

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

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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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