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THE CONSTRUCTION INDUSTRY EXPERTS

RESIDENTIAL & COMMERCIAL
PUBLIC & PRIVATE WORKS
PRIME & SUBCONTRACTORS

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Mechanic's Liens
Preliminary Notices
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Bond Claims
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Stop Notices and Bonds on Public & Private Works

The Stop Notice

While the commonly-understood Mechanic's Lien attaches to the equity in a piece of real property, the Stop Notice attaches to the funding for a particular construction project. This tool is utilized less frequently than the Mechanic's Lien, but is often a more effective method by which to collect funds you are owed because you do not have to physically foreclose upon a piece of real property. When a Stop Notice is properly prepared and served, the individual or entity holding the construction funds must set aside a sufficient amount of money to pay the amount claimed the Stop Notice, plus the cost of litigation. In some cases, a bond must accompany the Stop Notice.

Private Works Projects

Construction funds may be held by a construction

lender and/or the project owner. Stop Notice rights vary slightly, according to who the claimant has contracted with. On a private works project, anyone with Mechanic's Lien rights – e.g. the original (prime) contractor, subcontractor and material supplier – may serve the construction lender with a Stop Notice. However, prime contractors may not serve a Stop Notice on the owner of a private works project. All others who have Mechanic's Lien rights may serve a Stop Notice on a project owner.

Preparing and Serving the Private Works Stop Notice

On private works projects, both Mechanic's Liens and Stop Notices share the same Preliminary 20-Day Notice requirements. One Preliminary Notice will protect both the Mechanic's Lien and the Stop Notice. Failure to

properly prepare and serve a Preliminary Notice may invalidate your Mechanic's Lien, Stop Notice and/or Bond Claim rights.

The Stop Notice may be served via registered or certified mail, or by personal service (same as the Preliminary Notice). If served by mail, the claimant should retain the certified mailing receipts and delivery confirmation to prove the Stop Notice was served in the manner required by law.

On private works projects, a Stop Notice that is served on a construction lender must be accompanied by a bond equal to 125% of the amount claimed. If a private works Stop Notice is not accompanied by this bond, the construction lender is not required to set aside any funds.



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Timing and Deadlines

Stop Notices must be served according to the same deadlines for recording a Mechanic's Lien. Generally, a Stop Notice must be served within 90 days of the completion of the project. This deadline may be shortened if a Notice of Completion or Notice of Cessation is recorded on the project. If either of these Notices has been recorded, the deadline to serve a Stop Notice is 60 days for prime contractors or 30 days for subcontractors and material suppliers. The Stop Notice may be served sooner, however, which may help ensure that funds will be withheld. The Stop Notice attaches to funds held at the time it is served; if it is late in the project, there may be little money left.

Once the Stop Notice is served, a lawsuit must be filed to enforce it. Timing for the Stop Notice litigation differs from the Mechanic's Lien foreclosure deadline of 90 days. An action to enforce

payment under a Stop Notice may be initiated at any time after 10 days from the date the Stop Notice is served, and must be filed within 90 days after the last date that Mechanic's Lien may be recorded.

Prime contractors must record a Mechanic's Lien within 60 days after a Notice of Completion or Notice of Cessation is recorded, or 90 days after actual completion if there is no Notice of Completion or Notice of Cessation on the project. Hence, a prime contractor must file a Stop Notice enforcement action within 150 days of the date the Notice of Completion or Cessation is recorded, or 180 days after actual completion if no Notice of Completion or Cessation is recorded.

Subcontractors and material suppliers must record a Mechanic's Lien within 30 days after a Notice of Completion or Notice of Cessation is recorded, or 90 days after actual completion if there is no Notice of Completion or

Notice of Cessation on the project. Hence, a subcontractor or material supplier must file a Stop Notice enforcement action within 120 days of the date the Notice of Completion or Cessation is recorded, or 180 days after actual completion if no Notice of Completion or Cessation is recorded.

Releasing the Stop Notice

Once the claim is resolved, the claimant may need to release the Stop Notice by serving a Release of Stop Notice or Notice to Withhold. This document must be notarized.

State and Local Public Works Projects

There are a few key differences in the handling of Stop Notices on state and local public works projects.

No bond is required to enforce a Stop Notice on public works projects.

The requirement of first serving a Preliminary Notice remains the same,

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however, only those persons who do not have a direct contractual relationship with the prime contractor are required to serve a Preliminary Notice. Thus, on public works projects, first-tier subcontractors do not need to serve a Preliminary Notice. If required, the Preliminary Notice must be served in the same manner as for private works projects.

All of the deadlines for service of notices and commencement of litigation set forth in the previous section also apply to Stop Notices on public works projects.

State and local public works projects also afford contractors and material suppliers with another means of recovery, in addition to the Stop Notice. Most public works projects

have Payment and Performance Bonds in place, enabling subcontractors and material suppliers to seek recovery under the Payment Bond. (See the next section for a detailed discussion.)

As with private works, a claimant may need to release a public works Stop Notice once the claim is resolved.

Bonds: Payment and Performance

Payment and Performance Bonds are the most common form of bonds in construction litigation. Although these bonds can be used on either private works or public works projects, they are most frequently used on public works projects (most public works contracts require that a Payment Bond and a Performance Bond be in place).

If a Preliminary Notice was not served on the bond surety, a claimant must serve a written Notice to Bonding Company on the surety and the bond

principal (typically the prime contractor) within 15 days after a Notice of Completion or Notice of Cessation is recorded. If no Notice of Completion or Cessation has been recorded, the written notice may be given to the surety and to the bond principal within 75 days after actual completion of the project.

Alternatively, the Payment Bond surety may be served with the Preliminary 20-Day Notice at the same time it is served on the owner, lender, etc., as noted in the previous section.

Performance Bonds

A Performance Bond guarantees the performance of the contractor (typically the prime contractor), and is for the protection of the project owner, should the prime contractor fail to complete the project in accordance with the terms and conditions of the contract.

If the contractor is in default of the contract, the project owner can then make a demand against the Performance Bond surety to complete the

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project. The bonding company can either pay the money to the owner or hire a replacement contractor to complete the work. The bond surety's liability is usually limited to the amount of the bond.

If the Performance Bond surety company refuses to complete the project, the bonding company may then become subject to a lawsuit.

Payment Bonds

A Payment Bond protects subcontractors and material suppliers. Payment Bonds are intended to provide payment to the subcontractors and material suppliers for work performed and/or materials provided. Unpaid subcontractors and material suppliers may make a demand upon the Payment Bond surety to pay them the value of the work performed or materials supplied on the project. Note that a material supplier to a material supplier has no lien or bond rights.

As with a Performance Bond, if the Payment Bond surety refuses to pay, the claimant must then file a lawsuit to seek recovery under the Payment Bond.

Filing a Lawsuit Against the Surety Bond Company

The statute of limitations for filing a lawsuit against a surety bond company depends upon whether the project is a public works project or a private works project, and whether the bond in question is a Performance Bond or Payment Bond. The statute of limitations is often very short.

If a lawsuit is to be filed against the surety on a public works Payment Bond, the complaint may be filed at any time after the claimant has furnished the last of the labor and materials, but must be commenced before the expiration of six months after the period in which Stop Notices may be filed. This time period could be as short as 30 days plus six months (about 210 days),

or as long as 90 days plus six months (about 270 days). (The difference depends on whether or not a Notice of Completion or Cessation is recorded, reducing the time period in which claimants may serve their Stop Notice from 90 days to 30 days. See the previous section for a more information about the Stop Notice deadlines.)

Depending on the type of project, whether the bond is recorded and the nature of the bond, two different statutes of limitations may apply.

- If the Payment Bond on a private work of improvement is recorded in the proper office of the County Recorder before the work of improvement is completed, the claimant must file an action on the Payment Bond within six months after completion of the work of improvement.
- If the Payment Bond is not recorded, or the

Bonds, continued from page 4

recording occurs after work is completed, or in the wrong county, the six-month statute of limitations is no longer applicable, and the general statute of

limitations for written contracts applies, requiring a lawsuit to be filed within four years.

Important – the above

applies to private works payment bonds, and those are almost always recorded. Also, public works bonds have the six-month requirement.

Federal Public Works

Bonds are also utilized when the project is located on federally owned property. As with state-owned property, federally-owned property is considered public property. However, there are differences in the way in which a claimant may seek recovery on a federal project.

Unlike the state remedies on public works projects, there are no Stop Notice rights on federal property. The Miller Act, (40 USC §§ 3131 – 3134) provides a remedy for federal public works projects that is similar to the Payment and Performance Bond requirements on state and local public works projects.

The Miller Act requires a Payment Bond and

Performance Bond to be in place on any federal public works contract that exceeds \$100,000.

In addition to the bond claims under the Miller Act, breach of contract remedies remain available to claimants on federal public works projects. Even if a claimant does not pursue remedies under the Miller Act, that claimant is permitted to seek recovery for breach of contract in state court, regardless of the fact that work was performed on a federal project. However, if a claimant seeks to recover funds owed under the Miller Act, the lawsuit must be filed in federal court, and the claimant must seek recovery specifically under the terms of the Miller Act. This,

however, does not prevent a claimant from also seeking recovery for breach of contract in the same lawsuit in the federal court.

The Miller Act divides claimants who are entitled to recover upon a Payment Bond into two classes:

- All subcontractors, laborers, and material suppliers who deal directly with the prime contractor; and
- All subcontractors, laborers, and material suppliers who do not have a direct contractual relationship with the prime contractor but do have such a relationship with a subcontractor and who gave the statutory



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notice of their claim to the prime contractor.

Generally, third and lower-tiered subcontractors, and material suppliers who sell to a second-tier subcontractor cannot sue on a Miller Act Bond.

Unlike the Stop Notice remedy on a state or local public works project, subcontractors and material suppliers do not have a legal right to sue the federal government directly for payment. Although subcontractors and material suppliers may argue that they have some right to the funds being withheld from a prime contractor, they are only permitted to seek recovery from the prime contractor or the surety bond company that wrote the Miller Act Bond.

Notice

The Notice requirement under the Miller Act is less stringent than the Preliminary Notice required to enforce a Stop Notice or other type of bond claim. Those who have a direct contractual

relationship with the prime contractor (first-tier subcontractors) are not required to provide any notice prior to filing suit. However, second-tier subcontractors who have a direct contractual relationship with a first-tier subcontractor must give written notice within ninety (90) days after the date they last furnished labor or material under the contract.

Federal law requires that the service of the notice be done by registered or certified mail, and addressed to the prime contractor at a location where the prime contractor maintains an office or conducts his business, or the prime contractor's residence.

Labor and Materials

Under the Miller Act, labor and materials are handled differently than claims made on state or local public works projects.

Under state court rules, a subcontractor or material supplier is required to prove that the labor and/or

materials were incorporated into the work of improvement.

The Miller Act does not require that claimants prove that the materials were actually incorporated into the work of improvement. Claimants under the Miller Act are only required to prove that the materials and/or labor were furnished in the furtherance of the work. To satisfy this requirement, the claimant must convince the court that the materials and/or labor were furnished and/or supplied in good faith, under the belief that they were going to be used in the work of improvement. "Furnished" or "supplied" generally means actual delivery to the job site.

Filing Suit on a Miller Act Payment Bond

The court having jurisdiction is the federal district court in the location where the work was performed. Every action under the Miller Act Bond must be brought in the

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name of the United States for the use of the person suing. For example, if John Doe is seeking recovery under a Miller Act Payment Bond, the Plaintiff would be "United States, for the use of John Doe."

Another key difference between state and federal public works projects is that on a state or local public works project, the time period to file a lawsuit to enforce a Payment Bond claim commences on the

date the project is completed. However, on federal public works projects, the time period for claims under the Miller Act begins to run on the date the claimant last furnished labor and/or materials to the project.

Subcontractors and material suppliers must keep track of their own deadlines once they have completed their portion of work for the project. Whether project is

complete is irrelevant; the clock starts ticking when you are done furnishing labor or materials.

Under the Miller Act, lawsuits against the surety to collect on a Payment Bond must be filed after the expiration of 90 days from the date the claimant last performed labor or supplied materials, but not later than one year after the last date the claimant provided labor and/or materials to the project.

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About Construction Commando

With a paralegal background, and nearly a lifetime spent in the construction industry, Suzanne Ervine is uniquely poised to assist contractors in handling their own legal and financial affairs.

Suzanne is a bonded Legal Document Assistant and a practicing freelance Paralegal. She established Construction Commando to provide affordable, quality legal document services to contractors who choose to handle their own legal matters without a lawyer.

Construction Commando's services can be tailored to fit your specific needs, whether you just need a contract, lien or release form, or want an experienced legal professional to take you through the entire process, handling all document preparation, official filing & recording, and service of process on your behalf.

Together with her husband Roger, Suzanne also owns and manages Fidelity Electric, a full-service residential and commercial electrical contracting company.

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Stop Notice Flow Chart—Private Works (Subcontractors & Material Suppliers)

Before Starting Work—Gather the following information:

- The legal description of the property (map book and page number, Assessor's Parcel Number, etc.); if this information is unavailable, a good street address should be sufficient;
- The name of the owner and the extent of the owner's interest in the property;
- Whether the owner is the one who is requesting the improvement; if not, what is the interest of the person requesting it, and are there any others who claim an interest in the property (e.g. lenders, landlords, tenants, etc.);
- The name and address of the construction lender or other holder of construction funds (if any); and
- The name and address of any Payment Bond surety.

Upon Commencement of the Work

Within twenty (20) days of starting work, serve a Preliminary Notice on the owner (if the contract is for tenant improvements, serve the Notice on both the tenant and the landlord), construction lender or other holder of construction funds, Payment Bond surety and the prime contractor.

Upon Completion of Your Portion of the Work

Provide notice that you are unpaid to any Payment Bond surety.

Upon Completion of the Project: Did owner record a Notice of Completion or Notice of Cessation?

YES

NO

If Owner **has** recorded a Notice of Completion or Notice of Cessation:

- You may serve a Stop Notice at any time after you have stopped work; your Stop Notice must be served within 30 days of the date the Notice of Completion/Cessation was recorded.
- Serve (in the same manner as a Preliminary Notice) a Stop Notice on the owner and serve a Bonded Stop Notice on a construction lender or anyone holding funds.
- If a Payment Bond has been recorded with the County Recorder, serve the Stop Notice on the surety that wrote the Payment Bond.

If Owner **has not** recorded a Notice of Completion or Notice of Cessation, you may serve a Stop Notice at any time after you have stopped work; but it must be served within 90 days of any of the following:

- The project is actually completed, or
- Labor ceases and owner/agent uses work of improvement, or
- Owner or agent accepts work of improvement, or
- Labor ceases for a continuous period of 60 days

Serve (in the same manner as a Preliminary Notice) a Stop Notice on the owner and serve a Bonded Stop Notice on a construction lender or anyone holding funds. If a Payment Bond has been recorded with the County Recorder serve the Stop Notice on the surety that wrote the Payment Bond.

File Lawsuit to Enforce Stop Notice

If a Notice of Completion or Cessation **has** been recorded, subcontractors and materials suppliers must file a Stop Notice enforcement action within 120 days of the date the Notice was recorded.

File Lawsuit to Enforce Stop Notice

If a Notice of Completion or Cessation **has not** been recorded, subcontractors and materials suppliers must file a Stop Notice enforcement action within 180 days of the date any of the above acts occurred.

Stop Notice Flow Chart—State & Local Public Works (Subcontractors & Material Suppliers)

Before Starting Work—Gather the following information:

- The legal description of the property (map book and page number, Assessor’s Parcel Number, etc.); if this information is unavailable, a good street address should be sufficient;
- The name and address of the public entity contracting for the project, and the name of the appropriate contact person;
- The name and address of any Payment Bond surety.

Upon Commencement of the Work

If you are a first-tier, listed subcontractor, the public entity is aware that you are working on the project and no Preliminary Notice is required. Within twenty (20) days of starting work, all other subcontractors and material suppliers must serve a Preliminary Notice on the public entity, Payment Bond surety and the prime contractor.

Upon Completion of Your Portion of the Work

Provide notice that you are unpaid to any Payment Bond surety.

Upon Completion of the Project: Did the public entity record or issue a Notice of Acceptance, or record a Notice of Completion or Notice of Cessation?

YES

NO

If the public entity **has** recorded or issued a Notice of Acceptance, or recorded a Notice of Completion or Notice of Cessation:

- You may serve a Stop Notice at any time after you have stopped work; your Stop Notice must be served within 30 days of the date the Notice of Acceptance/Completion/Cessation was issued or recorded.
- Serve (in the same manner as a Preliminary Notice) a Stop Notice on the public entity.

If the public entity **has not** recorded or issued a Notice of Acceptance, Notice of Completion or Notice of Cessation, you may serve a Stop Notice at any time after you have stopped work; but it must be served within 90 days of any of the following:

- The project is actually completed, or
- Labor ceases and owner/agent uses work of improvement, or
- Owner or agent accepts work of improvement, or
- Labor ceases for a continuous period of 30 days on a contract awarded under the State Contract Act.

Serve (in the same manner as a Preliminary Notice) a Stop Notice on the public entity.

File Lawsuit to Enforce Stop Notice

If a Notice of Completion or Cessation **has** been recorded, subcontractors and materials suppliers must file a Stop Notice enforcement action within 120 days of the date the Notice was recorded.

File Lawsuit to Enforce Stop Notice

If a Notice of Completion or Cessation **has not** been recorded, subcontractors and materials suppliers must file a Stop Notice enforcement action within 180 days of the date any of the above acts occurred.