

## CRITICAL DOCUMENTS TO BE EXECUTED AND DATES TO BE OBSERVED ON CONSTRUCTION PROJECTS

### INTRODUCTION

This discussion will:

- (a) Point out **general factors** affecting a contractor's, subcontractor's or material supplier's right to payment
- (b) Put forth **time limits** to be observed in order to preserve the contractor's, subcontractor's or supplier's right to payment
- (c) Provide **checklists** that can be used and referred to as jobs progress
- (d) Provides a **timetable** that can be incorporated into the construction schedule for a job

### GENERAL FACTORS AFFECTING MECHANICS LIENS

Under Illinois law, a party to a written or oral contract can pursue its legal rights to payment by filing a lawsuit for breach of contract. In addition, if the written or oral contract is for construction work, a General Contractor or Subcontractor will also have the right to seek payment by filing, and suing to foreclose on, a mechanics lien. This right is granted under the Illinois Mechanics Lien Act for work on private property ("Private Lien Act") and the Illinois Liens Against Public Funds Act for work on public property ("Public Lien Act").

In order to have the right to enforce a mechanics lien, the requirements for filing and enforcement must be *strictly* followed in all respects. The most important of these requirements are the absolute deadlines specified in both the Private Lien Act and the Public Lien Act for the filing of a Notice of Lien and the subsequent suit to foreclose.

Failure to adhere to the respective statutory deadlines is absolutely fatal to the right of a General Contractor or Subcontractor to collect by means of enforcing it mechanics lien. As a result, the General Contractor or Subcontractor will be forced to seek payment by means of a breach of contract lawsuit, which will undoubtedly be less compelling on the non-paying party since it may drag on for several years. Therefore, it is absolutely critical that the specified time requirements are met.

The procedure for perfecting a mechanics lien differs for General Contractors, Subcontractors and Materials Suppliers. In addition, those procedures vary based on the type of property which is the subject of the work, as well as the type of customer for whom the work is being done.

### CHANGE ORDER PROCEEDURES

EXTRAS SHOULD NOT BE PERFORMED WITHOUT A WRITTEN CHANGE ORDER THAT COMPLIES WITH THE FIVE REQUIREMENTS BELOW.

A recurring issue for both General Contractors and Subcontractors is the right to payment for "extras" performed at the job that were not in the original construction contract. Illinois law requires that five (5) factors be present in order for a General Contractor or Subcontractor to be entitled to payment for the performance of "extras":

- (a) The extras must be outside the scope of the original contract;
- (b) The extras must have been ordered by the Owner;
- (c) The Owner must agree to pay for the extras, either by words or conduct;
- (d) The extras must not have been volunteered by the General Contractor or Subcontractor; and
- (e) The extras must not have been necessary to correct nonconforming work of the General Contractor or Subcontractor.

Failure to obtain written Change Orders will bar the right of the General Contractor or Subcontractor to collect for extras.

**DATES TO BE OBSERVED**  
**General Contractor's Mechanics Lien**

**Private Property**

FILING A LIEN AND BRINGING SUIT WITHIN THE 4-MONTH PERIOD MAXIMIZES THE RIGHTS OF THE GENERAL CONTRACTOR. IF THE 4-MONTH PERIOD HAS LAPSED, A CLAIM SHOULD BE FILED AND A SUIT BROUGHT TO ENFORCE THE CLAIM WITHIN THE 2-YEAR PERIOD.

When a General Contractor performs work on private property, the primary contract runs between the General Contractor and the owner of the private property ("Owner) or the agent for the Owner, such as a tenant or lessee. The law of contract and Private Lien Act control the General Contractor's right to payment. To begin preserving its mechanics lien rights, the General Contractor must file a General Contractor's Notice of Mechanics Lien Claim ("Mechanics Lien") with the Recorder of Deeds of the County in which the subject property is located.

FILING A MECHANICS LIEN CLAIM AND SUING TO ENFORCE LIEN RIGHTS WITHIN THE 4-MONTH PERIOD ENTITLES THE GENERAL CONTRACTOR TO RIGHTS WHICH ARE SUPERIOR TO THOSE OF MOST OTHER CREDITORS.

**4-Month Period:** This period applies to *either* filing of a Mechanics Lien by the General Contractor *or* commencement of an action by the General Contractor to enforce its Mechanics Lien rights. The General Contractor has four (4) months after the Completion Date to file its Mechanics Lien or file suit against the Owner to enforce its lien rights. By doing so, the General Contractor assures superiority of its claim over all other parties who may claim an interest in the subject property, including mortgagee institutions, creditors of the owner, subsequent lien claimants and subsequent purchasers of the property. Note that filing the Mechanics Lien is preferable to simply bringing suit, since filing will preserve the rights of the General Contractor in case of a mortgage foreclosure.

FILING A MECHANICS LIEN CLAIM AND SUING TO ENFORCE LIEN RIGHTS WITHIN THE 2-YEAR PERIOD ENTITLES THE GENERAL CONTRACTOR TO RIGHTS SUPERIOR TO THOSE OF THE OWNER.

**2-Year Period:** This period applies to *both* the filing of a Mechanics Lien *and* the filing of suit to enforce that Mechanics Lien. **To be entitled to any recovery under the Private Lien Act, the General Contractor must file its Mechanics Lien and bring a suit to foreclose within two (2) years of the completion of the project ("Completion Date").** Note that the Completion Date is the one on which the General Contractor rendered its final services at the subject property.

In the alternative, the General Contractor may choose not to file its Mechanics Lien at all and instead simply bring suit within the 2-Year Period. While doing so will still allow the General Contractor to proceed against the Owner for payment, it will *not* give the General Contractor's claim superiority over the rights of mortgagee institutions, subsequent buyers of the property or other parties having a claim against the property, *even if they have actual notice of the General Contractor's claim.*

**Public Property**

GENERAL CONTRACTOR THAT PERFORMS WORK ON PUBLIC PROPERTY MAY NOT FILE A NOTICE OF MECHANICS LIEN OR SUIT TO ENFORCE SAME AGAINST THE STATE OR POLITICAL SUBDIVISION FOR WHICH THE WORK WAS DONE. INSTEAD, GENERAL CONTRACTOR MUST BRING A LAWSUIT AGAINST THE GOVERNMENT ENTITY FOR WHOM THE WORK WAS DONE.

When a General Contractor performs work on public property, the primary contract runs between the General Contractor and the political subdivision that administers the property for the public. There is no "owner" for the property *per se*, but rather an obligation that runs from that government entity to the General Contractor. Under these circumstances, the General Contractor is entitled to payment out of monies set aside by the government entity for the project ("Bond"). The law of contract applies to the General Contractor's right to payment. The Illinois Liens Against Public Funds Act ("Act") does not permit the General Contractor to file a Mechanics Lien against the public property. Instead, the General Contractor will bring suit for an accounting and for the value of its Bond due to the default of the government entity.

**DATES TO BE OBSERVED**  
**Subcontractor's Mechanics Lien**

**Private Property**

THE SUBCONTRACTOR MUST GIVE NOTICE TO THE OWNER OF THE PROPERTY PRIOR TO BRINGING ITS MECHANICS LIEN. A MECHANICS LIEN MUST BE FILED THEREAFTER WITHIN THE 4-MONTH OR 2-YEAR PERIODS AS SET FORTH ABOVE FOR GENERAL CONTRACTORS.

When a Subcontractor performs work for a General Contractor engaged in improvements to private property, the primary contract runs between the Subcontractor and the General Contractor, with the underlying contract for the work running from the General Contractor to the Owner. The law of contract and the Private Lien Act apply to the Subcontractor's right to payment. To enforce its lien rights, the Subcontractor must give written notice to the Owner indicating that the Subcontractor has been working at the Property and is unpaid. The Subcontractor may then file a Subcontractor's Notice of Mechanics Lien Claim ("Mechanics Lien") with the Recorder of Deeds of the County in which the subject property is located.

THE SUBCONTRACTOR MUST GIVE 90-DAY NOTICE IN WRITING PRIOR TO BRINGING A MECHANICS LIEN AGAINST ANY PROPERTY.

**90-Day Notice:** This form of notice must be given no matter what kind of private property the Subcontractor is working on. The Subcontractor must give written notice to the Owner, the Owner's agent or the Architect, as well as any known lenders, within ninety (90) days of the Completion Date, setting forth: (i) the amount due or to become due for unpaid work; (ii) name of the Owner(s) and the lender, if known; (iii) name of the General Contractor; (iv) name of the Subcontractor; (v) what the contract was for; (vi) what was done or to be done, or what the claim is for; and (vii) a description of the premises, such as by legal description.

The 90-Day Notice must be dated and signed, but need not be made under oath. The Owner, agent or Architect, and lenders on whom 90-Day Notice must be served are those *as of the date of the giving of notice – even if those parties have changed since the date of the initial contract*. The 90-Day Notice must be served personally or by registered or certified mail, return receipt requested, delivery limited to addressee(s) only. If a husband and wife occupy the premises then the 90-Day Notice must be served on both.

Exceptions to the 90-Day Notice rule do exist however, in situations where: (a) the property in question is listed under the Torrens registration system; (b) the Owner, its agent and the Architect reside in a county other than the one in which the premises are located; (c) the Owner, its agent and the Architect cannot be found after a diligent search; or (d) the Subcontractor's claim is included in the General Contractor's statement to the Owner.

Where the Owners, its agent and the Architect do not reside in the County in which the property is located or cannot after a diligent search be found, the Subcontractor's filing of a Mechanics Lien in the office of the County Recorder is sufficient to satisfy the 90-Day Notice requirement. However, the Mechanics Lien must state that the above parties have not been found after a diligent search or do not reside in the County in which the property is located.

Under the last scenario, in which the Subcontractor's work has been included in a Sworn Statement from the General Contractor to the Owner, the Subcontractor is limited to the amount listed as an unpaid claim in the General Contractor's statement. Moreover, the amount that the Subcontractor can collect will be limited to that amount which is listed in the Sworn Statement and no greater recovery against the Owner will be allowed.

IN ADDITION TO GIVING WRITTEN 90-DAY NOTICE, THE SUBCONTRACTOR MUST GIVE WRITTEN 60-DAY NOTICE PRIOR TO BRINGING A MECHANICS LIEN AGAINST AN OWNER OCCUPIED SINGLE FAMILY RESIDENCE. **THE PRIOR RULE REQUIRING 14-DAY NOTICE IS HEREBY REVOKED.**

**60-Day Notice:** This form of notice must be given, *in addition to 90-Day Notice*, by the Subcontractor who performs work at an existing single family, owner occupied residence. The Subcontractor must give written notice to the Owner within sixty (60) days of **starting** work setting forth: (i) the name and address of the Subcontractor; (ii) the date on which the Subcontractor began work; (iii) the type of work done or to be done; (iv) the name of the General Contractor who requested the work; and (v) the following warning, in at least 10-point, bold face type:

## NOTICE TO OWNER

THE SUBCONTRACTOR PROVIDING THIS NOTICE HAS PERFORMED WORK FOR OR DELIVERED MATERIAL TO YOUR HOME IMPROVEMENT CONTRACTOR. THESE SERVICES OR MATERIALS ARE BEING USED IN THE IMPROVEMENTS TO YOUR RESIDENCE AND ENTITLE THE SUBCONTRACTOR TO FILE A LIEN AGAINST YOUR RESIDENCE IF THE SERVICES OR MATERIALS ARE NOT PAID FOR BY YOUR HOME IMPROVEMENT CONTRACTOR. A LIEN WAIVER WILL BE PROVIDED TO YOUR CONTRACTOR WHEN THE SUBCONTRACTOR IS PAID, AND YOU ARE URGED TO REQUEST THIS WAIVER FROM YOUR CONTRACTOR WHEN PAYING FOR YOUR HOME IMPROVEMENTS.

The 60-Day Notice must be served on the Owner(s) personally or by certified mail, return receipt requested, and if a husband and wife occupy the premises then the 60-Day Notice must be served on both. Notice by Certified Mail is deemed to be complete as of the time of mailing. The 60-Day Notice need not be signed, dated or be made under oath. **Failure to serve the 60-Day Notice is not fatal to the Subcontractor's claim for lien. However, late notice will prevent the Subcontractor from collecting any sums already paid by the Owner to the General Contractor on the Subcontractor's account, as in response to a General Contractor's Sworn Statement.**

### Public Property

THE PUBLIC LIEN ACT IS THE SUBCONTRACTOR'S SOLE REMEDY FOR WORK DONE AND MATERIALS SUPPLIED TO PUBLIC PROPERTY.

When a Subcontractor performs work for a General Contractor engaged in improvements to public property, the primary contract runs between the General Contractor and the political subdivision that administers the subject property for the public benefit. Thus, there is no owner of the subject property *per se*. Rather, a Subcontractor is entitled to the payment of any monies set aside by the government entity for the project ("Bond") under the law of contract and the Public Lien Act apply to the right of the Subcontractor for payment. The Act is the Subcontractor's *sole* statutory remedy when performing improvements to public property.

### State Agencies

WHEN PERFORMING IMPROVEMENTS TO PUBLIC PROPERTY ADMINISTERED BY A STATE AGENCY, THE SUBCONTRACTOR MUST GIVE NOTICE WITHIN 30 DAYS OF DATE OF COMPLETION AND BRING SUIT WITHIN 90 DAYS OF DATE OF COMPLETION TO PRESERVE ITS LIEN RIGHTS.

In order to perfect its lien rights with respect to projects for a State agency such as a department, board, commission, or any other person financing and constructing a public improvement for the benefit of the State or department, board or commission thereof, the Subcontractor must do the following:

- (a) send written notice of the Subcontractor's claim for lien within thirty (30) days of the completion of work or the date on which the claim arises, but before money is paid to the General Contractor, to the official or officials whose duty it would be to pay the original contractor (or in the alternative file suit within that time);
- (b) by registered or certified mail, return receipt requested with delivery limited to addressee only, or by delivery of written notice by personal service;
- (c) with a copy of that notice delivered to the contractor by one of the same two methods; and
- (d) bring suit against the contractor for an *accounting* within ninety (90) days of the notice date.

Like the Mechanics Lien Act, the requirements of the Act are strictly construed. The lien would not be on the improved property itself, since a lien by a private party on a public improvement would be considered void as against public policy, but rather against the funds due to the General Contractor by the particular political entity. If proper notice is given, the official responsible for paying the Subcontractor *must* withhold the claimed funds until a resolution of the dispute or running of the time for suit. Note that filing a Mechanics Lien with the Recorder of Deeds does *not* comply with the notice requirements of the Act.

### Political Subdivisions of the State

WHEN PERFORMING IMPROVEMENTS TO PROPERTY ADMINISTERED BY A COUNTY, CITY, TOWNSHIP, VILLAGE OR OTHER MUNICIPALITY, THE SUBCONTRACTOR MUST GIVE NOTICE WITHIN 30 DAYS OF DATE OF COMPLETION AND BRING SUIT WITHIN 90 DAYS OF DATE OF COMPLETION IN ORDER TO PRESERVE ITS LIEN RIGHTS.

**The steps that need to be taken by the Subcontractor to enforce and perfect its Mechanics Lien are functionally the same as the procedures set forth above.** With respect to projects for any political subdivision of the State such as a county, a city, a township, a village or other municipality, in order to perfect its lien rights the Subcontractor must:

- (a) send written notice of the Subcontractor's claim for lien within thirty (30) days of the completion of work or the date on which the claim arises, but before money is paid to the General Contractor, to the official or officials whose duty it would be to pay the original contractor (or in the alternative file suit within that time);
- (b) by registered or certified mail, return receipt requested with delivery limited to addressee only, or by delivery of written notice by personal service;
- (c) with a copy of that notice delivered to the contractor by one of the same two methods; and
- (d) bring suit against the contractor for an *accounting* within ninety (90) days of the notice date.

Like the Mechanics Lien Act, the requirements of the Act are strictly construed.

The lien would not be on the improved property itself, since a lien by a private party on a public improvement would be considered void as against public policy, but rather against the funds due to the General Contractor by the particular political entity. If proper notice is given, the official responsible for paying the Subcontractor *must* withhold the claimed funds until a resolution of the dispute or running of the time for suit. Note that filing a Mechanics Lien with the Recorder of Deeds does *not* comply with the notice requirements of the Act.

## GENERAL CONTRACTOR'S CHECKLIST

A General Contractor should make sure that the following points are followed on every job:

- (1) A full **Title Search** should be obtained on the subject property to ensure that the "owner" with whom the General Contractor is the proper contracting party. The Title Search should also reveal the proper legal description of the subject property, the presence of any pre-existing liens, the names of mortgagee institutions, and other matters that affect title. This information will come in hand later if disputes arise as to payment and a Mechanics Lien must be filed.
- (2) The **Contract** and all of its Exhibits should be reviewed by the General Contractor's Attorneys to ensure that it does not contain overly restrictive covenants or conditions, such as a waiver of lien, default provisions, a confession of judgment provision or similar language.
- (3) The General Contractor should identify **Construction Lenders** on the project and give them written notice of its participation, in turn requesting written acknowledgment from each lender that the General Contractor is on the job.
- (4) **Sworn Statements** should always be used by the General Contractor indicating that all of its Subcontractors will be paid out of the proceeds paid by the Owner. The General Contractor should require countersignature by the Owner on all Sworn Statements prior to progressing to the next stage of the project.
- (5) In order to accurately prepare Sworn Statements, the General Contractor should keep **Daily Records** of materials furnished and work performed on a project, and should require that Subcontractors and, if appropriate, Materialmen do the same and turn those records in regularly.
- (6) **Lien Waivers** should be gathered from all Subcontractors and Materialmen and given to the Owner only as to those portions of the project paid for by the Owner pursuant to Sworn Statements.
- (7) Only **Written Change Orders** should be honored by the General Contractor, and then only those containing the Owner's signature, the price for the alteration, and notice that additional materials and labor will be involved.

## SUBCONTRACTOR'S CHECKLIST

A Subcontractor should make sure that the following points are followed on every job:

- (1) A full **Title Search** should be obtained on the subject property to ensure that the "owner" with whom the General Contractor is the proper contracting party. The Title Search should also reveal the proper legal description of the subject property, the presence of any pre-existing liens, the names of mortgagee institutions, and other matters that affect title. This information will come in hand later if disputes arise as to payment and a Mechanics Lien must be filed, especially since the Subcontractor's Mechanics Lien rights are derivative of the lien rights of the General Contractor. *In other words, if the Owner of the subject property has not been correctly identified, the Subcontractor risks sacrificing its Mechanics Lien rights entirely.*
- (2) The **Contract** between the General Contractor and the owner with all Exhibits should be reviewed by the Subcontractor's Attorneys to ensure that the Subcontractor's agreement with the General Contractor does not deviate significantly from that Contract or contain overly restrictive provisions such as those set out above.
- (3) The Subcontractor should identify **Construction Lenders** on the project and give them written notice of its participation, in turn requesting written acknowledgment from each lender that the Subcontractor is on the job.
- (4) The General Contractor's **Sworn Statements** should always be reviewed by the Subcontractor to verify that the Subcontractor has been, or will be, paid from the proceeds remitted to the General Contractor by the Owner.
- (5) In order to substantiate its contributions to Sworn Statements, the Subcontractor should keep **Daily Records** of materials furnished and work performed on a project, and should require that Sub-subcontractors and Materialmen do the same and turn those records in regularly.
- (6) **Lien Waivers** should be only be delivered to the General Contractor as to those portions of the project which have been accounted for in the General Contractor's Sworn Statement to the Owner.
- (7) Only **Written Change Orders** should be honored by the Subcontractor, and then only those which contain the Owner's signature, the price for the alteration, and notice that additional materials and labor will be involved.