

ARE YOU READY FOR THE OVERHAUL OF CALIFORNIA'S LIEN AND CONSTRUCTION LAWS?

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SB293: Important Interim Changes To Public Works Prompt Payments, Retentions, Bond Claim Procedures And Lien Requirements

While we were all trying to absorb the impact of the omnibus restructuring and revision of the mechanic's lien, bond and stop notice laws that will go into effect on July 1, 2012, Senate Bill 293 was signed into law on October 9, 2011, revising some existing laws as well as ones that will not take effect until July 2012. SB 293 will shorten the time for payment of progress payments, limit the amount that can be held as retentions, impose restrictions on subcontractor's claims against payment bonds and alter the requirements for recording a mechanic's lien. SB 293's amendments will become law on January 1, 2012 and continue as amendments to the new law after July 1, 2012.

Prompt Payments

Effective January 1, 2012, a prime contractor (now referred to as a "direct contractor") or subcontractor must pay its subcontractor within seven days of receipt of any progress payment. Formerly, the time for payment of progress payments to subcontractors was ten days after receipt of the payment. This requirement is not waivable by the parties.

What should you do?

Remember that the other grounds for withholding payment remain untouched. For example the right to withhold up to 150% of payments that are the subject of a good faith dispute remains intact.

Retentions on Public Works

Beginning with contracts signed on or after January 1, 2012 and until January 1, 2016, the maximum retention on public works projects shall be 5%, unless the public agency owner makes a *pre-bid* finding that the project is “substantially complex” and includes this finding in the bid documents.

What should you do?

If the public owner contends the project is exempt from the 5% limit, careful attention must be made to determine if the pre-bid findings satisfy the requirements of the law. (See, Public Contracts Code §§7201 and 10261)

Payment Bond Claims

The former provisions of the Civil Code §3252 allowed a subcontractor who fails to timely serve the public works payment bond surety with a 20-Day Prelien Notice may redeem the bond claim by serving written notice of his claim within 15 days after the recording of a notice of completion or 75 days after completion, if a notice of completion was not recorded. Starting in 2012, the ability of claimants to rely on these provisions will be severely limited. The effect of the amendments is to limit the late notice remedy to subcontractor claims for undisputed sums and to deny it to those who seek to recover disputed claims. Implementation will be in 2 steps: First, on January 1, 2012 on public works projects, and second, on July 1, 2012, on private works projects. The requirement that owners or contractors withhold retentions until project completion has been eliminated.

What should you do?

The purpose of the prelien notice is implied by its name: It is given to put the recipient on notice that the claimant is providing services or materials that may ripen into a lien, stop notice or bond claim. A surety or owner’s actual notice of the subcontractor’s claim may overcome a “failure to serve prelien” defense. While revisions to the prompt payment statute and the reduction of public works retentions will benefit subcontractors, the loss of the safe harbor provisions relating to bonds will require subcontractors to carefully monitor completion dates on “slow pay” projects. The better practice for a subcontractor is to always demand a copy of the

payment bond and the name and address of the owner's disbursing agent (for stop notices) and to timely serve the subcontractor's 20-day prelien notice on these parties.

Service of Mechanic's Liens:

Beginning in 2011, in order to record a mechanic's lien, the claimant must provide the recorder with an affidavit of service confirming the service of a Notice of Lien on the owner or reputed owner of the property. As of January 1, 2012, the affidavit of service must identify the owner or reputed owner *and the capacity of the person or entity that was served*.

What should you do?

Contact Gary Funamura or Dan Steinberg at Trainor Fairbrook to ensure that your mechanic's lien form satisfies the new law.

What else can you expect in 2012?

The great bulk of the revisions to the mechanic's lien, stop notice, construction bond and related construction laws will go into effect on July 1, 2012. These include changes to required forms as well as procedures. Trainor Fairbrook will be conducting seminars starting in January to help you transition smoothly under the new laws.