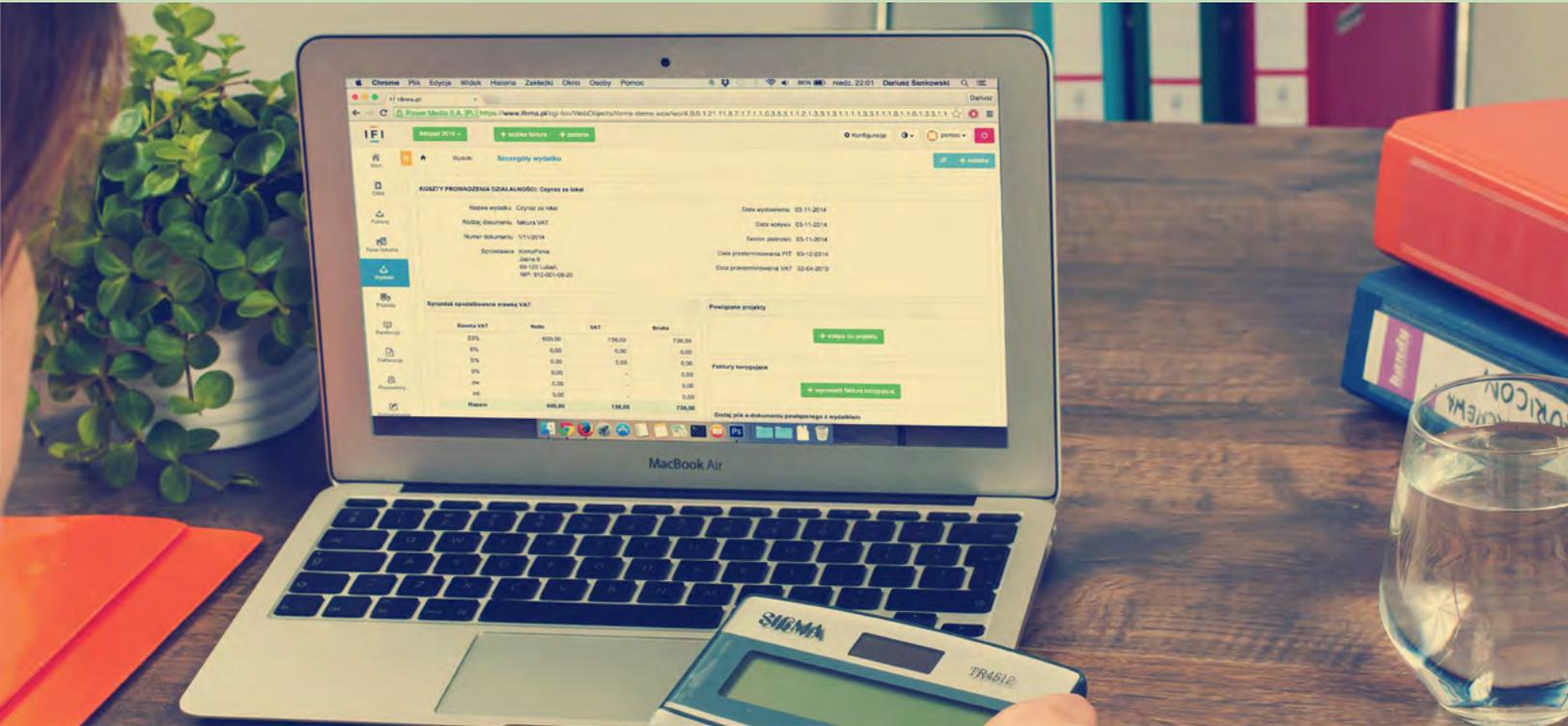


## Use Mechanic's Lien and Payment Bond Claims to Get Paid

by Timothy Woolford, Woolford Law, PC



Subcontractors must be aware of every possible legal tool to enforce payment rights. Among the most important in the subcontractor's arsenal are mechanic's liens and payment bond claims. Subcontractors must acquaint themselves with the mechanic's lien and payment bond rights available to them in their particular state. Mechanic's lien laws differ widely between states. On federal government projects, a law called the "Miller Act" sets forth all the requirements for making bond claims. Most states also have their own unique laws governing claims on payment bonds. These state laws are often referred to as "Little Miller Acts" since they are often similar to the federal Miller Act. Mechanic's lien and payment bond claims can be very powerful and properly asserting such a claim can be the difference between getting paid or not. But if you don't carefully follow the proper law, you risk losing these rights.

A subcontractor with a valid mechanic's lien has the right to force a judicial sale of the property on which their work was performed and to be paid out of the proceeds of that sale. The ability to compel a sale of property is a powerful weapon, so subcontractors must understand exactly what needs to be done in order to establish a valid mechanic's lien. While requirements differ in each jurisdiction, there are some common features that should be kept in mind. Lien laws typically require claimants to give notice of their lien claim within a certain number of days or months following completion of their work. Four- and six-month limitation periods are common, but some states have even shorter periods. These deadlines arrive quickly and are frequently missed by subcontractors. Therefore, if the customer owes you money after you finish your work, be sure to file your lien claim and provide all required notices within the required time frame.

Some states require subcontractors to some form of preliminary or advance notice of their intent to file a mechanic's lien claim to the owner of the property a certain number of days before the actual mechanic's lien claim is filed. Failing to provide the required notice can invalidate the lien. If the law of your state requires a preliminary or advance notice of some kind, it means you need to get started with the mechanic's lien process even earlier to avoid losing lien rights. This is all the more reason to carefully track receivables and exercise your lien rights quickly. The contents of the lien claim (and preliminary notice if required) vary from state to state and again, making a mistake can invalidate the lien. There are often numerous other requirements to file a mechanic's lien, such as the existence of a written contract and completing the work under that contract. It is highly recommended that you confer with experienced

construction counsel to make sure nothing is missed and that all requirements are followed and deadlines are met.

When a mechanic's lien is filed or notice of a potential claim given, many owners often immediately contact the general contractor and pressure it to pay the lien claim so that the lien (or the threat of the lien) is removed. Thus, simply filing the lien may result in payment to you without having to actually go through the entire process to force the judicial sale of the property.

Some states' mechanic's lien laws provide that subcontractors can waive their mechanic's lien rights in advance of starting work on the project. These are often referred to as up-front lien waivers. Subcontractors who agree to waive their lien rights before starting work are taking an enormous risk and giving up one of the greatest sources of security they have to enforce their payment rights. If the general contractor has provided a payment bond, waiving mechanic's lien rights is not as perilous because the payment bond provides an alternative source of security. A payment bond claim, however, does not encumber the owner's property. Therefore, the owner is not likely to be involved in a claim upon the payment bond and not likely to pressure the GC to pay the claim as it often does when a lien is filed on its property. A mechanic's lien is often the most powerful weapon that a subcontractor possesses to enforce its payment rights, so waiving that right before receiving payment should be avoided. With that said, partial lien waivers given during the course of the project in exchange for payments actually received are usually acceptable, but check the language of the partial waiver form to make sure you are not inadvertently waiving lien rights for work for which you have not been paid (such as pending change orders or other claims).

On public projects, contractors and subcontractors normally can't file mechanic's liens. This is because, as previously stated, a lien ultimately entitles the lienholder to sell the property in question. Since the government will not allow its property to be sold, public projects normally require all prime

contractors to post payment bonds. The payment bond is a guarantee that if the contractor (referred to as a "principal" under the payment bond) does not fulfill its payment obligations to subcontractors, the bonding company (or "surety") will. As with mechanic's liens, there are detailed requirements that subcontractors must follow in order to make a valid claim on the payment bond. Subcontractors usually must provide written notice to the surety within 90 days of completion of their work. If the notice does not result in payment, the subcontractor usually must file a lawsuit against the surety on the payment bond within one year of completing the work. Missing these deadlines will cause the bond claim to be dismissed. Many subcontractors miss the 90-day deadline for notice to the surety since it arrives so quickly. Their payment bond rights are forever lost as a result.

There are two sources of requirements setting forth the contents of the notice to the surety and the suit on the bond. The first is the written payment bond itself. If the project is a public project, the state's bond law, or "Little Miller Act," will apply and will contain requirements that must be followed. Again, if it is a federal project, the Miller Act applies and its requirements must be followed. It is imperative to make sure you strictly comply with all requirements in the payment bond itself and any bond law that applies. Often, both the bond itself and the state's Little Miller Act will require the amount claimed, the name of the customer, the last day of work or delivery of materials, and certain other information be included.

Subcontractors should insist on receiving copies of payment bonds before signing the subcontract. It is critical for subcontractors to know whether security to guarantee the customer's payment obligations exists in the form of a payment bond. Don't wait until a dispute develops to request the bond because your customer is not likely to respond to a request for a copy of the payment bond when there is a payment dispute. They may not even be responding to your emails or returning phone

calls at that point. Tell the customer during contract negotiations that as a condition of signing the subcontract, they must provide you with a copy of the payment bond. It's a red flag if they refuse this reasonable request.

On public projects, state and federal laws allow you to obtain a copy of the payment bond from the owner. Requirements for these requests vary from state to state. However, even on public projects, though, it is strongly recommended that you obtain a copy of the payment bond before signing the subcontract. You don't want to be at the mercy of a government bureaucrat providing you with a copy of the payment bond while the clock is running. If you wait until there is a payment dispute to request the bond, it might be too late to file the claim once you receive it.

The payment bond is not a guarantee that you will be paid no matter what. The surety providing a payment bond is entitled to assert any defenses that the principal on the bond has available under the subcontract. Thus, if your customer has legitimate grounds to withhold payment based on the subcontract terms, the surety can refuse to pay you on those grounds as well. Still, when a surety receives notice of a bond claim from a subcontractor, the surety often applies pressure on the GC to resolve the claim (pay the subcontractor or otherwise resolve the claim), so the surety is off the hook. This may be the leverage you need to get paid.

It is imperative to understand your mechanic's lien and payment bond rights. ASA has attorneys throughout the country that can assist you in navigating the complex requirements for liens and bond claims. Consult one of them, or someone else you trust, to make sure that your rights are protected. Doing so could make all the difference.

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