



Steel Strong: Ensuring Payment with Mechanic's Liens and Payment Bond Rights

Angela M. Richie
Denise M. Motta
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GRSM50
GORDON REES SCULLY MANSUKHANI

2025 Webinar Series

- March 11th – Steel Smart: Tips for Successful Contract Negotiations for Steel Fabricators.
- April 8th – Steel Coordination: Navigating Downstream Subcontract Challenges.
- May 13th – Steel Solutions: Navigating Best Practices to Secure Payment for Change Orders.
- June 10th – Steel Defense: Shielding Against Delay and Acceleration claims in Steel Fabrication.
- July 8th – Steel Justice: Emerging Trends in Employment Litigation.
- August 12th – Steel Safe: Effective Defense Tactics for OSHA Citations.
- September 9th – Steel Shield: Overcoming Bogus Backcharge Claims.
- October 7th – Steel Precision: Optimizing Collaboration with Steel Detailers.
- November 11th – Steel Standards: Mastering the AISC Code of Standard Practice.

But Wait, There's More...

- Google “GRSM Steel Team”
- [Structural Steel | Gordon Rees Scully Mansukhani, LLP](#)

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Lien and Bond Claims 101





Making sure you get \$\$\$

Quick Reminder: NEDD

- To bring a successful lien or bond claim, remember NEDD:
 - **Notice** – pre-lien or preliminary bond claim notice is often required by statute, contract, or under the terms of the bond
 - **Entitlement** – show that you are entitled to bring your lien or bond claim (by contract, statute, under the bond, or all the above)
 - **Damages** – document your damages, and have supporting documentation ready
 - **Don't Waive Claims** – beware of lien and claim waivers

What are Lien and Bond Claims?

- **Lien Claims**

- » Encumbrance or real property for payment concerning the improvement on real property
- » Mechanic's and Materialmen's Lien laws
 - Statutory
 - Different requirements in every state
 - Principle: The owner benefited from the labor and materials, so the owner should pay

- **Bond Claims**

- Legal document that protects the rights of parties on a construction project for payment
 - » Governed by the terms of the bond – state/private projects
 - » State/Federal law if the project is public or federal

What are Lien and Bond Claims?

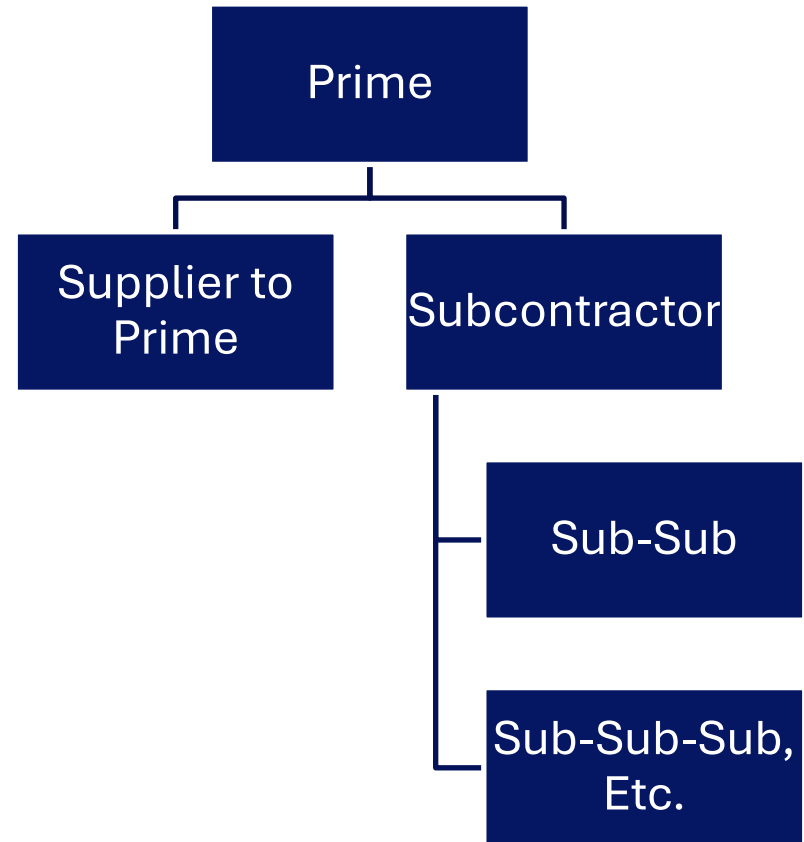
- **Lien Claims**
 - Value of the improvements to the property
 - What about amounts not yet due?
- **Public Projects**
 - Usually cannot “lien” a public project
 - Permitted in some states
 - What about partial government projects?
 - » Schools
 - » Airports
 - » Medical

Why are They Important?

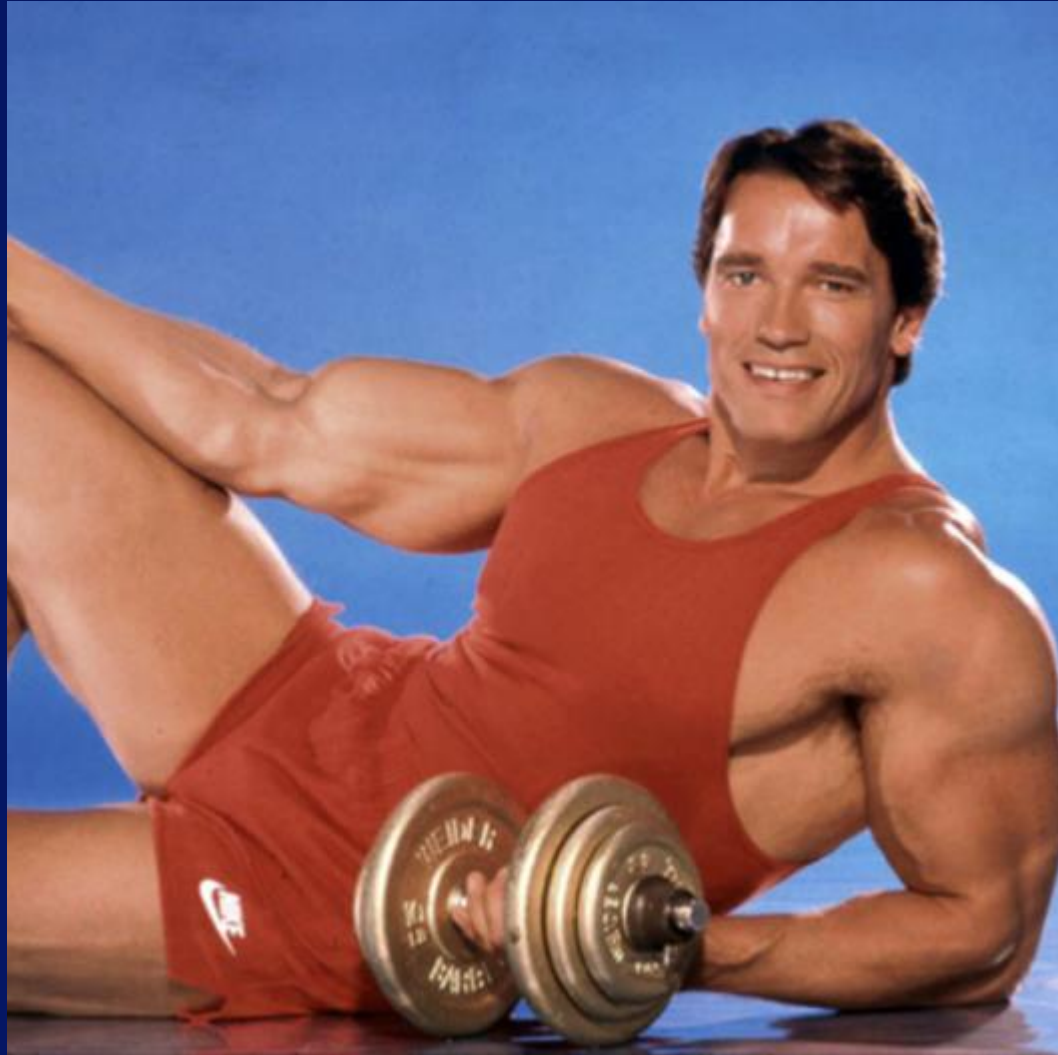
- They are your “Plan B” when project payments go awry
 - Did you review the contract? yes/no?
 - » If provided - take exception to contents or be bound by them
 - » Prior use is not necessarily determinative
 - » Offer, acceptance, NTP, and change of position (such as ordering steel) = binding subcontract



Who has Lien/Bond Rights?



Lien Claims



Filing a Lien: Preparation

- Are you a subcontractor or a prime contractor?
 - If subcontractor what tier?
 - Will position in the contractual chain be too low for liens claims?
 - » **PA**: Limited to first-tier subcontractors and material suppliers
- Is this a private project or a public project?
 - This will impact (1) what you need to do to file your lien and (2) if you can file a lien (if public project)

State of _____

MECHANIC'S LIEN

STATE OF _____
COUNTY OF _____

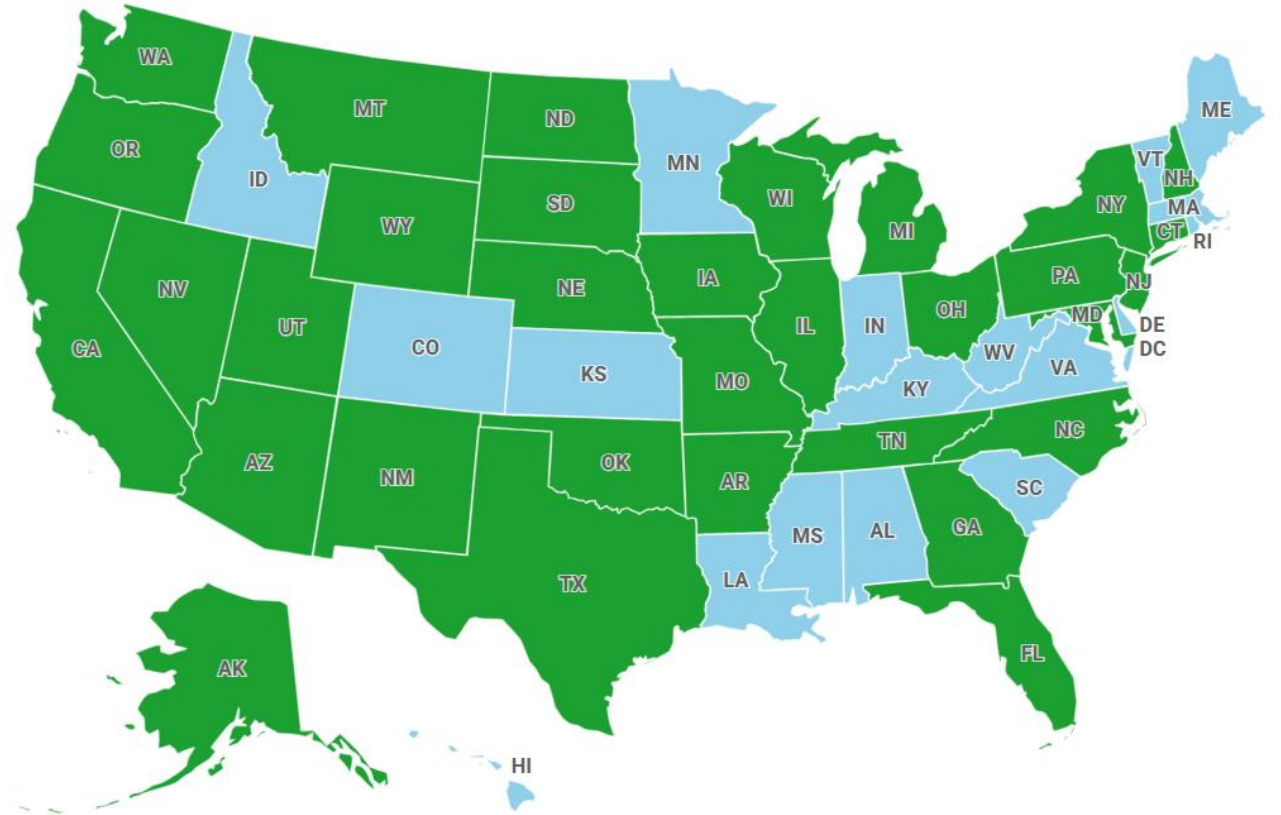
Notice is hereby given that this Mechanic's Lien, this "Lien", is filed as of the _____ day of _____, 20_____, (the "Effective Date"), by _____ [Claimant] located at _____ [Address], with the license number _____ issued on _____ [Issue date] and expiring on _____ [Expiry date], (the "Claimant"), claims a construction lien in sum of \$_____ [Claim amount] for labor, services, materials, and/or equipment furnished for

Filing a Lien: Step-by-Step Process Overview

- With some nuances between states, filing usually involves:
 - **Step #1:** Pre-Lien Notice
 - » Some states require you to provide pre-lien notice to the owner and GC to preserve your claim
 - » Timing of pre-lien notices varies by state:
 - **OH:** Notice of Furnishing within 21 days of the first day of work
 - **MD:** Notice of Intention to Claim a Lien within 120 days of the last day of work

States Requiring Pre-Lien Notice

- Alaska
- Arizona
- Arkansas
- California
- Connecticut
- Florida
- Georgia
- Illinois
- Iowa
- Maryland
- Michigan
- Missouri
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- South Dakota
- Tennessee
- Texas, and more . . .



Filing a Lien: Step-by-Step Process Overview

- **Step #2:** Filing the Claim of Lien before the State's Filing Deadline
 - » We recommend filing *at least* 1 week before the filing deadline to account for County Recorder's Office processing time
 - » Filing deadlines vary by state:
 - **FL:** 90 days from last day of work
 - **KY:** 6 months from last day of work

Filing a Lien: Step-by-Step Overview

- **Step #3:** Post-Lien Notice
 - Some states require you to provide post-lien notice to preserve your claim
 - Timing of post-lien notices varies by state:
 - » **MI:** Claim of Lien must be served on owner's designee within 15 days of recording
 - » **OH:** Lien Affidavit must be served on the owner within 30 days of recording
- **Step #4:** Filing a Lien Foreclosure Lawsuit to Enforce Your Lien
 - Filing deadlines vary by state:
 - » **MI:** 1 year from recording the claim of lien AND must record a Notice of *Lis Pendens*
 - » **NC:** 180 days after the last day of work AND must record a Notice of *Lis Pendens*
- **Important Note!** If you miss any of these deadlines, it can render your lien claim unenforceable – missing a lien deadline is usually a fatal error

Licensing Requirements

- Some states require that the business must be licensed to do business in the state to file mechanic's liens
- Some states require that the business must be licensed to do business in the state to file a lawsuit

Bond Claims



What is a Bond Claim?

- **Bond Claims**

- Provide funds sufficient to cover anticipated expenses for the project
- Claim for the amount owed
- Surety backs the financial aspect of the bond
 - » Surety will not want to come out of pocket for \$\$\$ if it can be avoided

- **Public Projects**

- Bonds usually required
- GET A COPY!
- FOIA Request

- **Private Projects**

- Bonds may be required
- GET A COPY!

Bond Form

04/26/2019

KNOW ALL MEN BY THESE PRESENTS, That we

[Redacted Name]

a Corporation organized under the laws of the State of Texas

and licensed to do business in the State of Illinois, as Principal, and Zurich American Insurance Company and
(Name of Surety)

Federal Insurance Company

and existing under the laws of the State of New York and Indiana, with authority to do business in the State of Illinois, as Surety, are held and firmly bound unto the People of the State of Illinois in the penal sum of

ONE HUNDRED SIXTY-SIX MILLION NINE HUNDRED FIFTY-FIVE THOUSAND SEVENTY-FOUR DOLLARS & 05/100 CENTS (\$166,955,074.05)

lawful money of the United States, well and truly to be paid unto said People of the State of Illinois, for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH that whereas, the said Principal has entered into a written contract with the State of Illinois acting through the Department of Transportation, for the construction of the work designated as:

[Redacted Description]

which contract is hereby referred to and made a part thereof, as if written herein at length, in and whereby the said Principal has promised and agreed to perform said work in accordance with the terms of said contract, and has promised to pay all sums of money due for any labor, materials, apparatus, fixtures or machinery furnished to such Principal for the purpose of performing such work and has further agreed to pay all direct and indirect damages to any person, firm company or corporation suffered or sustained on account of the performance of such work during the time thereof and until such work is completed and accepted; and has further agreed that this bond shall inure to the benefit of any person, firm, company or corporation to whom any money may be due from the Principal, subcontractor or otherwise for any such labor, materials, apparatus, fixtures or machinery so furnished and that suit may be maintained on such bond by any such person, firm, company or corporation for the recovery of any such money.

NOW THEREFORE, if the said Principal shall well and truly perform said work in accordance with the terms of said contract, and shall pay all sums of money due or to become due for any labor, materials, apparatus, fixtures or machinery furnished to him for the purpose of constructing such work, and shall commence and complete the work within the time prescribed in said contract, and shall pay and discharge all damages; direct and indirect, that may be suffered or sustained on account of such work during the time the performance thereof and until the said work shall have been accepted, and shall hold the People of the State of Illinois and the said Department of Transportation harmless on account of any such damages, and shall in all respects fully and faithfully comply with all provisions, conditions and requirements of said contract, then this obligation to be void; otherwise to remain in full force and effect.

TO REPORT A CLAIM WITH REGARD TO A SURETY BOND, PLEASE SUBMIT ALL REQUIRED INFORMATION TO:

Zurich American Insurance Co.
Attn: Surety Claims
1299 Zurich Way
Schaumburg, IL 60196-1056

Why Bond Claims are Required for Public Projects

- Protection of contractors, subcontractors, and other material suppliers
- Protection of the governmental entity
- Retainage added protection to the government to ensure that work is completed properly

Who Can Bring a Bond Claim?

- **Governed by the Bond and by Statute**
 - Lower-tiered subcontractors (usually beyond the second tier) may not be able to make a bond claim
- Federal vs. State Statutes Governing Bond Claims
 - Federal → Miller Act
 - State → Little Miller Acts



Federal Projects: The Miller Act

- Who can make a claim?
 - Material suppliers who contract with the general contractor
 - First-tier subcontractors who contract with the general contractor; and
 - Second-tier subcontractors and material suppliers who contract with first-tier subcontractors
- Notice Requirements:
 - Claimants not contracting directly with the GC must give written notice of nonpayment to the GC within 90 days of the claimant's last day of work under their original contract
 - Delivery: by means with verifiable delivery (e.g., certified mail, FedEx)
- Deadline to Institute a Payment Bond Legal Action:
 - 1 year from the last day of work (*but be sure to check the bond to see if it is different*)

State/Local Public Projects: Little Miller Acts

- **State Law Variations**

- Little Miller Acts typically mirror the federal Miller Act but do vary sometimes
- For example . . .
 - » **KY**
 - Does not have its own notice requirements, notice is governed by requirements in the bond
 - » **OH**
 - Allows recovery of prejudgment interest on the claim from the date when it becomes due
 - » **MN**
 - Must provide notice of claim to the surety within 120 days after the last day of work

Benefits: Lien Claims v. Bond Claims

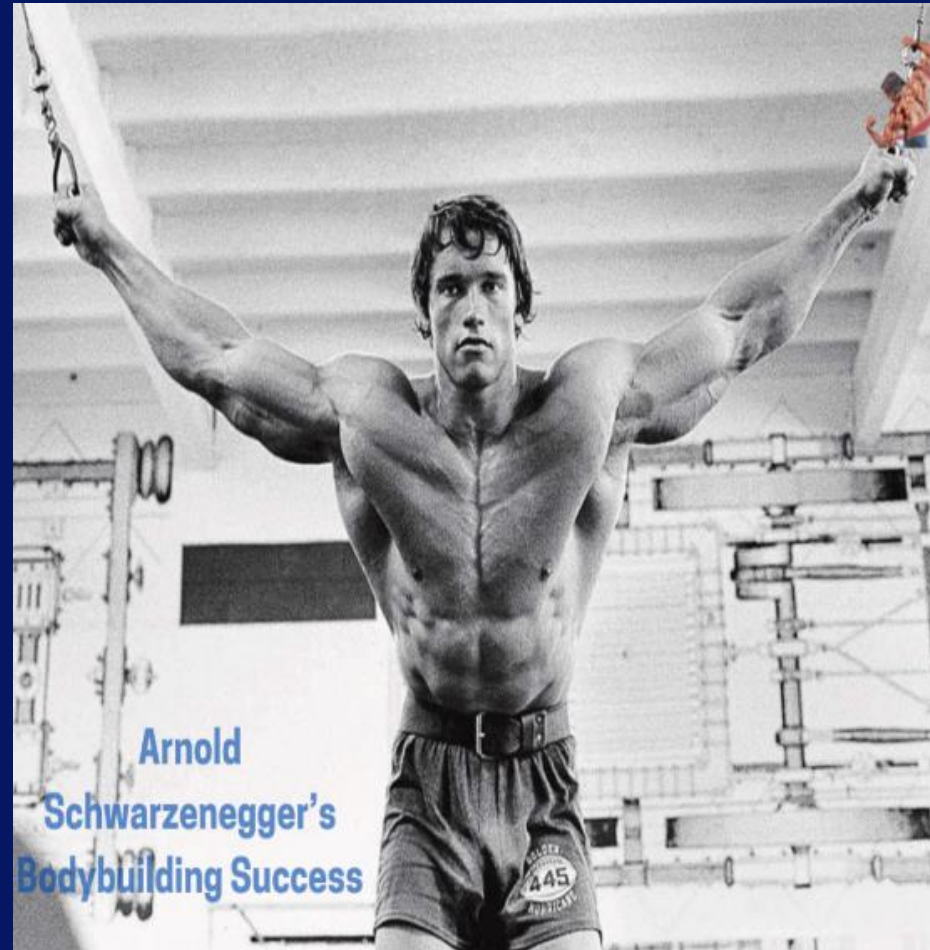
Lien Claim Benefits

- Direct and actionable, immediately
- Subcontractors can control the pacing of their lien claim, decide when to file their foreclosure suit
- Encumbrances against the property get the Owner, lender, etc.'s attention quickly
- In many states, can recover attorney's fees
- Elevates collection effort and demonstrates to other parties involved that you are serious

Bond Claim Benefits

- Security, ensures payment in the event of an upstream contractor's default
- Adds a third party you can present your claim to, the surety
- Provides a remedy for public projects where subcontractors usually cannot file mechanic's liens
- Elevates collection effort and demonstrates to other parties involved that you are serious

Protection of Rights: It Starts with Contracts



Lien Terms

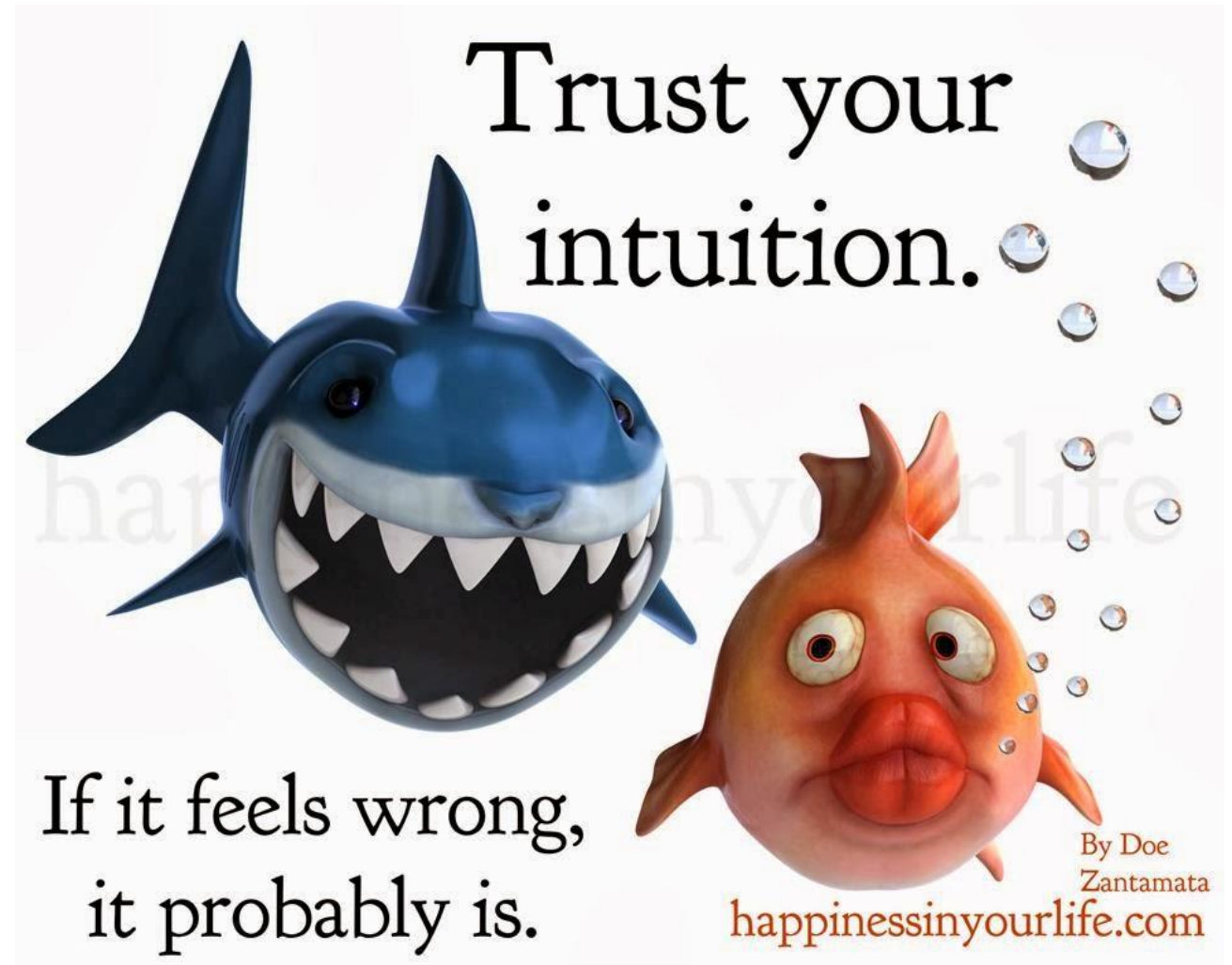
- LIEN WAIVERS: Nothing in the Contract Documents shall cause to be voided or diminished in any manner Seller's right to enforce its mechanic's lien rights or obtain payment under an applicable payment bond if Seller is not timely paid. Seller will only execute unconditional and/or final lien waivers for amounts actually received and any lien waivers shall only relate to the actual Work performed and not future Work or future payments.
- Any form or release wherein the Subcontractor purports to release the Contractor, Owner, or Design Professional is hereby qualified by the following language, whether or not the Subcontractor specifically adds the language: **“This release shall apply only to work for which payment has been received in full by Seller, and it shall not apply to retainage, unbilled changes, or amounts not yet paid.”**

Get Information

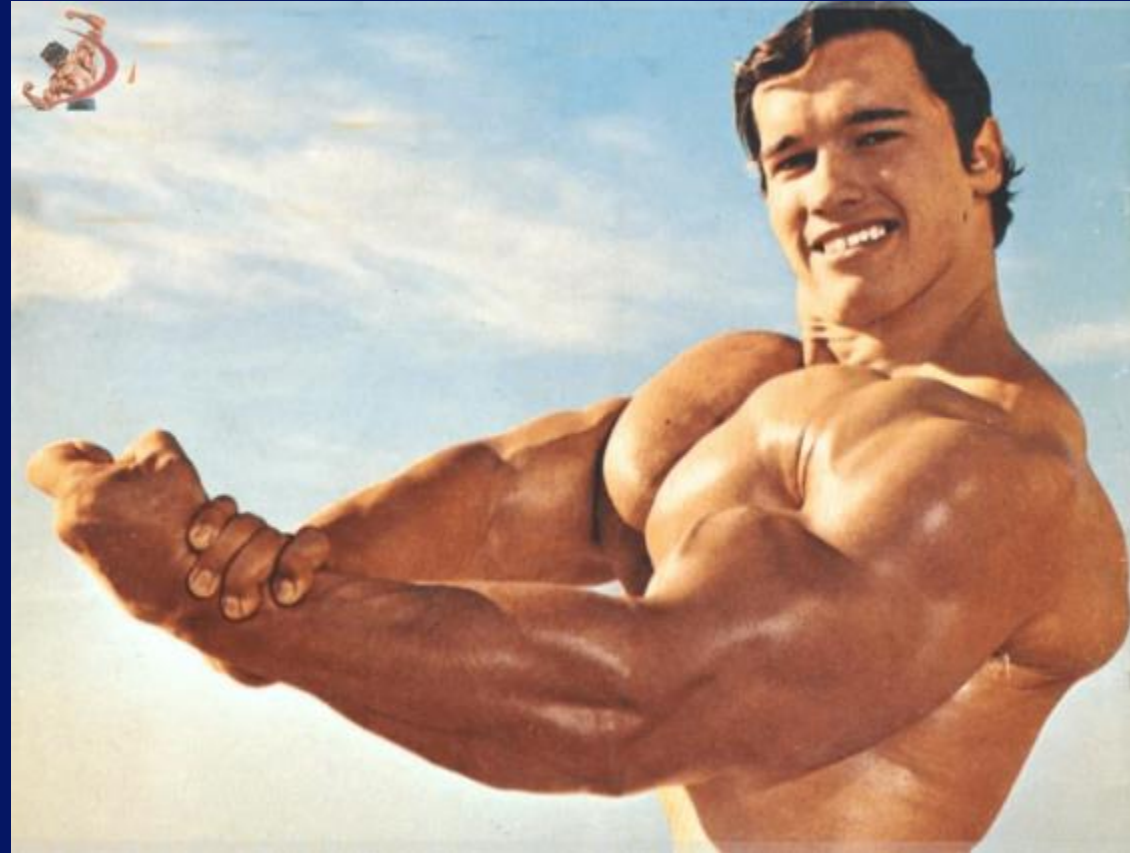
- Include in Contract:
 - “The Contractor shall furnish to the Subcontractor within 15 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic’s lien or bond rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner’s interest therein, along with copies of any payment bonds in existence.”
- Request from Contractor/Owner
 - Legal description
 - Notice of Commencement
- Check Records
 - County Clerk

Contract Considerations?

- Should you require a Payment Bond?
 - Do you know the contractor/owner?
 - Financial stability?
 - History of legal action?
 - History of bankruptcy?
 - What have you heard about them?
- DUE DILIGENCE!



Preserving Claims



Bond Requirements

- Look for Conditions:
 1. Who is a claimant?
 2. Deadline to submit claim?
 3. What needs to be provided?
 4. How is it served?
 5. Deadline to file Suit?
 6. Jurisdiction?

Otherwise this Bond shall remain in full force and effect, subject, however to the following conditions:

1. A Claimant is defined as an individual or entity who provides labor, materials or equipment for the performance of the Subcontract and who further: (a) provides such labor material or equipment pursuant to a direct contract with Subcontractor; (b) could assert a mechanic's lien for such labor, materials or equipment in the jurisdiction where such labor, materials or equipment were provided; or (c) has rights, directly or indirectly, arising out of the provision of such labor, materials or equipment against Obligeo or a surety of Obligeo, if any.

2. Subcontractor and Surety hereby jointly and severally agree with Obligeo that every Claimant as herein defined, who has not been paid in full before the expiration of a period of one hundred twenty (120) days after the date on which the last of such Claimant's work or labor was done or performed, or materials or equipment were provided by such Claimant, may sue on this Bond for the use of such Claimant, prosecute the suit to final judgment for such sum or sums as may be justly due Claimant, and have execution thereon. Obligeo shall not be liable for the payment of any costs or expenses, including attorneys' fees, of any such suit.

3. No suit or action shall be commenced hereunder by any Claimant:

a) Unless Claimant shall have given written notice to Obligeo and Surety, within one hundred twenty (120) days after such Claimant did or performed the last of its work or labor, or provided the last of its materials or equipment for which said claim is made, stating with substantial accuracy the nature and amount of its claim and the name of the party to whom such materials or equipment were provided, or for whom such work or labor was done or performed, and the date Claimant provided its last item of such labor, materials and equipment. Such notice shall be served by mailing the same by registered mail or certified mail, postage prepaid, addressed to Obligeo and Surety, at any place where an office is regularly maintained for the transaction of

business, or served in any manner in which legal process may be served in the state in which the Project is located, save that such service need not be made by a public officer.

b) After the expiration of one (1) year following the date on which (i) Subcontractor last performed work on the Subcontract or (ii) Claimant last performed work or labor or last provided materials or equipment under the Subcontract, whichever of (i) or (ii) occurs last, it being understood, however, that if any limitation embodied in this Bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the Project, or any part thereof, is situated, or in the United States District Court for the district in which the Project, or any part thereof, is situated, and not elsewhere.

4. Surety shall not be liable to Obligeo or Claimants in excess of the Bond Sum, as such Bond Sum may be adjusted as provided herein. The amount of this Bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanics' liens which may be filed of record against said improvement, whether or not claim for the amount of such lien be presented under and against this Bond.

5. Obligations of Surety shall not be affected by any changes or alterations which may be made to the terms of the Subcontract or the work to be performed, any time extensions granted for the performance of the Subcontract, or any forbearances on the part of Obligeo. Surety hereby waives notice of such extensions or forbearances, and of any changes to the Subcontract.

Are you Providing a Bond?

- Protect Yourself:
 - “To the extent Seller is required to provide Payment and/or Performance Bonds on the Project, the ability of Buyer’s or Sub-Subcontractors rights to make a claim against such Bonds shall be subject to the following conditions precedent: Buyer has made payment to Seller of all undisputed amounts owed; Buyer has promptly and properly paid all outstanding change order requests; and Buyer is not in default or material breach under the Agreement.”

Pay Attention to Payment Terms

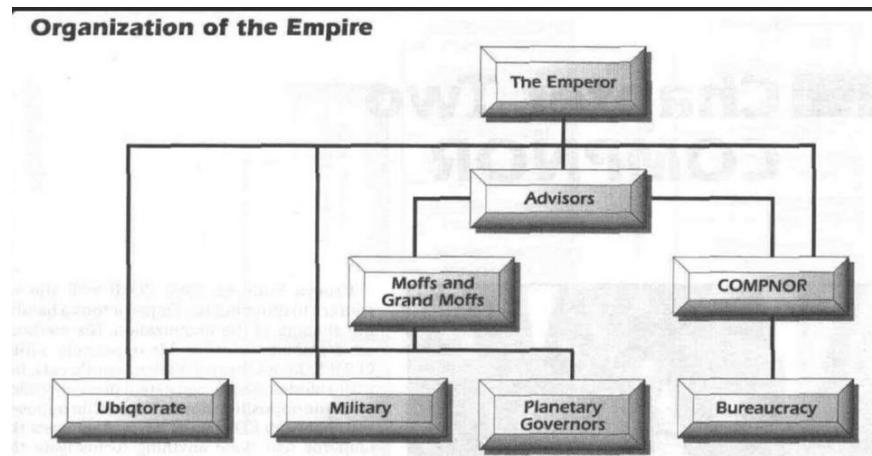
- Final payment at project completion could be well after the deadline to enforce!
 - “Provided, however, that if Owner fails to pay one of Contractor's progress payment applications that includes amounts for Subcontractor's Work, for more than sixty (60) days after such payment becomes due under the terms of the Prime Contract, and such failure is based solely on reasons entirely unrelated to Subcontractor or Subcontractor's fault or negligence, then that payment will be made within 10 days by Contractor after written demand by Subcontractor”
- When do you get paid retainage?
 - “Retainage shall be reduced to 5% of the total contract amount after 50% completion of Subcontractor's Work, and Retainage shall be paid in full within thirty (30) days after final completion of Subcontractor's Work.”
- What about raw materials?
 - “Seller shall invoice for raw materials, mill order invoices including freight charges, and supplies upon receipt of such items by Seller at its plant, and payment for such invoice shall be due from contractor within 30 days of invoice. For purposes of clarity, any pay-if-paid or pay-when-paid provisions in this agreement shall not apply to Raw Materials and Supplies.”

Who is Communicating?

- VERY Important to identify who is communicating on your behalf during the Project.
 - » Project Manager – Is the Project Manager the Designated Representative to bind you or give directions downstream?
 - » Assistant Project Manager – Make sure employees understand contractual obligations and hierarchy on who can bind
 - » Others (supervisory personnel, decisionmakers)
- Is oversight necessary?
 - » Should PMs get approval before having verbal communications?
 - » Should supervisory personnel be consulted before agreeing to certain terms, change order?
 - » Should supervisory personnel be copied on communications?

Establish a Chain of Command

- Make it clear who is signing waivers
- Establish an internal communication protocol for the project
 - » Who is permitted to sign lien waivers?
 - » Is there communication with the project team?
 - » What is the status of the project?
 - » Are there any disputes?
 - » Is there an approval process?



Bond Claim Rules

- Private Projects
 - Look to the Bond itself
 - State Statute?
- Public Projects
 - Little Miller Act Requirements

Miller Act Requirements

- Notice required 90 days of LDOW
- Must file suit within 1 year of LDOW
- Subcontractor tiers
 - First-tier subcontractors and suppliers
 - Second-tier subcontractors and suppliers to first-tier subcontractors
 - Are you too low on the tier-chain to have bond rights?

Basics of Preserving Claims

- Good change order practices
- List unpaid progress payments, pending change orders, and outstanding retainage on the lien waivers
- Incorporate a clean version of your claims tracking spreadsheet as “See Exhibit A” to your lien and claim waivers
- Insist on a place to provide this information in your contract negotiations

Lien Waivers - It's a Trap



2 Types of Waivers of Lien Rights

1. **Advanced Waiver in Subcontract**

1. Subcontractor shall not file any lien . .
2. Is it enforceable?
3. Modify it – waive to extent paid
4. Ask for Bond – will not waive right to make claim against bond

2. **Lien Waivers for Progress Payments**

1. Waive ALL CLAIMS (including pending CO claims) through date

Lien Waivers

- Broad Lien Waivers:

By this payment to the undersigned (or payment to the Owner, and cash, good and valuable consideration, and receipt and acknowledgment, of which is hereby acknowledged, the undersigned does hereby waive, release, and relinquish any and all rights, claims, demands, liens, claims for relief, causes of action and the like, whether arising at law, under a contract, in tort, in equity or otherwise, which the undersigned has now or may have had arising out of the performance of work or the furnishing of labor or materials by the undersigned through:
(date of requisition), the effective date of this Waiver And Lien Release, pursuant to Trade Contract/Subcontract

- Failure to Identify Claims:

This Waiver and Lien Release applies to all facts, acts, events, circumstances, changes, constructive or actual delays, accelerations, extra work, disruptions, interferences, and the like which have occurred, or may be claimed to have occurred, prior to the effective date hereof, excepting only any claims currently unresolved for which written notice has been provided to [REDACTED] as follows:

Except as specifically described above, and excepting retainage, if any, held under the Trade Contract/Subcontract/Purchase Order, the undersigned expressly waives all claims against [REDACTED] and the Owner as hereinabove described. This Waiver and Lien Release is also intended to apply to and protect [REDACTED] payment and performance bond surety, if any, as well as anyone claiming by or through [REDACTED], the Owner, or the surety in connection with any claim, demand, lien, claim for relief, cause of action and the like waived, released, and relinquished by the terms of this Waiver and Lien Release.

SUBCONTRACTOR/SUPPLIER
CONDITIONAL WAIVER OF LIEN AND CERTIFICATION OF PAYMENT
FOR LABOR, MATERIALS, EQUIPMENT AND SUBCONTRACTORS

NOW THEREFORE, conditioned upon actual receipt of One Hundred Eighteen Six Hundred Ninety Five Dollars and Fifty Cents (\$118,695.50) ("Payment") the undersigned shall provide the FINAL RELEASE AND WAIVER OF LIEN ("Release") for the amount of the Payment actually received. The Release shall be in the form of the attached **Exhibit 1** and shall be provided within five (5) business days from the day the Payment check clears.

conditioned upon actual receipt of C



1. Unpaid contract amount
2. Retainage
3. Unpaid change orders

Do you have a Payment Bond?

- Get a copy before you start work!!!



Don't Waive Your Claims

- Change Order Language:

D. Release

By signing this Change Order, Subcontractor agrees and certifies that any and all claims, disputes, costs, issues, requests for additional compensation or time, and/or other matters arising from, or related to the subject matter of this Change Order are hereby satisfied in full. The New Agreement Price and Change to Agreement Time are full and complete consideration for all materials and services furnished by Subcontractor on the Project and any impacts as of the date of this Change Order, and Subcontractor agrees and certifies that in consideration of [REDACTED] issuing this Change Order, Subcontractor hereby releases and discharges [REDACTED] [REDACTED] sureties in full from any and all claims, disputes, costs, issues, requests, and/or matters whatsoever relating to HRCP and Subcontractor as of the date of this Change Order, except the following:

Don't Waive Your Claims – Change Orders

- Zero Days = BAD
- WATCH \$0 Change Orders

DRAFT AIA® Document G701™ - 2001

Change Order

PROJECT (Name and address):	CHANGE ORDER NUMBER: 001	OWNER: <input type="checkbox"/>
ARS	DATE: [REDACTED]	ARCHITECT: <input type="checkbox"/>
TO CONTRACTOR (Name and address):	ARCHITECT'S PROJECT NUMBER: [REDACTED]	CONTRACTOR: <input type="checkbox"/>
[REDACTED]	CONTRACT DATE: [REDACTED]	FIELD: <input type="checkbox"/>
	CONTRACT FOR: General Construction	OTHER: <input type="checkbox"/>

THE CONTRACT IS CHANGED AS FOLLOWS:
(Include, where applicable, any undisputed amount attributable to previously executed Construction Change Directives)

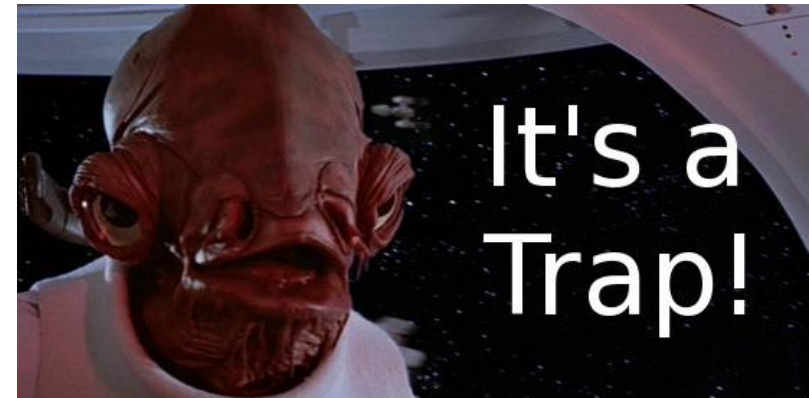
[REDACTED]

The original Contract Sum was	\$	0.00
The net change by previously authorized Change Orders	\$	0.00
The Contract Sum prior to this Change Order was	\$	0.00
The Contract Sum will be increased by this Change Order in the amount of	\$	0.00
The new Contract Sum including this Change Order will be	\$	0.00

The Contract Time will be increased by Zero (0) days.
 The date of Substantial Completion as of the date of this Change Order therefore is [REDACTED]

Don't Waive Your Claims

- Accept payment =waiver?
- Change Order Waivers
- Fail to modify lien waivers = waived claims?
- Contract language
- Missed deadlines for lien and bond claims
- Failed to timely start dispute resolution procedures



Don't Waive Your Claims – Change Orders

- Reserve your claims:
 - » This change order constitutes compensation for the cost of the work listed in this change order, but does not constitute a settlement of the time extension sought by Steel Fabricator, and Steel Fabricator reserves its rights to pursue such time extension. Contractor disputes the time extension is warranted and reserves its rights to maintain such position.
 - » This change order constitutes compensation for the work and items specified in this change order only. The parties reserve all other rights, claims, and defenses.

No Damages for Delay Provision

- Example clause
 - If Subcontractor is delayed, the Subcontractor shall be entitled to an extension of Time. **The Subcontractor shall not be entitled to and shall make no claim for damages arising out of or relating to delays, disruptions, suspensions, accelerations, inefficiencies or impacts upon the work.**
- No Damage for Delay Clauses:
 - limits recovery to time extension
- Is Time an adequate remedy for excusable delay?
 - Delay – think of idle crane
 - Acceleration - think of sub-fab

No Damages for Delay

- Enforceable? CHECK STATE LAW
- Modify
 - Subcontractor shall be entitled to an equitable adjustment resulting from any change of schedule, acceleration, out-of-sequence work, or delay **caused by others for whom Subcontractor is not responsible.**
 - Allow recovery of direct cost

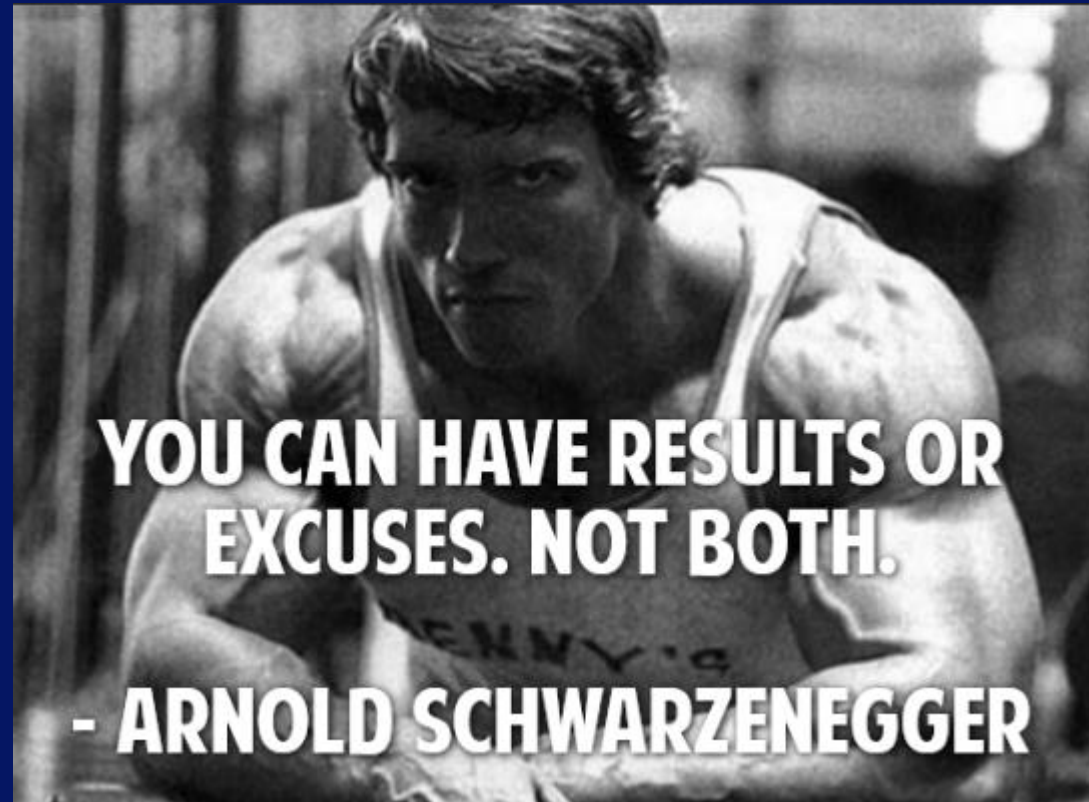
Consequential and Liquidated Damages

- Mutual waiver of consequential damages – do you want to be prevented from recovering if you are delayed/accelerated?
 - » If waiver, define consequential damages to include all damages arising from delay and inefficiencies.
 - » Unabsorbed Shop Overhead?
- Limit exposure to liquidated damages:
 - Both parties agree that the Seller's liability to liquidated damages shall not exceed 10% of the total Contract amount, that no liquidated damages will be assessed to the Seller if the Contractor has not been assessed liquidated damages by the Owner, and that in no event shall Contractor be allowed to recover liquidated and actual damages when doing so would result in a double recovery to Contractor or Owner.
 - Depends on contract amount – is it better to agree to a \$\$ amount/day?

Textura and Other Project Software Waivers

- BE CAREFUL!
 - You can't edit when you submit payment application
 - Must be addressed in the contract

Making Claims



Teeing Your Claim Up: What You Need

- Accounting of amounts due
 - Calculation of interest?
 - Fees/costs?
- Proof that invoices were submitted
- Lien waivers (last waiver for which payment was received)
- Communications regarding payment
 - Acknowledgment that amounts are owed?
 - Reasons why payment has not been made?

Mechanic's Lien Checklist

- Required Contents for Claims of Lien:
 - **#1:** First Day of Work
 - **#2:** Last Day of Work
 - **#3:** Amount of Claim/Amounts Owed
 - **#4:** Contract price
 - **#5:** Verification/Affidavit, verifying the amount of the lien claim
 - » Usually signed by an authorized agent

Note: Some jurisdictions also require submission of the outstanding balance calculation and supporting documentation. Kansas does, for example.

Important Note: Don't Let Time Run Out!

- Don't wait until the last minute!
 - Lien preparation takes time
 - » Confirming Legal Description
 - » Determining the amount of the lien
 - » Are you entitled to payment?
 - What about retainage if it is not yet due?
 - What about unapproved change orders/not yet due?
 - » Recording requirements
 - » Some states require attorney to file
 - » Clerk can reject!
 - We recommend filing *at least 1 week* before the filing deadline to account for processing time

Payment Bond Checklist

- Formal letter
 - Outlining claim
 - Summarizing payment
 - Demanding payment
- Surety acknowledgement
 - Request for information
 - Provide information requested
 - Follow up with surety

Enforcing Claims



How do You Enforce Lien and Bond Claims?

- Legal Action
 - Liens are enforced in state court
 - Bond claims on federal projects are enforced in federal court
 - Bond claims on private projects determined by terms of the bond
 - » State of federal court
- Seek to stay the lien/bond claim pending resolution of the underlying payment dispute
 - Can you arbitrate a bond claim?
 - Does the contract preclude the surety from actively participating?

14. Notwithstanding anything to the contrary contained in this Purchase Order or under Florida law, Vendor expressly agrees that any surety of the Contractor is not obligated to participate in any mediation or arbitration under Article 12. Furthermore, Vendor agrees to stay any proceeding that Vendor initiates against Contractor's surety during the pendency of any mediation or arbitration under Article 12. Finally, Vendor agrees that any attorney's fees and costs incurred in any mediation or arbitration under Article 12 shall not be taxable against Contractor's surety. Vendor acknowledges that Contractor's surety is an intended third-party beneficiary of this provision.

Implications

- Legal action is expensive
- Leverage
 - Owners do not like claims against title
 - Surety does not like the risk of having to pay
 - Owner/Surety may put pressure on contractor
 - Additional cost to the contractor to defend lien/bond claim
 - » Bond requires principal to pay legal expenses of surety
 - » Surety may make a demand for collateral/guaranty to pay

Resources



Available Resources

- GRSM
 - 50 State Matrix
- Outsource to Software company
 - Levelset
- Online Resources
 - 50 State Lien Handbook – ABA Forum on Construction Law
 - ChatGPT/AI
 - YOU NEED TO CHECK FOR ACCURACY
 - » Lien rights in Ohio are waived if notice not filed



You

is a notice of furnishing required in Ohio to file a mechanics's lien



Copilot

Yes, in Ohio, a Notice of Furnishing is generally required to file a mechanics' lien. This notice must be provided if the property owner has filed a Notice of Commencement. The Notice of Furnishing must be served on the property owner and the general contractor within the first 21 days of starting work on the project ¹ ².

If the Notice of Furnishing is not served within this period, you can still file it later, but the mechanics' lien will only cover the services performed starting from 21 days prior to the date the notice was served ².

Is there a specific project you're working on that you need help with?

Learn more

1

 levelset.com

2

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