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PROTECTING YOUR RIGHTS WHEN YOU ARE NOT GETTING PAID LIENS, BONDS AND CONTRACT FUNDS

Contributed by Peterson • Dymond • Reagor, LLP, a Rocky Mountain Chapter IEC Industry Partner

There are at least three collection options a contractor should consider if it is not getting paid for the work it performed on a project. You can file a mechanics' lien, assert a claim against the surety bond, or assert a claim against the holder of earned contract funds. Each of these involves an "asset" that acts as collateral for the amounts due and may be in addition to your other contractual and equitable rights. These collection options may give you some negotiating leverage and, at the very least, may become your only source of recovery should the owner and/or general contractor skip town, become insolvent or file bankruptcy.

Mechanics' Liens. The Colorado Mechanics' Lien Statute allows a contractor to place a lien on the project's real property. The lien is usually for an amount equal to the labor, materials, supplies and equipment for which you have not been paid.

Three items are critical to enforcing a mechanics' lien. You must properly serve a Notice of Intent to File a Lien Statement upon the property owner and the principal contractor. You must then record a Statement of Lien with the clerk and recorder for the county where the real property is located. Finally, you must file a lawsuit with the District Court and record a Notice of *Lis Pendens* in the appropriate county.

It is critical that each of these tasks be completed properly and performed within the deadlines established by the statute. Even though a mechanic's lien can be an effective too, failure to follow the statutory deadlines and other requirements will not only result in a loss of your lien rights, but may also expose you to liability for the other side's damages, including attorneys' fees.

Payment and Performance Bonds. Under a payment bond, the surety is generally required to satisfy the claims of unpaid subcontractors, laborers and suppliers. A performance bond, on the other hand, generally obligates the surety to ensure completion of the bonded contractor's work. Surety bonds are almost always present on federal, state and local government construction projects. In that context, the parties' respective rights and obligations are primarily controlled by the federal Miller Act or Colorado's Public Works Statute. Surety bonds may be required on a private construction project, depending upon the owner's wishes. The parties' rights and obligations in the private project context are primarily controlled by the language of the bond.

With the exception of federal construction projects, there is no standard bond form. Therefore, you must evaluate your bond rights on a case-by-case basis. Here are a few guidelines that can help you go through that process. First, you should get a copy of the

bond as soon as possible and become fully familiar with the terms and conditions of the bond and any applicable statutes. Second, you must provide all required written notices to the appropriate parties within the necessary deadlines. Third, you should be prepared to submit backup documentation to the surety so it can evaluate the claim. Finally, a lawsuit to enforce your bond rights must be filed within the deadlines established by the bond and applicable statute. As with mechanics' liens, failure to strictly follow all conditions required by the bond or applicable statute will result in a loss of your bond rights.

Contract Funds. There are also a number of ways that an unpaid contractor may be able to obtain a "lien" on contract funds that are still in the possession of the general contractor, the owner or the construction lender. For example, the Colorado Mechanics' Lien Statute allows you to serve a notice of claim on the "disburser," i.e., the one who periodically releases construction funds. Once properly served, the disburser must make payments directly to you or hold the funds until the parties either settle their dispute or a court directs otherwise. The Colorado Public Works Statute allows you to place a "lien" on contract funds still in the possession of the local or state public contracting authority. Other Colorado statutes may require the general contractor to hold certain contract funds that it has received in trust for the benefit of others, such as yourself. Finally, common law may even impose a lien on earned contract funds in favor of an unpaid contractor. Each of these alternatives may require that you perform certain tasks within specific deadlines to perfect a "lien" on contract funds. Again, failure to do so will result in a loss of your rights.

The factors that impact the determination of which of these collection avenues is available, the procedures that must be followed, the deadlines that must be met, and the ultimate success of your collection efforts are too numerous to cover in this article. You are urged to consult with your legal counsel as soon as a payment dispute arises to discuss your rights, remedies and options in light of your particular circumstances.

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