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Lien & Bond Rights

The Importance Of Knowing Your Lien & Bond Rights

By Laurence Schor
Attorney, Asmar, Schor & McKenna, PLLC
LSchor@asm-law.com

Lien and bond law is an important mechanism for protecting parties in construction law, and it continues to change on both the state and federal levels. State lien and bond laws are frequently enacted by piecemeal, causing the statutes to be redundant or inconsistent between provisions. Accordingly, it is critical that practitioners continually remain familiar with all parts of the laws relevant to their jurisdictions. What follows is a brief discussion of the notable differences found in lien and bond law around the country and of some important developments in this area of law.

Public Works Projects

Individual parties do not have lien rights on federal public construction projects because the doctrine of sovereign immunity precludes liens on government property. *See, e.g., F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.,* 417 U.S. 116, 121-22 (1974). The Miller Act provides an alternate remedy to those who supply labor or materials by requiring both a performance bond and a payment bond on federal public works projects over $100,000. 40 U.S.C. § 3131(b) (2012).

Most of the states are generally like the federal government in that they do not allow liens to attach to state-owned property. However, there is a narrow, judicially-created exception to this rule in a small minority of states, including Delaware, Pennsylvania, Louisiana, Florida, and Kentucky. In Delaware, for instance, the court interpreted the legislative grant of authority to a state agency to enter into contracts and to "sue and be sued" as an express waiver of sovereign immunity, and thus allowed a mechanic's lien to attach to state-owned property. *Dep't of Cmty. Affairs & Econ. Dev. v. M. Davis & Sons,* 412 A.2d 939, 941-42 (Del. 1980). *See also American Seating Co. v. City of Philadelphia,* 256 A.2d 599 (Pa. 1969) (holding that mechanics' liens may be filed against municipal buildings held in quasi-private or for-profit capacity in Pennsylvania); *Kerr v. City of New Orleans,* 126 F. 920 (5th Cir. 1903); *City of Bradenton v. Fusillo,* 184 So. 234 (Fla. 1938); and *City of Hazard v. Duff,* 154 S.W.2d 28 (Ky. 1941). Some states, such as Illinois, allow a lien on public improvement funds, which does not attach to the improvement, and is limited to the unpaid amount. 770 ILCS 60/23.

What Is Covered

Claims covered by a Miller Act payment bond are generally awarded recovery if (1) the materials or labor were supplied in the prosecution of the contracted work, (2) the claimant was not paid, (3) the claimant had a good-faith belief the materials or labor were intended for the specified work, and (4) the Act's jurisdictional requirements are satisfied. *United States* ex rel. *Balzer Pac. Equip. Co. v. Fid. & Deposit Co. of Md.,* 895 F.2d 546, 550 (9th Cir. 1990). Such claims can include:

• labor charges, including contributions to union trust funds, 40 U.S.C. § 3133; *United States ex rel.Edward Hines Lumber Co. v. Kalady Constr. Co.,* 227 F. Supp. 1017 (N.D. Ill. 1964);

• materials used or reasonably expected to be used or consumed in the work, which does not include a contractor's capital equipment, *see United States ex rel. Sunbelt Pipe Corp. v. U.S. Fid. & Guar. Co.,* 785 F.2d 468, 470 (4th Cir. 1986);

• unpaid obligations on rental equipment, *United States* ex rel. *Carter-Schneider-Nelson, Inc. v. Campbell,* 293 F.2d 816 (9th Cir. 1961), *cert. denied,* 368 U.S. 987 (1962); [1] and

• consequential damages, including in some cases delay damages, *compare United States ex rel. Mariana v. Piracci Constr. Co.,* 405 F. Supp. 904 (D.D.C. 1975) (allowing recovery of increased costs resulting solely from delay) *with McDaniel v. Ashton-Mardian Co.,* 357 F.2d 511 (9th Cir. 1960) (distinguishing costs of labor and materials from delay damages), and in other cases not involving delay damages, reasonable profits, *see, e.g., United States ex rel. Woodington Elec. Co. v. United Pac. Ins.,* 545 F.2d 1381 (4th Cir. 1976) (finding surety liable for full price of subcontract, which included profit).

Who Is Covered

The Miller Act bonds protect material suppliers, laborers, and subcontractors with express or implied contractual relationships with the prime contractor. 40 U.S.C. § 3133. This is more accommodating than, for example, the District, where sub-subcontractors do not have lien rights. *Battista v. Horton, Myers, & Raymond,* 128 F.2d 29 (D.C. Cir. 1942). Mississippi's state law is even less protective, which excludes subcontractors by making lien rights available only to those parties in a direct contractual relationship with the owner. *MISS. CODE ANN. § 85-7-1355; Noble House, Inc. v. W&W Plumbing & Heating, Inc.,* 881 So. 2d 377, 386 (Miss. App. 2004).

Most states strike a middle ground by allowing those not in direct contractual privity with the owner, such as subcontractors, to create an unpaid balance lien upon performance of statutory notice requirements, while those in direct privity have lien rights to the full amount of the contract price. *See, e.g.,* ALA. CODE § 35-11-210. Moreover, in Florida, in addition to property owners, construction lenders are also subject to lienors' claims, through the owner, if the lender fails to disburse funds for payment that are secured by a mortgage on the property. FLA. STAT. § 713.13(7).

Notice Requirements

Under the Miller Act, those who do not have a contract directly with the prime contractor must give written notice of a claim to the prime contractor within ninety days of the last performance. *See United States ex rel. Billows Elec. Supply Co. v. E.J.T. Constr. Co.,* 517 F. Supp. 1178 (E.D. Pa. 1981), *aff'd,* 688 F.2d 827 (3d Cir. 1982), *cert. denied,* 459 U.S. 856 (1982).

The states vary as to the exact notice requirements for those not in direct privity with the owner and the consequences of failing to meet them. For instance, in Iowa, a sub-subcontractor must provide the prime contractor with written notice within thirty days of the first furnishing of labor or materials, and it loses its lien rights altogether if it fails to provide this timely notice. IOWA CODE § 572.33(1), (3) (2013). In Montana, on the other hand, if the lienor fails to give notice within twenty days, the lien is still valid, but only for the labor or materials supplied within the twenty-day period prior to the date on which notice is given. MONT. CODE ANN. § 71-3-531(2)-(3).

Recovery of Attorneys' Fees

[1] On the other hand, equipment owned by the claimant is not typically covered, because presumably it can be used for other projects.

Recovery of attorneys' fees under Miller Act is very limited, and courts generally do not allow the use of state law to recover attorneys' fees in a Miller Act dispute. *F.D. Rich Co. v. United States ex rel. Leno v. Summit Constr. Co.,* 417 U.S. 116, 127 (1974). On the other hand, Connecticut, Vermont, and Florida all allow recovery of attorneys' fees under state legislation. CONN. GEN. STAT. § 42-158i(2), 42-158j (for disputes involving private commercial and industrial construction contracts over $25,000); VT. STAT. ANN. tit. 9, §§ 4001-4009 (West 2007, Supp. 2012) (awards attorneys' fees to "substantially prevailing party" in private contract dispute); FLA. STAT. § 713.29 (2012) (court determines amount of reasonable fee for services of prevailing party's attorney, if any party is determined to prevail).

Pay-if-Paid Clauses

Finally, a practitioner must be aware of the interpretation in local jurisdictions of contract language. The Seventh Circuit recently interpreted a pay-if-paid clause in a subcontractor's contract to mean that the subcontractor had absorbed the risk of not being paid. *BMD Contractors v. Fid. & Deposit Co. of Md.,* 679 F.3d 643 (7th Cir. 2012). The court distinguished a pay-when-paid clause from what it determined in this case was a pay-if-paid clause; that is, the court read the conditional language of the clause to mean that the subcontractor would only get paid if the owner paid the contractor. Id. at 647, 649. The court held that express language transferring the risk of upstream nonpayment is not necessary to preclude the subcontractor from prevailing on a claim to the surety bond. Id. at 649. This case arose in Indiana, and similar conclusions have been reached by courts in Arizona, Maryland, and Michigan. *Id. (citing L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.,* 189 P.2d 811 (Ariz. Ct. App. 1997), *Gilbane Bldg. Co. v. Brisk Waterproofing Co.,* 585 A.2d 248 (Md. Ct. Spec. App. 1991), and *Berkel & Co. Contractors v. Christman Co.,* 533 N.W.2d 838 (Mich. Ct. App. 1995)).

Conclusion

This article serves solely as a brief summary to remind practitioners of the importance of keeping up to date on lien and bond law in the jurisdictions in which they practice. All the differences between all the jurisdictions could fill volumes. Further information in much greater detail is available in *Fifty State Construction Lien and Bond Law, Third Edition,* available from Wolters Kluwer Law & Business publishers.

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About the Author

LSchor@asm-law.com
Telephone: 202-302-7557
Web: http://www.asm-law.com/attorneys/laurence-schor

Laurence Schor concentrates his practice on all phases of public and private construction and non-construction government contracts and he has represented large and small business clients in various courts and forums across the United States. Mr. Schor served as the Assistant General Counsel for NASA Support in the office of the General Counsel, United States Army Corps of Engineers, and as an attorney at the Marshall Space Flight Center for NASA. His experience also includes claim and trial work involving submarines, surface ships and various other shipbuilding and maritime matters on behalf of major contractor's supplying ships to the U.S. Government and to private owners.