



**Welcome To:**

***Commercial Lien and Bond  
Webinar***

The webinar will begin shortly. Thank You!



# **Commercial Lien and Bond**

## **Primerus Commercial Law Practice Group**

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# OVERVIEW

## **1. What do I need to know before filing a claim?**

This portion of the webinar will focus on the due diligence that you (and your attorney) will need to perform to help protect yourself. In other words, what will your attorney need to know to help you? This section of the webinar will provide you with answers to all of these questions.

## **2. What is the Federal Miller Act?**

The Federal Miller Act governs payment bond claims for labor and/or materials furnished for public construction projects owned by the federal government. Subcontractors and suppliers do not have mechanics' lien rights on federally-owned construction jobs. However, in lieu thereof, the Federal Miller Act provides certain subcontractors and suppliers with a right to assert a claim against a payment bond furnished for the job by the general contractor. This portion of the webinar will discuss who qualifies to assert a claim under the Miller Act and what steps they need to take to preserve, perfect and enforce their bond claims.

## **3. What are the Differences Between Private and Public Projects?**

This section of the webinar will explain the difference between mechanics liens for construction on public and private construction jobs. Participants will also learn how they are the same and will be provided with tips on what to watch for when filing.

## **4. Who is Qualified to File a Lien?**

This final section will discuss what types of contractors can file liens. Additionally, participants will learn the type of work that is lienable.



# What Do I Need to Know Before Filing a Lien or Bond Claim?

Presented by Barry P. Kaltenbach, Esq.

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Chicago, IL



# Lien and Bond Claims: Why Due Diligence is Important

- Protects against the risk of non-payment
- Differences between lien and bond claims, especially for public construction projects.
- Minor errors can void an entire claim.
- Risk of error increases in the days leading up to a deadline.



# What You and Your Attorney Will Need to Know

- The chain of contracting.
- Where you were working, specifically.
- Payment bond details.
- How much you are owed for lienable work.



# Chain of Contracting

- Who hired you and who hired them?
- AIA-based documents may have some of this information.
- Understanding the delivery method is important.
  - Traditional delivery.
  - Multi-prime.
  - Construction manager.



# Where Did you Say You Worked?

- Where, specifically, did you work?
  - Not good enough that everyone knows where the jobsite is.
  - AIA-based documents may have only street address or intersection.
  - Particular problem for material suppliers.
- Use legal description and index number.
- Obtain a title commitment.
- Post-contracting changes.





# Payment Bonds

- Required in many public construction projects.
- Miller Act and state Little Miller Acts.
- Bonding company and bond number.



# How to Value Your Claim

- Overvalued claims may be void in their entirety.
- Must allow all credits that are due, including for work that you did not perform.
- Must include only lienable work.
- Key is to realize this is an issue and that it may take time.
- This can vary significantly depending of your state.



# What is the Federal Miller Act?

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# 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 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



# 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
- 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)



# 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





# 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)



# 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



# Difference Between Private and Public Projects

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# Main Differences:

- Cannot lien public property
- Venue may be different
  - All Miller Act claims must be filed in federal court, which has original jurisdiction (even for amounts less than \$75,000)



# How They are the Same:

- Claimants are the same
  1. Prime contractors
  2. Subcontractors
  3. Material suppliers
  4. Design professionals (architects and engineers)



# How They are the Same:

- The amounts that can be sought are the same
  1. Amount of the contract
  2. Approved extra work
  3. Labor, services and materials must have been used in the work of improvement
  4. Prerequisites are often the same for claiming right to payment





# What are These Pre-lien Requirements:

- Prelien notice - California has a requirement that owner, general and finance company receive a notice from the lien claimant within 20 days of the date work first starts on the project
  
- Notice following completion of the project
  1. Private projects - must record a mechanic's lien within statutory period after completion of the project (30 days for subcontractors/material suppliers; 60 days for prime contractors), which then has to be enforced within a statutory time after being recorded (90 days in California)
  2. Public projects - must serve a notice to the bonding company with a similar time following completion of the project



# How they are the same:

- Some similar remedies

1. Bond claims (payment and performance bonds/Miller Act bonds)
  - required on all public projects over \$25,000 and all federal projects and on many private projects
2. Stop notice - allows the lien claimant to stop payment to prime contractor from funds held by bank and/or public entity
3. Suit against prime contractor and/or owner, including provisional relief available in certain states (e.g., California allows for parties to apply for a writ of attachment if amount owed is unsecured and over \$500, the amount owed is readily ascertainable, is not for personal, family or household purposes and you can prove the probable validity of the debt)



# What to watch for

- What kind of project is it? Is it clearly public or private?
- Who is the owner of the project? May be a private project on public land (e.g., airport projects, hospital districts, cemetery districts, etc.)
- Was a bond required (regardless of whether private or public)?
- Were proper notices given? If not, claim against bond and/or property may be waived, but not claim against company who hired the lien claimant



# Statutory Frameworks from Select Jurisdictions

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# **FLO R I D A**



# Florida: Generally

- Construction liens for private projects addressed under Chapter 713, Part I.
- List of materialmen, contractors, laborers, and professionals entitled to a construction lien is listed in Section 713.03.
- Different requirements apply based on status and privity of contract with owner.



# Florida: Notice of Commencement ("NOC")

- Recorded in the county records with certified copy posted at job site before commencement of construction.
- Where construction loan involved, must occur before first disbursement.
- Construction must commence within 90 days.
- Duration is one year unless NOC specifies to the contrary.
- NOC not required for "horizontal improvements" or exceptions listed under 713.02(5), Fla. Stat.



# Florida: Notice of Commencement ("NOC")

- Form and requirements of NOC set out in Section 713.13(1) , including:
  1. Description sufficient to identify property, and should include street address where available;
  2. General description of improvements;
  3. Name and address of owner, owner's interest in site, and fee simple owner if different.
  4. Name and address of contractor;
  5. Name and address of the surety on the Section 713.23, Fla. Stat., payment bond, if applicable;
  6. Lender and contact person, where relevant;
  7. Name of person designated by owner to accept notices and service on owner's behalf;
  8. Section 713.13, Fla. Stat., also sets out other optional information that may be included, but is not required.





# Florida: Notice of Commencement ("NOC")

- Failure to record and post NOC will not defeat construction lien that otherwise follows statutory requirements.



# Florida: Notice to Owner (“NTO”)

- Where no privity of contract exists and the lien is not that of a laborer, NTO satisfying Section 713.06(2), Fla. Stat., must be served upon the owner within 45 days of the date services or materials were first furnished to the project and before owner’s final disbursement and receipt of GC’s final affidavit.
- Additional service requirements for subcontractors, materialmen, and sub-subcontractors.
- Failure to timely serve NTO is complete defense to enforcement.
- NTO not required for certain listed professionals.



# Florida: Claim of Lien

- Requirements set forth in Section 713.08(3), Fla. Stat.:
  1. Name of lienor and address;
  2. Name of contracting party;
  3. Description of labor, services, etc.;
  4. Description of real property;
  5. Name of owner;
  6. Time when first and last work was furnished;
  7. Amount unpaid plus finance charges, if applicable; and
  8. Date and method of service of NTO, if required.



# Florida: Claim of Lien

- Some limited deviation from statutory requirements allowed.
- Limited amendment authority.
- Must be filed no later than 90-days after the lienor last provided labor, services, or materials.
- No advance waiver of lien rights per Section 713.20(2), Fla. Stat.



# Florida: Proper Payments Process

- Where owner complies with NOC requirements, can protect against risk of double payment by following “proper payments procedure” set forth in Section 713.06(3), Fla. Stat. and obtaining contractor affidavits.
- If owner skips NOC process, cannot use.



# Florida: Tenant Improvements

- Section 713.10, Fla. Stat., governs ability of a tenant's contractor to impose lien on the landlord's interest.
- Lien can reach fee interest in land unless lease provides otherwise and notice of limitation recorded.
- Landlord can record global notice of limitation on liens for overall center where uniform lease form used.



# Florida: Transfer of Lien to Other Security

- Governed by Section 713.24, Fla. Stat.:
- May either deposit money with the clerk of court or obtain a bond and file it with the clerk.
- Amount must be equal to amount claimed in the lien, plus interest at the legal rate for three years, plus greater of \$1,000.00 or 25% of amount demanded in lien to cover attorneys' fees and court costs.



# Florida: Enforcement

- Action must generally be brought within one year of the date the lien is recorded or will lapse.
- Section 713.22(2), Fla. Stat., establishes procedure for filing notice of lien contest, following which lienor has 60 days to file enforcement action or lien lapses.
- In any action to enforce a construction lien, prevailing party is entitled to recover reasonable attorneys' fees.
- Arbitration clauses are enforceable.
- Venue of lawsuit is county where property is located, even if contract provides for other venue.





# Florida: Public Property

- Governed by Chapter 255, Fla. Stat.
- Public property cannot be liened.
- Section 255.05, Florida's "Little Miller Act."
- Recovery is dependent on existence of surety bond or application of Section 225.071, Fla. Stat. which provides specific expedited court procedure for pursuing payments not made within 30 days of acceptance of work or applicable prompt payment requirements mandated under Section 225.073, Fla. Stat.
- Private property may be lienable if improvements to public property are an element of improvement to the owner's property.



# CALIFORNIA



# California: General

- Covers all works of improvement that are permanent and visible.
- Includes materials delivered to the job site.
- An architect, surveyor or engineer may obtain a design professional's lien.
- For a claim on a payment bond on a public project, the project must exceed \$25,000.00.



# California: Scope of Lienors

- Licensed contractors, licensed subcontractors of any tier.
- Suppliers of labor or materials to the foregoing.



# California: Property Subject to Lien

- The project itself and the associated land.
- For public projects, the contractor's payment bond



# California: Preliminary Notice

- Any claimant, except the contractor, certain labor trust funds, and people performing actual labor for wages, must give preliminary notice. General contractors must include specific notices in their contracts with owners.
- Notice goes to the party with whom the contractor is contracting. Subcontractors not required to give notice to original contractor.
  1. For public projects, subcontractors must give notice to general contractor and public agency concerned.
  2. For claims on payment bond, notice must be given to payment bond principal and surety, and county recorder is also recommended.



# California: Preliminary Notice

- Notice must be given within 20 days after claimant first furnishes labor, materials, etc.
- For a claim on a payment bond, if no preliminary notice is given, may preserve claim by giving final notice to surety and bond principal within 15 days after notice of completion is filed, or within 75 days after completion of project if notice of completion not filed.
- Specific statutorily required content and service procedure for the Notice.



# California: Final Notice (Notice of Claim)

- All claimants must provide, except for claimants under a payment bond who gave preliminary notice.
- Notice is to be given to county recorder where property is located, or surety and bond principal for claim on payment bond.
- Notice must be given within 30 days after notice of completion or cessation is filed or within 90 days after completion of project if no notice of completion or cessation is filed. For payment bond claim, if no preliminary notice was given, then within 15 days after notice of completion is filed, or within 75 days after completion of project if notice of completion not filed.
- Specific statutorily required content for Final Notice. The Final Notice must be filed with the county recorder. For claims on payment bonds, it must be personally served or sent via certified mail.





# California: Enforcement

- On a private project, must bring suit within 90 days after claimant records lien.
- Claim on payment bond can be brought within 6 months after completion of work or improvement, if the surety recorded the bond with the county recorder. If bond has not been recorded, claimant has 4 years to bring a claim against the surety.
- On private project, attorney's fees may be allowed, but claimant must sue to recover it.
- Attorneys' fees are also allowed in claims against a payment bond.



# TEXAS

**Texas Property Code, Section 53**



# Texas: Amount Secured

- Under Texas Constitution, an amount equal to the value of the labor done and/or the value of the material furnished.
  
- By statute:
  1. Labor performed or material furnished for construction or repair of improvements;
  2. Any materials specially fabricated for project, even if material was never delivered or incorporated into project (less the salvage value);
  3. preparation of plans or a plat by an architect, engineer or surveyor, but only if prepared under a written contract with the owner.



# Texas: Scope of Lienors

- Under Texas Constitution, only those who have provided labor or material under a contract directly between the contractor and the owner or his agent.
- By statute, persons entitled to a lien include labors, special material fabricators, or persons who furnish labor or material for construction or repair of a house, building or other improvement, a railroad, or a levee or embankment, and if the person does so under or by virtue of a contract with the owner or owner's agent or with the contractor or another subcontractor.
- For a lien against a homestead to be valid, the contract must be in writing and signed by both the owner (and spouse, if married) and the contractor before any work commences or material furnished, and the contract must be recorded with clerk of the county where the homestead is located.
- Additional disclosure and notice requirements must be met for residential construction contracts to be valid and enforceable.



# Texas: Property Subject to Lien (Section 53.022)

- Whatever was enhanced by the value of the labor or material covered by the lien.
  1. Includes the house or building, fixtures and other improvements, and whatever land or lot of land is necessarily connected with the covered work or activity, except public property such as sidewalks.
  2. Specially fabricated material is covered, even if it never reaches the work site or is used.



# Texas: Effect of Recording

- Lien vs. lien affidavit & perfection process
- Lien will not be enforced if not properly perfected by process of written notices to those entitled and by proper recording of a properly completed and executed affidavit.
- Notices must be given by prime contractor to owner, and by derivative claimants (those who claim under contractor or other subcontractors) to both contractor and owner.
- For non-residential construction project, both original contractor and subcontractor must file lien affidavit within the same period of time, which is by 15th day of the 4th calendar month following the day claimant's indebtedness "accrues."



# Texas: Effect of Recording

- For residential projects, lien affidavits must be filed by 15th day of 3rd calendar month following the day claimant's indebtedness "accrues."
- When indebtedness "accrues" is statutorily defined.
- Any party filing an affidavit must send a copy by registered or certified mail to owner, not later than one business day after date the affidavit is filed with the county clerk. If the party is not an original contractor, they must also send a copy to original contractor.
- Once owner receives notice of a derivative claim, owner may withhold from contractor any amounts necessary to cover that claim.



# Texas: Priority of Lien

## (Sections 53.121 thru 53.124)

- Mechanic's lien "relates back" to date of lien inception, which is generally date of commencement of construction of improvements or date materials were delivered to site.
- lien has preference to other prior liens, encumbrances, or mortgages, although it does not affect any lien, encumbrance, or mortgage which was on the land at the time of the inception of the lien, except as to removables (improvement capable of being removed from the construction without material injury to land or improvements).
- All properly perfected mechanic's liens are on equal footing with one another without reference to date each affidavit was filed, except for lien of an architect, engineer, or surveyor, which is determined by date of recording.





# **NEW YORK**

## **N.Y. Lien Law**



# **New York: Amount Secured**

The value or agreed upon price of the work (including interest where applicable), labor (including benefits and wage supplements due or payable for the benefit of any laborer), or materials provided to the site.

N.Y. Lien Law Section 3.



# New York: Scope of Lienors

Contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers. N.Y. Lien Law Section 3.



# New York: Property Subject to Lien

- For private projects, the project itself, the land it is on, and a convenient space surrounding it.
- For public projects, the contractor's payment bond.



# **New York: Notice of Lien (N.Y. Lien Law Section 10)**

- Notice of lien may be filed at anytime during progress of work and the furnishing of materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished.
- Where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished.



# New York: Notice of Lien (N.Y. Lien Law Section 10)

- Within five days before or thirty days after filing the notice of the lien, lienor shall serve a copy of such notice upon the owner. Failure to file proof of such a service with county clerk within 35 days after notice of lien is filed terminate notice as a lien.
- Notice from subcontractors and laborers to property owners:
  1. A contractor working on a public improvement may issue a written demand that a state agency provide a notice of completion and acceptance.
  2. A subcontractor or other party who furnishes labor and or materials for the improvement of property may issue a demand to the owner or contractor demanding that the owner or contractor provide a statement of the terms of the contract between the owner and the contractor.



# New York: Notice of Lien (N.Y. Lien Law Section 10)

- Notice from property owner to contractor, subcontractor, or laborer:

A property owner whose property has been the subject of a notice of lien may demand in writing that the lien claimant provide an itemized statement of the labor and/or materials provided and their value.

- Notice prior to starting work, or after work has been completed:

New York statutes do not require a Notice of Commencement or a Notice of Completion as in some other States.



# **New York: Duration of Lien**

Lien expires one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, or appropriate steps are taken to request that the court grant an extension. N.Y. Lien Law Section 17.





# New York: Other Information

- Assignment. New York statutes provide for the assignment of valid liens. The assignment must be in writing and acknowledged by the lienholder. N.Y. Lien Law Section 13.
- Satisfaction of a lien. New York statutes do not provide for or require that a lienholder who has been paid produce or file a notice to that effect.



# New York: Other Information

- Release of a lien

1. A lien may be discharged by the issuing of a certificate by the lienholder, filed where the lien notice was filed, acknowledging the satisfaction and release of said lien.
2. Lien dissolves automatically after one year of filing if no legal action is taken to foreclose on said lien.
3. New York law permits a party with an interest in the property in question to file a bond in the amount unpaid under the contract to release lien.



**Questions?**



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