tier subs in some jurisdictions. Suppliers generally fall into subcontractor category

Optimize Lien and Bond Processes and Case Management to Boost Company Revenue
J. Paul Allen, Assistant General Counsel
Contech Engineered Solutions LLC

Processes (Tips, Tricks & FAQ): *Practice Tips / Thoughts*

- Coordination with Credit Department: *Depending on the size of your enterprise, legal department and credit department, this could be a conversation with yourself! Regardless, you want to make sure the persons extending credit and trying to collect once that credit has been extended are on the same page.*
    - Prior to obligation: *This is the most important part of the transaction. Deciding correctly who to extend credit to and on what terms will help in your collection efforts after the fact. Poor decisions made at this stage often cannot be overcome by any level of collection process or procedure.*
        - Credit checks
            - Single Transaction: *Bond and lien rights on a specific project may permit extending credit to a customer that may not merit a general extension of credit. Also, in a single transaction you have more details on type, amount, margin, etc.*
            - Blanket Application to All Transactions: *PRO: no further interaction is necessary and your terms apply. CON: conditions change and party may no longer warrant credit extension.*
                - Past
                - Future
                - Change of terms agreed to (see http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1300&context=facpubs)
                - Web-based review, assent & audit trail
        - Purchase Orders: *Focus is on single transaction even though there may be a series of transactions using the same form.*
            - Signatures: *Proof is key. May want to insert web reference to T&C at signature point (e.g.,* www.conteches.com/COS & see Appendix A)
            - Acknowledge T&C: *What if the T&C are separated from the PO and only the PO is returned?*
            - Proof of receipt of T&C
                - 2-sided forms
                - Faxes
                    - Back page
                    - Additional pages
                    - Sent & returned
                - Scan & E-mail

- During Collection: *When is the appropriate time for legal to get involved?*
  - Typical "aging" calls
  - More aggressive "aging" calls
  - Outside vendors pursuing customer
    - Fair Debt Collection Practices Act (see Appendix B) *Not applicable when you are seeking to collect your own debt*
  - Outside attorneys pursuing customer
  - Collection actions filed against customer
  - Counterclaims by customer
    - How will outside counsel handle?
      - Typically on a contingency that does not address defense
      - Insurance implications
      - Legal department involvement
    - "Meritorious" v. "Opportunistic" counterclaims
      - Is the counterclaim a surprise? If not, why didn't we consider this impact before filing?
      - Is dismissal possible unilaterally? Often not once the counterclaim is filed.
      - Resolve now OR full defense approach: *If "opportunistic," consider approach that "This case can be resolved now with me on an X cents on the dollar basis. If they have to defend the counterclaim you have alleged, it will involve their insurance, they will need to defend their product and this will get much more complicated and expensive for both parties."*

- Coordination with Outside Vendors: *(No Endorsement, Merely Informational)*
  - Outside Counsel *Spend a little more, if you have to, in order to insure you have someone you trust on your side.*
    - Checklists
      - Private (see Appendix C)
      - Public (see Appendix D)
      - Top 10 Mistakes (see Appendix E)
    - Alerts & Updates on changes in law & processes
      - NC Statutory change (see Appendix F)
      - OH public contracting (see Appendix G)
    - ACC eGroups
  - Credit Companies
    - NCS (http://home.ncscredit.com/)
    - National Collection Agencies (http://www.nationalcollectionagencies.com)
    - Local options
  - Software / Web Options
    - www.zlien.com
      - State Specific Summaries
      - Blog (see Appendix H re payment after 12 years)
    - www.traditionsoftware.com

- Trade or Other Groups
  - Examples
    - National Association of Credit Management (NACM)
      - http://www.nacm.org/
      - CCE (Certified Credit Executive designation by NACM)
    - ACA International, the Association of Credit and Collection Professionals
      - http://www.acainternational.org/
      - PCS (Professional Collection Specialist designation by ACA)
    - The Credit Research Foundation
      - http://www.crfonline.org/aboutcrf/experience.asp
      - Publications & Surveys
  - Education & training *Make sure you benefit from the group's size, scale & experience, including networking with other members*
  - Self-policing mechanism (complaints can be filed)
  - Linked In Groups *Wide variations in usefulness and "issue creep"*
    - Greater Cincinnati Construction Connection Network
    - Construction Lawyer Network
    - Debt Collection Issues on Both Sides of the Fence
    - Collection Agency Management Professionals
  - ACC *Just in case you were still reading!*

Jun 16 10 10:44a [redacted] [redacted] p.3

CONTECH CONSTRUCTION PRODUCTS INC.

Quotation

Page# 2/3

Quote # QUO-27020-B8L8XY

PAYMENT TERMS ARE 1/2%-10, NET 30 DAYS FROM DATE OF INVOICE UNLESS MATERIAL IS OTHERWISE NOTED AS NON-STANDARD ABOVE. IF NON-STANDARD, PAYMENT TERMS ARE 1/3 AT ORDER ACCEPTANCE AND PRIOR TO START OF PRODUCTION, 2/3 NET 30 DAYS FROM DATE OF INVOICE. THIS OFFER IS SUBJECT TO CREDIT APPROVAL. PRICES QUOTED APPLY ONLY TO THE REFERENCED PROJECT AND ARE IN EFFECT FOR 30 DAYS FROM THE DATE OF QUOTATION. SELLER RESERVES THE RIGHT TO ADJUST PRICES AFTER 30 DAYS FROM THE DATE OF QUOTATION BUT THE CONTECH COS REMAIN APPLICABLE. PRICES ARE BASED ON ESTIMATED QUANTITIES SHOWN. IF A DIFFERENT QUANTITY IS PURCHASED, CONTECH RESERVES THE RIGHT TO ADJUST THE PRICES. THIS QUOTATION CONTAINS THE ENTIRE AGREEMENT WITH RESPECT TO PURCHASE AND SALE OF PRODUCTS DESCRIBED AND SUPERSEDES ALL PREVIOUS COMMUNICATIONS. BUYER'S SIGNATURE BELOW, DIRECTION TO MANUFACTURE, OR ACCEPTANCE OF DELIVERY OF GOODS DESCRIBED ABOVE, SHALL BE DEEMED AN ACCEPTANCE OF THE CONTECH COS. SELLER EXPRESSLY REJECTS ANY OTHER TERMS AND CONDITIONS. PRICES ARE F.O.B. ORIGIN WITH FREIGHT ALLOWED TO THE JOBSITE WITH UNLOADING BY OTHERS AT A TRUCK ACCESSIBLE LOCATION. THIS QUOTATION IS ISSUED BY CONTECH CONSTRUCTION PRODUCTS INC. FOR ITSELF AND/OR ON BEHALF OF ONE OR MORE OF ITS SUBSIDIARIES, INCLUDING, BUT NOT LIMITED TO, CONTECH STORMWATER SOLUTIONS INC., CONTECH BRIDGE SOLUTIONS INC., KEYSTONE RETAINING WALL SYSTEMS, INC., AND THOMPSON CULVERT COMPANY.

Acceptance		CONTECH CONSTRUCTION PRODUCTS INC.	
WE HEREBY ORDER THE DESCRIBED MATERIAL SUBJECT TO ALL TERMS AND CONDITIONS OF THIS QUOTATION AND IN THE CONTECH COS INCLUDED HEREWITH AND VIEWABLE AT www.contech-cpi.com/cos		By	[redacted]
Company	[redacted]	(O)	[redacted]
By	[redacted]	(F)	[redacted]
Title	Manufacturing Member	~~(Cell)~~ FAX	[redacted]
Date	6/16/10	~~Title~~ Cell	[redacted]

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CONDITIONS OF SALE

1. ACCEPTANCE. This quotation is an offer to sell to potential customer(s). BUYER'S RIGHT TO ACCEPT THIS OFFER IS LIMITED TO BUYER'S ASSENT TO THE TERMS AND CONDITIONS PRINTED HEREON AND THE ATTACHED OR ACCOMPANYING QUOTE, AND NO TERMS ADDITIONAL TO OR DIFFERENT FROM THOSE IN THIS OFFER ARE BINDING ON SELLER. THERE ARE NO UNDERSTANDINGS, TERMS, CONDITIONS OF WARRANTIES NOT FULLY EXPRESSED HEREIN.

2. LIMITED WARRANTIES. Seller warrants that it can convey good title to the goods sold under this contract and that they are free of liens and encumbrances. Seller also warrants that the goods sold under this contract are free from defects in material and workmanship for a period of one year after the date of delivery. There are no warranties, express or implied with respect to products sold hereunder which are misused, abused, or used in conjunction with mechanical equipment improperly designed, used or maintained or which are used, supplied for use or made available for use in any nuclear application of which Seller has not been notified in writing by Buyer at the time of order for the products sold hereunder. SELLER MAKES NO OTHER WARRANTY WHATSOEVER, EXPRESS OR IMPLIED. ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND ALL IMPLIED WARRANTIES OF FITNESS FOR ANY PARTICULAR PURPOSE ARE DISCLAIMED BY SELLER AND EXCLUDED FROM THIS CONTRACT.

3. LIMITATION OF BUYER'S REMEDIES AND SELLER'S LIABILITY. Seller's liability hereunder shall be limited to the obligation to repair or replace only those products proven to have been defective in material or workmanship at the time of delivery, or allow credit, at its option. Seller's total cumulative liability in any way arising from or pertaining to any product sold or required to be sold under this contract shall NOT in any case exceed the purchase price paid by Buyer for such products. IN NO EVENT SHALL SELLER HAVE ANY LIABILITY FOR COMMERCIAL LOSS, LOST PROFITS, CLAIMS FOR LABOR, OR CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY TYPE, WHETHER BUYER'S CLAIM BE BASED IN CONTRACT, TORT, WARRANTY, STRICT LIABILITY, NEGLIGENCE, OR OTHERWISE. IT IS EXPRESSLY AGREED THAT BUYER'S REMEDIES EXPRESSED IN THIS PARAGRAPH ARE BUYER'S SOLE AND EXCLUSIVE REMEDIES.

4. LIMITATION OF BUYER'S REMEDIES AND SELLER'S LIABILITY FOR FAILURE OR DELAY IN DELIVERY. NO DELIVERY DATES ARE GUARANTEED. BUYER'S SOLE AND EXCLUSIVE REMEDIES AND SELLER'S ONLY LIABILITY FOR ANY DELAY IN DELIVERY SHALL BE LIMITED AS SET FORTH IN PARAGRAPH 3 OF THIS CONTRACT.

5. FORCE MAJEURE. In any event and in addition to all other limitations stated herein, Seller shall not be liable for any act, omission, result or consequence, including but not limited to any delay in delivery or performance, which is (i) due to any act of God, the performance of any government order, any order bearing priority rating or order placed under any allocation program (mandatory or voluntary) established pursuant to law, local labor shortage, fire, flood or other casualty , governmental regulation or requirement, shortage or failure or raw material, supply, fuel, power or transportation, breakdown of equipment, or any cause beyond Seller's reasonable control whether of similar or dissimilar nature to those above enumerated, or (ii) due to any strike, labor dispute, or difference with workers, regardless of whether or not Seller's is capable of settling any such labor problem.

6. BUYER'S OBLIGATION TO PASS ON LIMITATION OR WARRANTIES AND REMEDIES. In order to protect Seller against claims by Buyer's buyer, if Buyer resells any of the goods purchased under this agreement, Buyer shall include the language contained in paragraphs 2 and 3 of this agreement, dealing with Seller's limitations of warranties and remedies, in an enforceable agreement with Buyer's buyer, or otherwise include language in an enforceable agreement with its buyer that makes Seller's limitation of warranties and remedies binding on its buyer. Buyer shall also include a provision in its agreement with its buyer applying Ohio law to any claims its buyer might assert against Seller with respect to goods manufactured by Seller, and requiring its buyer to bring any such action against Seller either in federal district court in Cincinnati, Ohio or the common pleas court for Butler County, Ohio. Buyer shall defend, indemnify and hold Seller harmless from any and all claims, causes of action, damages, losses or expenses (including reasonable attorneys' fees) that Seller incurs by reason of Buyer's failure to comply with this paragraph.

7. PASSAGE OF TITLE. Title to the products sold hereunder shall pass upon delivery to the carrier at the point of shipment. Neither Buyer nor the consignee shall have the right to divert or reconsign such shipment to any destination other than specified in the bill of lading without permission of the Seller. Unless otherwise agreed Seller reserves the right to select the mode of transportation.

8. PAYMENTS AND LATE CHARGES ON PAST DUE ACCOUNTS. Buyer represents that Buyer is solvent and can and will pay for the products sold to Buyer in accordance with the terms hereof. If Buyer shall fail to comply with any provision or to make payments in accordance with the terms of this contract or any other contract between Buyer and Seller, Seller may at its option defer shipments or, without waiving any other rights it may have, terminate this contract. All deliveries shall be subject to the approval of Seller's Credit Department. Seller reserves the right, before making any delivery, to require payment in cash or security for payment, and if Buyer fails to comply with such requirement, Seller

FTC Facts For Consumers

focuson CREDIT

Federal Trade Commission
For The Consumer

ftc.gov ■ 1-877-ftc-help

February 2009

Debt Collection FAQs: A Guide for Consumers

If you're behind in paying your bills, or a creditor's records mistakenly make it appear that you are, a debt collector may be contacting you.

The Federal Trade Commission (FTC), the nation's consumer protection agency, enforces the Fair Debt Collection Practices Act (FDCPA), which prohibits debt collectors from using abusive, unfair, or deceptive practices to collect from you.

Under the FDCPA, a debt collector is someone who regularly collects debts owed to others. This includes collection agencies, lawyers who collect debts on a regular basis, and companies that buy delinquent debts and then try to collect them.

Here are some questions and answers about your rights under the Act.

What types of debts are covered?

The Act covers personal, family, and household debts, including money you owe on a personal credit card account, an auto loan, a medical bill, and your mortgage. The FDCPA doesn't cover debts you incurred to run a business.

Can a debt collector contact me any time or any place?

No. A debt collector may not contact you at inconvenient times or places, such as before 8 in the morning or after 9 at night, unless you agree to it. And collectors may not contact you at work if they're told (orally or in writing) that you're not allowed to get calls there.

How can I stop a debt collector from contacting me?

If a collector contacts you about a debt, you may want to talk to them at least once to see if you can resolve the matter – even if you don't think you owe the debt, can't repay it immediately, or think that the collector is contacting you by mistake. If you decide after contacting the debt collector that you don't want the collector to contact you again, tell the collector – in writing – to stop contacting you. Here's how to do that:

Make a copy of your letter. Send the original by certified mail, and pay for a "return receipt" so you'll be able to document what the collector received. Once the collector receives your letter, they may not contact you again, with two exceptions: a collector can contact you to tell you there will be no

further contact or to let you know that they or the creditor intend to take a specific action, like filing a lawsuit. Sending such a letter to a debt collector you owe money to does not get rid of the debt, but it should stop the contact. The creditor or the debt collector still can sue you to collect the debt.

Can a debt collector contact anyone else about my debt?

If an attorney is representing you about the debt, the debt collector must contact the attorney, rather than you. If you don't have an attorney, a collector may contact other people – but only to find out your address, your home phone number, and where you work. Collectors usually are prohibited from contacting third parties more than once. Other than to obtain this location information about you, a debt collector generally is not permitted to discuss your debt with anyone other than you, your spouse, or your attorney.

Debt collectors may not harass, oppress, or abuse you or any third parties they contact.

What does the debt collector have to tell me about the debt?

Every collector must send you a written "validation notice" telling you how much money you owe within five days after they first contact you. This notice also must include the name of the creditor to whom you owe the money, and how to proceed if you don't think you owe the money.

Can a debt collector keep contacting me if I don't think I owe any money?

If you send the debt collector a letter stating that you don't owe any or all of the money, or asking for verification of the debt, that collector must stop contacting you. You have to send that letter within 30 days after you receive the validation notice. But a collector can begin contacting you again if it sends you written verification of the debt, like a copy of a bill for the amount you owe.

What practices are off limits for debt collectors?

Harassment. Debt collectors may not harass, oppress, or abuse you or any third parties they contact. For example, they may not:

- use threats of violence or harm;
- publish a list of names of people who refuse to pay their debts (but they can give this information to the credit reporting companies);
- use obscene or profane language; or
- repeatedly use the phone to annoy someone.

False statements. Debt collectors may not lie when they are trying to collect a debt. For example, they may not:

- falsely claim that they are attorneys or government representatives;
- falsely claim that you have committed a crime;
- falsely represent that they operate or work for a credit reporting company;
- misrepresent the amount you owe;
- indicate that papers they send you are legal forms if they aren't; or
- indicate that papers they send to you aren't legal forms if they are.

Debt collectors also are prohibited from saying that:

- you will be arrested if you don't pay your debt;
- they'll seize, garnish, attach, or sell your property or wages unless they are permitted by law to take the action and intend to do so; or
- legal action will be taken against you, if doing so would be illegal or if they don't intend to take the action.

Debt collectors may not:

- give false credit information about you to anyone, including a credit reporting company;
- send you anything that looks like an official document from a court or government agency if it isn't; or
- use a false company name.

Can a debt collector garnish my bank account or my wages?

Unfair practices. Debt collectors may not engage in unfair practices when they try to collect a debt. For example, they may not:

- try to collect any interest, fee, or other charge on top of the amount you owe unless the contract that created your debt – or your state law – allows the charge;
- deposit a post-dated check early;
- take or threaten to take your property unless it can be done legally; or
- contact you by postcard.

Can I control which debts my payments apply to?

Yes. If a debt collector is trying to collect more than one debt from you, the collector must apply any payment you make to the debt you select. Equally important, a debt collector may not apply a payment to a debt you don't think you owe.

Can a debt collector garnish my bank account or my wages?

If you don't pay a debt, a creditor or its debt collector generally can sue you to collect. If they win, the court will enter a judgment against you. The judgment states the amount of money you owe, and allows the creditor or collector to get a garnishment order against you, directing a third party, like your bank, to turn over funds from your account to pay the debt.

Wage garnishment happens when your employer withholds part of your compensation to pay your debts. Your wages usually can be garnished only as the result of a court order. Don't ignore a lawsuit summons. If you do, you lose the opportunity to fight a wage garnishment.

Can federal benefits be garnished?

Many federal benefits are exempt from garnishment, including:

- Social Security Benefits
- Supplemental Security Income (SSI) Benefits
- Veterans' Benefits
- Civil Service and Federal Retirement and Disability Benefits
- Service Members' Pay
- Military Annuities and Survivors' Benefits
- Student Assistance
- Railroad Retirement Benefits

- Merchant Seamen Wages
- Longshoremen's and Harbor Workers' Death and Disability Benefits
- Foreign Service Retirement and Disability Benefits
- Compensation for Injury, Death, or Detention of Employees of U.S. Contractors Outside the U.S.
- Federal Emergency Management Agency Federal Disaster Assistance

But federal benefits may be garnished under certain circumstances, including to pay delinquent taxes, alimony, child support, or student loans.

Do I have any recourse if I think a debt collector has violated the law?

You have the right to sue a collector in a state or federal court within one year from the date the law was violated. If you win, the judge can require the collector to pay you for any damages you can prove you suffered because of the illegal collection practices, like lost wages and medical bills. The judge can require the debt collector to pay you up to $1,000, even if you can't prove that you suffered actual damages. You also can be reimbursed for your attorney's fees and court costs. A group of people also may sue a debt collector as part of a class action lawsuit and recover money for damages up to $500,000, or one percent of the collector's net worth, whichever amount is lower. Even if a debt collector violates the FDCPA in trying to collect a debt, the debt does not go away if you owe it.

What should I do if a debt collector sues me?

If a debt collector files a lawsuit against you to collect a debt, respond to the lawsuit, either personally or through your lawyer, by the date specified in the court papers to preserve your rights.

Where do I report a debt collector for an alleged violation?

Report any problems you have with a debt collector to your state Attorney General's office (www.naag.org) and the Federal Trade Commission (www.ftc.gov). Many states have their own debt collection laws that are different from the federal Fair Debt Collection Practices Act. Your Attorney General's office can help you determine your rights under your state's law.

For More Information

To learn more about debt collection and other credit-related issues, visit www.ftc.gov/credit and MyMoney.gov, the U.S. government's portal to financial education.

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Federal Trade Commission
Bureau of Consumer Protection
Division of Consumer and Business Education

Dinsmôre

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Mechanics' Lien Law Checklist for Subcontractors and Material Suppliers – Private Improvements

1. Serve a request on the owner for a copy of the notice of commencement. The request may be served on the original contractor if you have a contract with it.

   a) In either case the notice of commencement is to be provided to you within 10 days.

   b) If your request is ignored, obtain the notice of commencement from another source. The owner (or original contractor, if applicable) is liable for your expenses incurred in obtaining the information.

   c) If the owner has failed to respond to your request, you do not need to serve a notice of furnishing until 21 days after the notice of commencement is provided by the owner. If the original contractor has failed to respond, you still need to serve a notice of furnishing, so make sure you follow-up to obtain the notice of commencement from another source.

2. If you have received a copy of the notice of commencement and are served with a request for it from one of your subcontractors or material suppliers, you must provide it to them within 10 days. Obtain a signed receipt from them.

3. Serve a notice of furnishing on the owner within 21 days of performing work or furnishing materials to the site of an improvement. If you are not in privity of contract with the original contractor, also serve a notice of furnishing on it.

4. Maintain evidence (e.g., delivery ticket, daily log, etc.) showing the date on which your first and last work was performed or material furnished.

5. If you are not being paid:

   a) Prepare a mechanics' lien affidavit based on the information contained in the notice of commencement.

   b) Record the mechanics' lien at the county recorder's office in each county in which the land being improved is located. The lien must be recorded within 75 days (60 days for residential projects, 120 days for oil and gas projects) of performing your last work or furnishing your last material.

c) Serve the lien affidavit on the owner and any designee provided in the notice of commencement. If the owner cannot be found, post the premises within 10 days after the first 30 days.

6. If a notice to commence suit is served on you, commence suit within 60 days. Otherwise, the lien becomes void.

7. Consider instituting an action in foreclosure in common pleas court. Action on the lien must be taken within six years, otherwise the lien becomes void.

8. Consider also serving a demand on the original contractor's surety. The name and address of the surety are contained in the notice of commencement.

9. Service of all documents should be by certified or registered mail, overnight delivery service, hand delivery, or any other method which includes a written evidence of receipt.

** *As there are many issues and possible complications that might arise, please call me if you have any questions!* **

Dinsmôre

Legal Counsel

Lori A. Landrum
Donald B. Leach, Jr.
www.dinsmore.com

Mechanics' Lien Law Checklist for Subcontractors and Material Suppliers – Public Improvements

1. Obtain a copy of the Notice of Commencement from the public authority.

2. Obtain the name and address of the principal contractor and public authority from the other party at the time you enter into the subcontract agreement.

3. If you are a subcontractor, you must provide the name and address of the principal contractor and public authority in writing at the time you enter into each contract with a material supplier or subcontractor.

4. If you are not in privity of contract with a principal contractor, serve a Notice of Furnishing on the principal contractor within 21 days of first performing work or furnishing materials to the site of an improvement.

5. Maintain evidence (e.g., delivery ticket, daily log, etc.) showing the date on which your first and last work was performed or first and last material furnished.

6. If you are not being paid, prepare the claim affidavit and serve it on the public authority within 120 days of performing your last work or furnishing last material. As the claim only attaches to funds remaining to be paid to the principal contractor, do not wait until the last minute to file the claim.

7. If you are not in privity of contract with the principal contractor, include with the claim affidavit a sworn statement as to when the Notice of Furnishing was served on the principal contractor and provide a copy of the Notice of Furnishing.

8. At the time you serve the claim affidavit with the public authority, serve a copy on the principal contractor. If the claim is for labor or materials provided to a subcontractor, also serve a copy of the claim affidavit upon the subcontractor.

9. Record a copy of the claim affidavit at the county recorder's office of every county in which the improvement is located.

10. Serve a copy of the recorded claim affidavit on everyone to whom you sent the original claim affidavit. Your claim is now entitled to priority over the claims of others who have not recorded.

11. After 20 days from the date of service of the claim affidavit have passed, check with the public authority to see if a notice of intention to dispute has been served by the principal contractor or subcontractor, if applicable. If no such intention to dispute has been served, request release of the detained funds to you.

12. Verify that acceptable escrow arrangements for the detained funds have been made or that the public authority will be paying interest on the funds at the rate of 8% per annum compounded daily.

13. If a notice to commence suit is served on you, commence suit within 60 days. Otherwise the claim becomes void.

14. Consider instituting an action in common pleas court to obtain release of the detained funds.

15. Consider also serving a demand on the principal contractor's surety. The name and address of the surety is contained in the Notice of Commencement.

16. Service of all documents should be by certified or registered mail, overnight delivery service, hand delivery, or any other method which includes a written evidence of receipt.

** *As there are many issues and possible complications that might arise, please call me if you have any questions!* **

Top Ten Mistakes Leading to Loss of Lien Rights in Tennessee

PRACTICES
Construction Law

INDUSTRIES
Construction

MAY 17, 2011 BY J. TIMOTHY CRENSHAW

Early in my career as a construction lawyer I had occasion to appear before one of our more venerable judges. Upon learning of my practice area, the judge leaned back in his chair, peered over his readers and stated "That's mechanic's and materialmen's liens, right? I reckon that in my twenty five years practicing law and twenty years on the bench I've seen one, maybe two, mechanics' liens that were valid!" The judge's statement was hardly an overstatement at the time. Tennessee's lien statute was strictly construed by the courts and even seemingly minor failures to comply with the statute resulted in liens being held invalid. In 2007, the Tennessee General Assembly enacted significant amendments to the statute, including a provision that the statute is "to be construed and applied liberally to secure the beneficial results, intents, and purposes." T.C.A. § 66-11-148. Nonetheless, the Tennessee mechanics' and materialmens' lien statute remains full of pitfalls and traps for the unwary and potential lien claimants should consult with a knowledgeable attorney rather than attempt to navigate the perils it poses on their own.

Tennessee's lien statute imposes differing requirements depending upon whether the lien claimant contracts directly with the property owner (a "prime contractor") or not (a "remote contractor"). Perhaps the most critical requirement for preserving a remote contractor's lien is that it must provide Notice of Nonpayment to the property owner and to the prime contractor within ninety 90 days from the end of any month in which the remote contractor supplies labor or materials for which it has not been paid. *See* T.C.A. § 66-11-145. The notice must include all the statutorily required information and must be served as set forth in the statute. Failure to send timely and proper Notice of Nonpayment results in the loss of lien rights (except as to retainage) for the period that the notice would have covered. The most common mistakes resulting in the loss of lien rights by remote contractors typically involve some aspect of the Notice of Nonpayment requirement. That having been said, the potential for other mistakes abounds. With apologies to a certain late night television host, here are the top ten lien mistakes of Tennessee lien claimants:

No. 1 – Focusing on the date of the bill rather than the date of the work. Remote contractors frequently fail to send a timely Notice of Nonpayment because they focus on the date when they billed the work rather than when the work was actually performed or when the materials

Top Ten Mistakes Leading to Loss of Lien Rights in Tennessee

were delivered. The 90 day time period runs from the last day of the month in which the labor or materials are supplied, not from the date when the labor or materials are billed. For example, if labor or materials are supplied in February but not billed until March, a remote contractor who has not received payment for that billing must serve Notice of Nonpayment by May 29 (31 days in March plus 30 in April plus 29 in May equals 90 days).

No. 2 - Failing to serve timely Notice of Nonpayment for unapproved change orders or extra work. This error is related to the previous mistake in that it typically results due to the lien claimant focusing on when the change order is approved or when the extra work is billed rather than when the work was actually performed. Because the approval of change order work often takes time and delays the inclusion of the change order in an application for payment, a remote contractor may frequently find itself in the situation where the deadline for sending Notice of Nonpayment is imminent, but the change order has not been approved or billed. In such situations, failure to send the notice will preclude the remote contractor from asserting a lien in the event that the change order is not issued or payment is not received.

No. 3 – Failing to scrutinize lien waivers and releases. A related mistake that costs lien claimants their rights is signing and submitting a "standard" partial lien waiver or application for payment without reserving lien rights or claims for unpaid sums. Such forms typically include language waiving all claims and lien rights through the date of the application for payment. Common errors include: (1) releasing retainage even though it has not been paid; (2) releasing extra or change order work performed within the period of the release; and (3) releasing all claims through the date of the release even though more work was performed during the period than was billed on the payment application. Accordingly, when a prime contractor or remote contractor has performed unbilled change order work or extra work during the period covered by the application for payment or lien waiver, it is prudent to add limiting language or an express reservation of the rights such as "This waiver does not apply to [describe change order, extra work or claim and amount thereof] and contractor expressly reserves all rights of lien or otherwise with respect thereto."

No. 4 – Failing to send the Notice of Nonpayment early enough to ensure timely receipt. The lien statute requires that the Notice of Nonpayment be served within 90 days of the last day of each month within which work or labor was provided. A notice sent on the 90th day and not received until the 91st day or later may be held untimely. Unfortunately, there currently is no case authority in Tennessee answering the question of whether such a notice is timely. Until this question is answered by Tennessee courts, remote contractors should be careful to send notice early enough to ensure its actual receipt prior to the expiration of the 90 days and thus avoid any argument that the notice is untimely. In that regard, the statute provides a rebuttable presumption that service is complete within three business days of mailing if served by registered or certified mail, return receipt requested and within one business day when sent by commercial, overnight delivery. *See* T.C.A. § 66-11-149. Because of this presumption and the ease of proving delivery, we generally encourage serving Notices of Nonpayment by commercial overnight delivery.

Top Ten Mistakes Leading to Loss of Lien Rights in Tennessee

No. 5 – Failing to include all the required information in the Notice of Nonpayment. The lien statute requires a Notice of Nonpayment to include the following information: (1) The name of the remote contractor and the address to which the owner and the prime contractor in contractual relation with the remote contractor may send communications to the remote contractor; (2) a general description of the work, labor, materials, services, equipment, or machinery provided; (3) the amount owed as of the date of the notice; (4) the last date the claimant performed work and/or provided labor or materials, services, equipment, or machinery; and (5) a description sufficient to identify the real property against which a lien may be claimed. *See* T.C.A. § 66-11-145. In order to avoid omitting required information from the Notice of Nonpayment, remote contractors can take advantage of another presumption provided by the lien statute and obtain a copy of the building permit for the project when they start work. The statute provides that "the name of any owner, the owner's agent, any prime contractor, any remote contractor, or any other person, their addresses, and the real property description stated in a building permit authorizing the improvement shall be presumed to be correct and, in the case of property description, sufficient to identify the real property." T.C.A. § 66-11-149.

No. 6 – Failing to send Notice of Nonpayment to both the owner and prime contractor or sending it to an incorrect party. The lien statute requires a remote contractor to send the notice to both the owner and the prime contractor in contractual privity with the remote contractor. Many Notices of Nonpayment are defective because the remote contractor fails to send the notice to both the owner and the prime contractor or sends notice to parties who are later discovered not to be the actual owner or prime contractor. Often these errors are the result of waiting until the deadline for sending the notice and not having adequate time to investigate the correct identities of those parties. Remote contractors can generally avoid this problem if they make it a practice to send their Notices of Nonpayment in the middle of the month, rather than waiting the full 90 days. Additionally, utilizing the presumptions provided by the statute with respect to the information set forth in the building permit can simplify the process of obtaining the required information to include in the notice. Significantly, those presumptions also provide that service of the notice on the owner listed on the permit is deemed to be service on all owners, including those not listed. *See* T.C.A. § 66-11-149.

No. 7 – Failing to serve separate Notices of Nonpayment for each month for which work is unpaid. The lien statute requires that a remote contractor "shall serve, within ninety (90) days of the last day of each month within which work or labor was provided or materials, services, equipment, or machinery furnished and for which the remote contractor intends to claim a lien under this chapter, a notice of nonpayment for such work." T.C.A. § 66-11-145 (emphasis added). A court decision interpreting this provision prior to the 2007 amendments held that this required separate notices for each month rather than a cumulative notice covering multiple months. The amendments to the lien statute now provide that the statute is "to be construed and applied liberally" and any document that "substantially satisfies the applicable requirements of this chapter is effective even if it has nonprejudicial errors or omissions." T.C.A. § 66-11-148. These provisions may provide a basis for extricating oneself from a failure to send monthly notices; however, until this question is answered by the Tennessee courts, the safer course of action is sending multiple notices.

Top Ten Mistakes Leading to Loss of Lien Rights in Tennessee

No. 8 - Failing to serve and record a timely written Notice of Lien. Remote contractors are required to serve written Notice of Lien to the property owner within 90 days of completion of the improvement and must also record a notice of lien in the property records of the county where the project is located within that same time. *See* T.C.A. § 66-11-115. Prime contractors do not have to serve a Notice of Lien in order to preserve their rights against the owner; however, they must record a sworn statement of lien within 90 days of completion of the improvement in order to preserve the lien against "subsequent purchasers [of the property] or encumbrancers for a valuable consideration without notice of the lien." *See* T.C.A. § 66-11-112.

No. 9 - Failing to timely and properly file suit to enforce the lien. Remote contractors are required to file suit to enforce the lien within 90 days following the service of the Notice of Lien upon the owner. Prime contractors are required to file suit within one year following the completion of the improvement. Lien suits must seek the issuance of an attachment of the property (which requires that the suit be sworn to and that an attachment bond be posted). *See* T.C.A. § 66-11-126. If the suit is not filed timely and fails to comply with the statutory requirements, the lien may be lost.

No. 10 - Failing to respond to a Notice of Completion. The time periods for serving a lien can be significantly shortened by the owner's or prime contractor's filing of a statutory Notice of Completion. If the improvement is actually complete, an owner or prime contractor may record a Notice of Completion complying with the statutory form and, upon the recording of the notice, the time for serving a lien is shortened to 10 days on residential projects and 30 days on commercial projects. The owner or prime contractor is NOT required to serve a copy of the notice or notify the remote contractors that the Notices of Completion has been filed UNLESS the remote contractor had previously served a Notice of Nonpayment. *See* T.C.A. § 66-11-143. This protection from a "surprise" Notice of Completion is another reason remote contractors should be diligent about serving Notices of Nonpayment.

And here's a bonus mistake:

No. 11 - Willfully and grossly exaggerating the amount for which a lien is claimed. If a court finds that a lienor has willfully and grossly exaggerated the amount of the lien claimed in a Notice of Lien, the court has discretion to allow no recovery on the lien and "the lienor may be liable for any actual expenses incurred by the injured party, including attorneys' fees, as a result of the lienor's exaggeration." Potential lienors are well advised to bear this in mind, particularly since Tennessee's lien statute excludes certain items from being included in a lien.

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Legislature Makes Significant Changes to North Carolina's Lien and Bond Law

By: Drew Chapin, CGS Greensboro Office

For the first time in nearly twenty years, the North Carolina Legislature has made significant changes to North Carolina's Lien and Bond Law. Whether you are an owner, a general contractor, a subcontractor, a supplier, or a design professional, you will likely be affected by Senate Bill 42 (SB42) and House Bill 1052 (HB1052). Each law contains new notice requirements to preserve legal rights: SB42 requires the use of and notice to a "lien agent" on private projects, while HB1052 requires lower tier claimants on public projects to serve the general contractor with a "Notice of Public Subcontract."

SB42: THE "LIEN AGENT"

SB42 (which becomes effective April 1, 2013) was enacted in an attempt to fix the so-called "hidden" lien problem on private construction projects. This problem results from North Carolina's lien statute that allows a Claim of Lien on Real Property to be filed up to 120 days after the date on which the general contractor last furnished labor or materials to the property being improved. Once filed, the Claim of Lien on Real Property relates back and becomes effective as of the date labor or materials were first furnished to the project. Although "hidden" liens most often arise during the construction of residential subdivisions when homes are sold shortly after construction is completed, the statute as enacted applies to all private construction projects valued at $30,000 or more.

Consider the following scenario: A general contractor last performs work on a new house on July 1. Based on the 120-day rule, the contractor has until October 29 to file a Claim of Lien on Real Property. If the home sale closes on September 1, there is no document filed in the public records that would alert a title searcher to the existence of a potential, unfiled lien claim. Even though the property is sold to an innocent purchaser, a lien that is timely filed by the contractor after the closing will still attach to the property.

SB42 addresses this situation through the use of "lien agents." The lien agent is designated by the owner of the property to receive notices from potential lien claimants. Contractors and subcontractors that want to preserve their right to file a lien against the real property should complete the new statutory form entitled "Notice to Lien Agent" and ensure that the lien agent receives the Notice within fifteen days (15) of their first furnishing labor or materials to the project. Although potential lien claimants may still have an opportunity under limited circumstances to assert a lien against the real property if they fail to serve the Notice to Lien Agent, the better practice would be to get into the habit of serving the Notice at the start of each new project.

To facilitate the service of a Notice to Lien Agent, the owner of the property is required to provide the lien agent's contact information within seven (7) days of a request by any potential lien claimant for such information. Similarly, contractors and subcontractors are required to provide a written notice with the lien agent's contact information within three (3) days of contracting with any subcontractor or supplier. The easiest way to comply with this new requirement is to include the lien agent's contact information within the subcontract itself. A contractor or subcontractor that fails to provide the lien agent's information may become liable for actual damages incurred by a lower tier subcontractor that was entitled to receive such information. The contractor is also required to provide the lien agent's contact information to the inspection department when applying for the building permit.

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HB1052: NOTICE OF PUBLIC SUBCONTRACT

Just as SB42 was enacted to address "hidden" liens on private projects, the focus of HB1052 was to address the "double payment" issue often faced by general contractors on public projects. The double payment may occur when the general contractor (the principal on a payment bond) pays its first-tier subcontractor in full, but the first-tier subcontractor fails to pay in full all second-tier subcontractors or suppliers, or when a second-tier subcontractor fails to pay in full all third-tier subcontractors or suppliers. The general contractor is then exposed to double payment when the unpaid lower tier claimants make claims on the general contractor's payment bond. Because these lower tier claimants have 120 days from the date of their last furnishing of labor or materials within which to serve their Notice of Claim on Payment Bond, the general contractor may not know of the claims until long after the first-tier subcontractor has been paid in full.

HB1052 (which becomes effective January 1, 2013) requires the lower tier claimants to serve the general contractor with a "Notice of Public Subcontract." This Notice is separate from and in addition to the Notice of Claim on Payment Bond (that must be given to the contractor within 120 days of the claimant's last furnishing of labor or materials). The Notice of Public Subcontract provides notice to the general contractor that the lower tier subcontractor/supplier will be furnishing or has furnished labor or materials to the bonded project. First-tier subcontractors/suppliers are not required to serve a Notice of Public Subcontract because the general contractor is already aware of parties with whom it has contracted.

Although there is no statutory deadline to serve the Notice of Public Subcontract, the claimant's bond claim will only "capture" payment for labor or materials provided within seventy-five (75) days prior to the claimant's service of the Notice and thereafter. This type of provision is known as the "look back" period for the claim. While a lower tier subcontractor/supplier has 120 days from its date of last furnishing to give the contractor its Notice of Claim on Payment Bond, the claimant may fail to "capture" a portion of its claim if it waits too long to serve its Notice of Public Subcontract. A lower tier subcontractor/supplier that is required to serve a Notice of Public Subcontract should do so as soon as it enters into its subcontract to furnish labor or materials to the project.

HB1052 also addresses a problem subcontractors of all tiers often face in obtaining information about the payment bonds. The new law requires that the general contractor provide to each subcontractor it engages a "Contractor's Project Statement." The Contractor's Project Statement provides the subcontractor with the relevant information to serve a Notice of Public Subcontract and, if necessary, a Notice of Claim on Payment Bond. The requirement to provide the Contractor's Project Statement flows down to lower tier subcontractors: every subcontractor, at any level, must provide the Contractor's Project Statement to each subcontractor it engages. There is a severe penalty for failing to provide the Contractor's Project Statement. Any party that fails to provide the statement to a subcontractor is prohibited from enforcing the subcontract until the statement is provided.

SUMMARY

SB42 and HB1052 include significant new requirements for all participants on both private and public construction projects in North Carolina. Many of your current forms and procedures will need to be changed to satisfy the requirements of the new laws. If you fail to comply with these new requirements, you may lose valuable rights to make or defend lien or bond claims.

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Ohio House Bill 153 and Public Construction Reform

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JUNE 2011 BY KEVIN MALOF

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On June 30, 2011, Ohio Governor John Kasich signed into law HB 153, the biennial budget legislation, which includes significant reforms to Ohio's public construction laws. Although the construction reforms set forth in HB 153 will take effect September 30th, there are a number of rules that the Department of Administrative Services ("DAS") must issue pursuant to HB 153. And it will be difficult to fully appreciate the impact of HB 153 until those rules have been issued. Below is a summary of significant provisions from the legislation:

- **Eliminates Multiple-Prime Contracting Requirement**. Under current law, public authorities undertaking a public improvement project must utilize a multiple-prime contracting method. HB 153 no longer requires multiple-prime contracting and now allows alternative delivery methods such as construction manager-at-risk ("CMAR"), design-build ("D/B") or single-prime contracting ("Single Prime"), in addition to multi-prime contracting.

  Construction Manager at Risk. A CMAR is a company with substantial discretion and authority to manage all phases of a construction project. A CMAR holds and manages the contracts with subcontractors. Under HB 153, a public authority will evaluate proposals from CMARs will select at least three companies to rank and will enter into negotiations with the company it determines to be the best value (considering both proposed cost and qualifications). Under HB 153, a CMAR must provide the public authority with a guaranteed maximum price using an open-book pricing method. The CMAR must also provide a fee proposal broken down into a pre-construction fee, construction fee and the portion of the construction fee to be at risk in the guaranteed maximum price. The guaranteed maximum price is the total amount to be paid by the public authority to the CMAR including the cost of all work, the cost of general conditions, the contingency and the proposed fee.

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  Design-Build Firm ("D/B Firm"). A D/B Firm provides both the design and the construction services for a project. Under HB 153, a public authority will evaluate statements of qualifications from D/B

Ohio House Bill 153 and Public Construction Reform

firms, will select at least three firms to rank and will enter into negotiations with the firm it determines to be the best value (considering both proposed cost and qualifications). Best value is determined based on the pricing proposal divided into a design services fee, preconstruction fee and design-build services fee. The D/B Firm must provide the public authority with a guaranteed maximum price, which is the total amount to be paid by the public authority to the D/B Firm including the cost of all design and construction work, the cost of general conditions, the contingency and the fees contained in the pricing proposal.

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- **Increase of Project Cost Threshold for Complete Specifications.** HB 153 increases the minimum project cost threshold from $50,000 to $200,000 before detailed specifications are required in order to put a state public improvement contract to bid. This applies to any institution supported in whole or part by the state of Ohio. In determining project costs, the following expenses must be included: professional fees and expenses incurred in preparing plans, permit costs, testing costs and other fees associated with the project, project construction costs and a contingency reserve fund. However, this requirement of complete specifications does not apply to public projects where CMARs or D/B Firms are used.
- **Minimum Thresholds for Bidding**. Under the original statute, minimum thresholds determined whether a public project would be subject to the public bidding statutes ($5,000 minimum to determine if separate bids are required; $25,000 to determine if schools are required to bid prime contracts; $50,000 to determine if other public entities are required to bid prime contracts). Under HB 153, these minimum thresholds have been eliminated except for schools, which retain a $25,000 threshold. There has already been debate as to whether any thresholds now exist for public projects (other than the $25,000 school threshold which still exists). While some read HB 153 as eliminating all thresholds other than for school projects (the $5,000 and $50,000 thresholds have been deleted in their entirety), others maintain that the $200,000 threshold for requiring detailed specifications also implies that public bidding is required for all public projects in excess of $200,000 as well. As the DAS develops rules governing these projects, clarification may shed light on what was really intended. In the meantime, public owners are well-advised to approach this issue on a case by case basis.
- **New Contract Forms/Requirements.** HB 153 requires the DAS to establish form contracts to be used by public authorities with a CMAR or D/B Firm and form contracts to be used by the CMAR or D/B Firm with subcontractors. HB 153 does not address whether these requirements apply to single source general contractors; however it would appear that this will be resolved by revisions to the statute or rules imposed by the DAS.
- **New Forms of Advertising**. HB 153 allows advertising by traditional methods (newspapers of general circulation) and by electronic means pursuant to rules to be adopted by the DAS.

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- **Subcontracting**. HB 153 requires a CMAR or D/B Firm to establish criteria for the prequalification of prospective bidders on subcontracts based on standards to be created by the DAS. HB 153 requires a CMAR or D/B Firm to identify at least three prospective bidders who have been prequalified. Once the bidders are deemed acceptable by the public authority, the CMAR or D/B Firm must solicit proposals from each bidder and evaluate each based on an "open book" pricing method. *However, a CMAR or D/B Firm is not required to award a subcontract to the low bidder.* HB 153 does not address whether these requirements apply to single source general contractors; however it would appear that this will be resolved by revisions to the statute or rules imposed by the DAS.
- **Exempts CMARs and D/B Firms from Bid Guaranties.** CMARs and D/B Firms are now exempted from the requirement to submit bid guaranties under O.R.C. Section 153.54.
- **Obligation to Provide Surety Bonds**. In addition to other surety bond requirements for contractors, HB 153 requires CMARs and D/B Firms to provide a surety bond in accordance with rules to be adopted by the DAS.
- **Includes CMARs and D/B Firms in Prompt Pay Law**. HB 153 specifically defines "contractor" to include CMARs and D/B Firms under the prompt pay law, which requires interest to be paid when a contractor does not pay a subcontractor in a timely manner.

The public construction reforms ushered in by HB 153 and the rules to be imposed by the DAS will significantly alter the landscape of public construction projects for both construction/design firms and public entities. If you have any questions regarding the reforms made by HB 153 or their impact, please contact Kevin K. Malof of Frost Brown Todd's Construction and Governmental Services practice groups.

Ohio Mechanics Lien Claimant Gets Paid After 12 Years of Waiting

Posted By Scott Wolfe Jr On July 26, 2012 @ 1:45 pm In Lien Blog | No Comments

After 12 long years of waiting – and I mean *waiting* – Akron Concrete Company of Ohio appears to be getting paid on a mechanics lien claim it was forced to file on a $124,000 debt, as the Ohio Appeals Court in Akron Concrete Company v. Board of Education for Medina School District affirmed a trial court judgment in the concrete company's favor.

Why Did The Mechanics Lien Claim Took So Long?

Litigation does not have a reputation for being speedy, and this is a perfect example of that. Unfortunately for Akron Concrete Company, although they had to wait 9 years for a lawsuit to resolve itself before anyone would address their $124k debt, Akron wasn't even a party to that litigation!

The litigation in question was between the contracting entity (Medina Board of Education) and the prime contractor, Moser Construction Company. Those two parties fought from 2001 until 2009 about how much Moser was owed on the project.

All the while Akron's mechanics lien claim sat and waited for this dispute to work itself out.

Shouldn't The Mechanics Lien Have Expired?

Well, that is exactly the point of the litigation decided this month.

After the case between Medina and Moser settled in 2009, and Akron was left out of the settlement, Akron filed a lawsuit against the board claiming the board should have paid their lien claim before settling with Moser.

The board then argued that the lien claim had expired because Ohio claims must be enforced within 6 years, and it was obviously a lot longer than that. Akron claimed, however, that the 6 year statute never began to run until the settlement with Moser, since that was required (determining amount due to the prime contractor) before any money was owed to Akron.

The trial and appeals court agreed with Akron, and thus, their claim against the Medina School Board was still alive and well, and they are now awarded a judgment agains the school board for payment of their claim.

This situation was made possible by a series of interesting components within the Ohio lien laws for state projects.

Lesson for Mechanics Lien Claimants in Ohio and Everywhere

Not every business can afford to wait 12 years for payment of a $124k debt, but sometimes, they won't have the choice. Luckily, Akron was able to pull through and stay in business despite the decade-long loss, and this decision will be a nice plum at the end of a long road.

Most mechanics lien claims are paid without the need for a foreclosure action, and most are paid quickly. However, this case shows that even when a company must fight for its mechanics lien rights, and the fight takes a long time, there's still light at the end of the rainbow.

Undisputedly, if Akron had not filed their mechanics lien claim and followed up with it, they would have not recovered this money…even if it was 12 years later.

Related posts:

1. Waiting on Insurance Proceeds To Get Paid? Get Security With A Mechanics Lien
2. Construction Managers Can File A Mechanics Lien in Ohio
3. Painful Technicality Invalidates Ohio Lien in Recent Supreme Court Case
4. Send Ohio Notice of Furnishing Fast...But Not Early
5. Mechanics Lien Wrecks Havoc On Property Owner 8 Years After It's Filed

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