Transit Options on the Yellow Brick Road to Payment:
Ruby Slippers or a Broomstick?

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Presented at the 2018 Midwinter Program
January 17-19, 2018
Sanibel Harbour Marriott Resort & Spa, Fort Myers FL

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I. INTRODUCTION

When advising parties to a construction project regarding the drafting of the contract documents, the best advice is to “plan for the worst.” We all know that there is no such thing as a perfect construction project, and similarly there is no such thing as a perfect construction contract. The AIA contract forms, which have been undergoing constant evolutions for more than a century, reflect an organic approach to protecting the parties’ interests in getting the project built as planned. ConsensusDOCS and other contract families are also evolutionary documents, with the goal of leading to a successfully governed project.

What the contracts do not and cannot do on their own, however, is assure that any one party or tier gets paid what it is actually entitled. Contract language is part of a toolbox of remedies, which also includes statutory and regulatory provisions, court decisions, and practice tips. The goal of this paper is to highlight many of those tools for the lawyers who advise subcontractors and suppliers, and to help counsel for owners, general contractors, and designers to better understand how lawyers representing lower-tier subcontractors are going to approach payment disputes.

II. CHANGE ORDERS

Construction projects rarely proceed without requiring changes and, as the project size increases, so does the number of changes required.1 A change “occurs when an event or condition modifies the work as defined in the contract documents.”2 Change orders generally are “accomplished in a writing,” but can also be achieved through an oral agreement or course of dealing.3 They are an agreement between the owner and general contractor or other parties, to undertake a change in work along with any change in payments or completion time.4
Understanding that the project will change, and planning for the inevitable, will help protect the interests of all parties involved.

A. Avoid Problems: Use Contract Language to Plan Ahead

Including changes clauses in contracts will help “handling contract modifications or changes and claims for extra work.”\(^5\) A changes clause will allow an “owner to unilaterally direct changes in the work without the contractor’s consent and without breaching the contract provided the change is within the general scope of the contract.”\(^6\) This clause will establish “the procedure for the owner to make a change and for the contractor to seek compensation for the changed work to be performed.”\(^7\)

1. Scope of Work Clauses

Typically, a subcontractor will want a “narrow, detailed scope of work,” while a general contractor will want a more “expansive scope-of-work clause.”\(^8\) Including a clear scope of work clause in a contract will help diminish “disputes between” parties.\(^9\) As issues arise during construction, a clear scope of work clause will help establish who is responsible for the issue, and whether it is already within the scope of his/her work. Contracts generally use the term “reasonably inferred” to determine whether a change is foreseeable and within a general contractor’s scope of work.\(^10\) However, “reasonably inferred” does not have a definite meaning and could ultimately lead to disputes.\(^11\) Some have suggested that using the phrase “incidental to work” will help parties understand the scope of work since it “at least carries some connotation of limiting the additional work so as not to commit the contractor to substantial extra work.”\(^12\) Either way, it is important for general contractors to avoid a “gap in scope (i.e., work that is included in the general contractor’s scope but did not get pulled into the subcontractor’s scope).”\(^13\) Still, there is a “reluctant acceptance in the construction industry that ‘everyone’ knows that the design” will
be changed during construction, and thus trying to write a clear scope of work clause becomes easier said than done.14

In order to avoid confusion in scope-of-work clauses, subcontractors should include in their bids a “standard list of terms” and a “project-specific” list of terms.15 These terms can fluctuate as subcontractors become more familiar with what terms have been at issue in the past and help prevent future losses.16 Definition lists “used to be common but have fallen from use in recent decades.”17 It is easy to clarify these terms “in advance with definitions, and many disputes avoided as a result.”18

2. Pass-Through Clauses

A pass-through clause “generally require[s] that the subcontractor undertake to the contractor every obligation related to the specified Work that the contractor has undertaken to the owner.”19 However, many of these clauses “also give the subcontractor the same rights against the contractor that the contractor has against the owner.”20 Pass-through clauses are necessary for general contractors to ensure that they do not expend resources that should have been provided by a subcontractor.21 Such clauses also help subcontractors readily understand their responsibilities.22 A major issue with these clauses is that the subcontract is usually drafted prior to the general contract, which means that subcontractors are unaware of the obligations they have assumed.23 Boilerplate pass-through clauses fail to take into account the individualized nature of a subcontractor’s work on a particular project and can lead to courts having to decide whether a portion of a contract passed-through to a subcontractor.24 Clear scope of work clauses tied together with individualized pass-through clauses help limit confusion when a change arises.
3. Order of Interpretation Clauses

Contracts should also have a clause that prioritizes the order of interpretation of documents.\textsuperscript{25} If a conflict in a change order arises, this clause will help determine which document is controlling.\textsuperscript{26} A phrase that has gained widespread use states that, “Among all the Contract Documents, the term or provision that is most specific or includes the latest date shall control.”\textsuperscript{27} Scope of work clauses may vary from document to document, and a prioritization of interpretation clause will help the parties determine if the work is within the original scope or if a change order is required.\textsuperscript{28} This type of provision – favoring the specific over the general and/or favoring the recent over the older, derives from two important principles of contract interpretation: \textit{lex specialis degregate generali} and \textit{lex posterior derogate leg priori}.

4. Differing Site Conditions Clauses

Differing site conditions clauses help protect general contractors from “unanticipated subsurface conditions.”\textsuperscript{29} A contract usually requires a general contractor to inspect the site.\textsuperscript{30} A claim based on a “variation from the reasonable expectations of the contractor” will require proof that:

1. the site condition was actually unknown to the general contractor; 2. the condition was unusual and could not reasonably have been anticipated by the contractor from its review of the contract documents and any independent investigation it completed; and 3. the condition was materially different from those ordinarily encountered in the area of the work and generally recognized as inhering in work of that character.\textsuperscript{31}

So long as these requirements are satisfied, a change order will be appropriate as the new work cannot be “reasonably inferred” from the contract.\textsuperscript{32}

Since “everyone knows” that the design plans will be incomplete, parties need to work on clarifying them.\textsuperscript{33} Under the rule \textit{contra preferntum}, “ambiguous plans and specifications are generally the owner’s responsibility.”\textsuperscript{34} The drafting party of the contract will be responsible for
paying on a change order so long as the non-drafting party interprets the language reasonably.\textsuperscript{35} The drafting party will be required to pay the “full and fair” amount for the extra work that needs to be completed.\textsuperscript{36} Since this leaves the drafting party at a disadvantage, drafters of contracts should pay special attention to the scope of work clauses and pass-through clauses to avoid being bound to pay for work they did not desire. When the contract is the product of give and take between the parties, as opposed to being drafted by one party, the rule construing ambiguities against the drafter does not apply.

\textbf{B. Procedural Requirements}

As explained \textit{supra}, written change orders are preferred because they do not tend to lead to litigation as frequently as verbal change orders.\textsuperscript{37} A contract should lay out the procedure for creating change orders.\textsuperscript{38} If an owner orders a change order, or something that appears to be a change order, the general contractor should take the following steps:

(i) Attempt to reach a specific agreement that the owner’s direction is a change to the work agreed upon in the contract.

(ii) Make sure the owner has its best estimate of the impact of the owner’s directions in terms of time and money.

(iii) Urge the owner to put the directions in writing. Indeed, the general contractor may be entitled to insist on something in writing if the contract calls for such a step. If the owner will not comply and confirm the directions, the general contractor should notify him that it considers the directive to be a change to the work, and provide its best estimate of the time and cost impact of the change in one or more letters or faxes to the owner.

(iv) Keep careful records of the general contractor’s performance of the changed work, all of its costs associated with the change, and the time required to perform the work.

(v) Keep the owner advised of the general contractor’s progress.

(vi) Present its detailed claim for additional compensation caused by the change at an early date.\textsuperscript{39}
Change orders frequently arise, and general contractors should be wary of waiving their protection by proceeding with a change order that is not in writing.

A general contractor can waive the argument that a change order is outside its contractual scope of work in several ways. Failure to follow the contractual procedures for change orders may lead to waiver. Even though a general contractor may feel that a change order has been ordered, it may not wish to ruin a working relationship by stopping work. Continuing work that is outside the scope of the contract could also lead to a waiver of the protections of the contract for change orders. General contractors will walk a fine line during construction, and understanding when to enforce a change order clause will be fact specific.

C. Verbal Change Orders

General contractors and subcontractors need to be wary of change orders that are not in writing. “It is often typical on a project that a subcontractor is verbally directed to perform extra work and that any extras will be addressed at the end of the project.” If a contractor receives such a request, and does not get it in writing, the contractor may have waived the right to payment by continuing to work.

When a subcontractor receives a verbal change order on a federal project, it may be more protected. A general contractor may be able to obtain an “equitable adjustment in circumstances where the owner cannot show that it was prejudiced by the lack of the writing.” On federal projects, the contracting officer and the appeals board will consider the general contractor’s claims on its merits, possibly not limiting it to just the written contract.

D. Constructive Change Orders

Not all hope is lost if a general contractor does extra work without having an explicit change order. Constructive change orders result when extra work is not ordered, but is required.
A “contractor is entitled to payment for performing extra work for the benefit of the owner if the extra work is necessitated by the conditions of the project, even if the extra work is not the result of an explicit request for extra work.” Any type of interference with performance can be held as a constructive change order.

It is difficult to recover for a constructive change order because a subcontractor must demonstrate the following:

- the work performed was not included in the original scope of work;
- all contractual or statutory notice requirements were satisfied;
- the owner/contractor required the change by order or by default, and it was not volunteered by the subcontractor; and
- the subcontractor tracked its additional costs incurred due to the change.

However, it is not best practice to rely on constructive change orders and, if a change needs to be made, general contractors should still get a written change order to ensure execution of the terms.

**E. Effective Written Change Orders**

Steve Holloway presents several steps to help subcontractors ensure that they are retaining their rights in a change order.

1. **For Owner- or General Contractor-Ordered Changes**

   - Ensure that the person ordering the change has the appropriate authority.
   - Ensure that funding is available for the change on public projects.
   - Promptly prepare an estimate of the cost to perform the change—the subcontractor may need to estimate initially and then use actual costs after the change.
   - Perform a schedule analysis of the impact of the change and ask for time if necessary.
   - Request a written change order or modification confirmation.
• Assemble backup documentation for cost of change.

2. For Other Necessary Work That Requires a Change Order

• Give timely notice to the owner or general contractor.

• Demonstrate that there has been a change in the work or manner of performance.

• Promptly prepare an estimate of the cost to perform the change—the subcontractor may need to estimate initially and then use actual costs after the change.

• Perform a schedule analysis of the impact of the change and ask for time if necessary.

• Assemble backup documentation for cost of change.

III. PAY-IF-PAID AND PAY-WHEN-PAID CLAUSES

One of the first contract clauses that attorneys for subcontractors and suppliers should look for when counseling their clients on payment-related issues are pay-if-paid and pay-when-paid clauses. These “conditions precedent” provisions have traditionally had the effect of “shift[ing] the risk of non-payment by the owner from the prime contractor to the subcontractor.” While this is the case with both pay-if-paid and pay-when-paid, the higher allocation of risk of non-payment falls on the subcontractor with the pay-if-paid clause. For these reasons, subcontractors should be leery of accepting either type of clause, and owners and general contractors should not be surprised if (or when) those subcontractors either balk at accepting them or request higher prices as a hedge against the risk.

A. Language Distinguishing Pay-If-Paid from Pay-When-Paid

While the two clauses look very similar, pay-if-paid clauses are less favorable to the subcontractor because such a clause in essence sets a “condition precedent” that the general contractor only has an obligation to pay the subcontractor if the general contractor gets paid by the
Subcontractors should be leery of words such as “condition precedent,” “assumes the risk,” “only if,” or “to the extent,” since such language is often indicative of the intent to establish a pay-if-paid provision. On the other hand as mentioned earlier, pay-when-paid is generally seen to be more representative of when the subcontractor will be paid than if it will be paid.

Alternative language incorporated into the contract stating, instead, that the performance by the subcontractor shall entitle the subcontractor to prompt payment could prevent the need to litigate to receive payment. Some states seem to be much more supportive of alternative language than having to deal with or translate the meaning of clauses.

B. Pay-If-Paid – Allocation of Risk and Applicability

Pay-if-paid clauses create the potential for a general contractor to not have to pay a subcontractor if the general contractor is not paid by the owner for the subcontractor’s work. General contractors have incorporated restrictive provisions into their subcontracts, which shift the burden of financial risk to the subcontractor. Over the years, pay-if-paid clauses have been drafted with ever more precise language that explicitly states that the parties agree that the risk of non-payment is shifted to the subcontractor. This is so because of court opinions that frown upon the draconian impact of forfeiture provisions, and because more and more states have either narrowed or eliminated general contractors’ abilities to utilize such clauses. In the states where such clauses are valid or enforced, however, subcontractors and suppliers (and their counsel) must be more vigilant when attempts are made to include such provisions.

Because pay-if-paid clauses allocate risk to subcontractors and suppliers, courts have taken a protective role in scrutinizing these clauses. In striking down a pay-if-paid clause, the California Supreme Court ruled that the “freedom to contract” was outweighed by other policies, including the protection of mechanic’s lien rights. New York’s courts have also judicially overruled pay-
if-paid provisions on the basis that they violated the state’s public policy reflected in the lien laws.  

Courts in other states, including in Maryland and Virginia, have enforced such a clause if properly drafted. A recent Maryland Court of Appeals decision permitted the general contractor to avoid delay claims by a subcontractor on the basis of properly-phrased condition precedent language in the subcontract.  

Similarly, Virginia courts have shown great deference to the rights of parties to freely contract, even when it leads to forfeiture of payment rights. The enforceability of pay-if-paid clauses is highly dependent on the jurisdiction, and on the drafting of the contract language. Thus, in large part, subcontractors and suppliers need to closely review the relevant contract language.

C. Pay-When-Paid – A Matter of Timing

By contrast, pay-when-paid clauses are viewed more favorably because they do not have the draconian result of a pay-if-paid provision. Courts have viewed pay-when-paid clauses less as a means for shifting financial risk down the construction totem pole, and rather as simply being a mechanism for determining the timing of payment. Many courts reviewing such clauses have determined that if the general contractor was not paid, then the payment will still be due to the subcontractor within a “reasonable time.” Often times the contract will have a time frame noted, such as the “Subcontractor shall be paid within seven (7) days after the general contractor receives payment . . . for the work of the subcontractor.” The purpose of defining the “reasonable time” for payment is to “protect the contractor from having to shoulder debt while making active efforts to collect payment from the owner.” Courts have generally enforced pay-when-paid clauses so long as the language in the contract did not set a condition precedent to the payment of the subcontractor. If there is an established time frame for payment, or an acknowledgment from the
subcontractor that it is aware of a credit risk of not getting paid then the court is likely to uphold the clause.  

D. States Enforcing Pay-If-Paid and/or Pay-When-Paid Clauses

Some states permit these types of clauses because they do not wish to interfere with the right to private contract, the language is sufficiently explicit, or because the clauses are strictly constructed into the contract.

The Michigan Court of Appeals upheld pay-if-paid contract language as being clearly stated and without need of interpretation. The Michigan court’s decision was based on its determination that, “[t]he contract clearly provides that all payments to the subcontractor are to be made only from equivalent payments received by [the contractor] for the work done, ‘the receipt of such payments by [the contractor] being a condition precedent to payments to the subcontractor.”

The Ohio Supreme Court similarly enforced “unambiguous language” of a pay-if-paid provision. The court held that “when a contract provides that payment by a project owner to the general contractor for work performed by a subcontractor is a condition precedent to payment by the general contractor to the subcontractor, . . . the use of the term ‘condition precedent’… unequivocally shows the intent of those parties to transfer the risk of the project owner’s nonpayment from the general contractor to the subcontractor.” If the general contractor was not paid by the owner for the work completed by the subcontractor, then the general contractor had no duty of payment to the subcontractor.

E. Some States Prohibit Pay-If-Paid and/or Pay-When-Paid Clauses

On the other hand, numerous states have elected to prevent what was deemed an inequitable shifting of the financial risk, and thus to protect subcontractors and suppliers. Rather than relying
on judicial protection alone, those states have passed statutory protections to bar such “condition precedent” clauses as against public policy.

South Carolina has statutorily decreed that performance by a subcontractor in accordance with its contract entitles it to payment from the party with whom it contracts.\textsuperscript{70} The payment by the owner to the general contractor, or the payment by the general contractor to another subcontractor or supplier, is not a condition precedent for payment to the construction subcontractor, and any agreement to the contrary is not enforceable.\textsuperscript{71} North Carolina has adopted very similar language, specifically for the benefit of subcontractors.\textsuperscript{72} North Carolina has also imposed a seven-day deadline for payment to subcontractors after receipt of payment for their work.\textsuperscript{73} No fewer than nine states have prohibited such condition precedents via either statute or court ruling.\textsuperscript{74}

\textbf{F. Cross-Over Between Pay-If-Paid and Pay-When-Paid Clauses}

In some situations, even if the pay-if-paid language is unambiguous, other clauses in the contract can establish that the pay-if-paid clause is intended to act as a pay-when-paid clause. For example, where the payment clause stated that payment by the owner to the general contractor was a condition precedent, but other clauses did not transfer the risk of the owner’s non-payment to the subcontractor, the condition precedent language only “operates to postpone [the] obligation to pay the plaintiff for a reasonable time after the plaintiff’s requisition for payment.”\textsuperscript{75}


One last consideration for subcontractors is that, even if they are located in states with protections against condition precedent language, they could have those protections yanked out from under them if they are dragged into arbitration in another state. The Federal Arbitration Act (FAA) trumps state law related to contracts unless the contract explicitly states that the parties
intend to have the state arbitration law apply.\textsuperscript{76} Similarly, a choice of law provision that might not
be enforced by a state court judge can be overlooked or ignored in an interstate arbitration because
of the FAA. When state law can be ignored or avoided, the language in the contract becomes all
the more likely to be enforced. Accordingly, attorneys representing subcontractors or suppliers
must be certain to scour the subcontract language relating to choice of law before advising the
client to sign on the dotted line.

IV. RETAINAGE

The term retainage is not widely used in the legal community and appears to be “peculiar
to the construction industry.”\textsuperscript{77} Awkwardly enough, subcontracts “rarely define the term in any
detail and sometimes fail to define when retainage is payable.”\textsuperscript{78} One easy definition is that
retainage is the amount of money withheld from payments to a general contractor or subcontractor
“in accordance with the terms of the owner-contractor agreement.”\textsuperscript{79} It is “typically released once
substantial completion is reached.”\textsuperscript{80} This practice dates back centuries and its purpose is to secure
an owner against risks presented by work done by general contractors.\textsuperscript{81} An owner will withhold
a set amount of money from a general contractor every pay period, and put it away until the work
is completed.\textsuperscript{82} Although the typical amount of retainage is ten percent,\textsuperscript{83} some states cap retainage
at five percent,\textsuperscript{84} while others cap it at a “reasonable” level.\textsuperscript{85} This money is meant to “provide
the upstream party with additional financial assurances that the lower-tier contractor will timely
complete the work.”\textsuperscript{86}

A. Escrow Accounts for Retainage

Since owners are withholding a sum of money from progress payments actually due to the
general contractor, the retainage should be in an escrow account.\textsuperscript{87} Retainage may have a
trickledown effect and lead to the general contractor retaining payments from a subcontractor who
then retains payments from a sub-subcontractor and so on down the line. Using an escrow account places “the retained funds out of the reach of creditors should the owner experience financial difficulties.”

**B. How Retainage Affects General Contractors**

General contractors are on the front line of the battle for retainage. Some have argued that retainage is outdated and does a disservice to general contractors. With retainage set at ten percent, general contractors argue that this number is far too high because “their profit margins are generally considerably less than that figure” which means that they have to operate at a loss during construction. In an attempt to offset these costs, a general contractor can retain payments to subcontractors.

Even though retainage undoubtedly benefits the owner, placing it in a separate escrow account can at least offer protection for the general contractor. Experience has shown that some owners will use the retainage fund for other projects, not appropriately separating this money from other moneys. As a general contractor, putting specific language in a contract that requires the owner to pay the retainage into an escrow can ensure payment upon completion of the project.

**C. How Retainage Affects Subcontractors**

Since owners typically retain money from general contractors, general contractors tend to “withhold a certain percentage of each subcontractor payment . . . to ensure that the subcontractor will satisfactorily complete its obligations under the contract.” Subcontractors who have retainage funds withheld, should make sure that such retainage is released at “final acceptance of the subcontractor’s work, not final acceptance of the project.” Subcontractors can negotiate a reduction in retainage as they complete work, “for instance, a reduction from 10 percent to 5 percent at 50 percent completion.” The amount of retainage to hold and when to release or
decrease it is a constant balancing test between the “contractor’s need for funds to correct any subcontractor defaults with the subcontractor’s need for funds to cover its costs.”

Several states have enacted laws to help protect subcontractors from being denied the money in retainage. States such as Arkansas and North Carolina established “maximum retainage amounts.” Other states, like Tennessee and Maryland, have allowed “the subcontractor to earn interest on the retainage.” While some states, like Indiana and Pennsylvania, have allowed “security or construction bonds to substitute for retainage.”

V. LIEN AND CLAIM RIGHTS

A mechanic’s lien gives an interest in a building to a person who furnished labor or materials for the construction or improvement of that building. Mechanic’s liens are created by statute and help general contractors and subcontractors recover for labor or materials provided. Each state has enacted its own lien laws in order to “encourage construction by assuring payment to laborers, contractors, [and] material suppliers . . . .” Since mechanic’s liens are not recognized in common law, it is important for general contractors to be familiar with their state’s mechanic’s lien statute.

A. Who Can Be a Claimant?

“[M]echanic’s lien laws remain a patchwork, with material differences between states.” The parties who can claim a mechanic’s lien varies from state to state, with some very liberal in how far the party may be removed from the actual work when bringing a claim. For example, Vermont’s statute covers “suppliers to suppliers,” or North Carolina’s statute grants liens to first-, second-, and third-tier subcontractors and suppliers. Similarly, California’s lien law allows just about any person “contributing to a work of improvement” to have a lien upon the property. On the other hand, Georgia expressly designates who can claim a lien as the following:
“... mechanics ... contractors ... architects ... foresters ... land surveyors ... subcontractors ... materialmen ... [and] machinists ...”. Mechanic’s lien laws are designed to protect workers from not getting paid, and they have generally been given a liberal interpretation. In order to claim a lien, a claimant must have provided labor and/or materials for the building in some manner. A claimant may be able to place a lien even if he/she/it worked on off-site improvements, such as work on driveways or sewer pipes in a new development. In some states, like Maryland, material suppliers who deliver materials to an off-site location can claim a lien so long as the materials were in fact incorporated into the structure, while other states may require the material to be actually delivered to the site. Some states even allow rental equipment operators to file a mechanic’s lien.

B. What Can be Subject to a Lien?

Liens are actions “essentially against the building itself.” Claimants generally seek to enforce a lien against a building to which he/she/it supplied labor or materials. Since the action is against the building, the land that the building sits on will only be “incidental,” and a claimant generally has a lesser claim to it. Buildings and other similar constructed works can be subject to liens.

However, the term “building” does not have a precise definition. Courts “generally have adhered to fundamental principles and common sense” to determine what constitutes a “building.” One court’s definition is that a “building includes any structure, designed to stand more or less permanently, and covering a space of land for use as a dwelling, storehouse, factory, shelter for beasts or some other useful purpose.” New houses or commercial properties are the classic example of a property which can be subject to a mechanic’s lien. Repairs and improvements to existing structures are also considered to be subject to a mechanic’s lien.
Other types of property subject to mechanic’s liens are condominiums, machines; wharves; bridges; improvements to explore, develop, and produce oil and natural gas; and even such things as “railroad track, rolling-stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated.”

C. Amount of Lien

A claimant asserting a lien is generally entitled to “the reasonable value of the services or materials supplied to the project or the contract price, whichever is less.” Court costs and attorneys’ fees are usually recoverable by the prevailing party if litigation is required to settle the lien.

D. Timing: Preliminary Notice and Filing

Timing can make or break a mechanic’s lien. Since mechanic’s liens are statutory beasts, strict adherence to timing requirements is expected. Even acting one day late can destroy a claimant’s right to a lien. At a minimum, a mechanic’s lien requires the claimant to include, describe, and/or identify in its notice:

- the owner and property location;
- the project;
- the contract under which work was performed, and the parties to that contract;
- the work performed or materials furnished by the claimant;
- the unpaid amount due and basis for calculation; and
- the last date work was performed, or materials were furnished to the project.

1. Preliminary Notice to Owner

Many states require a general contractor to notify an owner prior to, or at the beginning of work that it retains the right to file a lien. In the states that do not require notice, “the law may
assume that the owner is aware” that if the general contractor is not paid, a lien will be claimed and no notice will be required.\footnote{130} However, the situation can be, and usually is, different for subcontractors because “the owner is not aware of the status of accounts between the general contractor and its subcontractors” so the subcontractor will be required to “send notice of the lien so that the owner can protect itself.”\footnote{131} In California, a subcontractor is required to give notice within the first twenty days that the subcontractor furnishes labor.\footnote{132}

2. \textit{Filing a Lien}

Filing a lien may be required “in the land records of the county in which the property is located or in the appropriate county court in which the property is located.”\footnote{133} Many states have a specific timing requirement for when a lien should be filed, “usually somewhere in the range of three to six months of a claimant’s last work on a project.”\footnote{134}

In some states, a tentative lien “attaches when the work is done,” but in others the lien exists even earlier: “the moment the work on the property begins.”\footnote{135} A claimant should still be aware of his/her/its state’s laws because the lien statute may require filing with a court clerk. However, filing a mechanic’s lien needs to be perfected in a timely manner or else “it is lost.”\footnote{136} In some states, the filing of a mechanic’s lien is presumptively valid.\footnote{137} Texas exemplifies the complexity of timely filing a lien. In Texas, a claimant must file “not later than the 15\textsuperscript{th} day of the fourth calendar month after the day on which the indebtedness accrues.”\footnote{138} Most states allow ninety days after the last labor or material was provided to file a lien.\footnote{139}

\textit{E. Miller Act}

Sovereign immunity supersedes mechanic’s lien statutes. Historically, this left many “materialmen and subcontractors on federal construction work without” any protection from being left unpaid for their work.\footnote{140} Congress first tried to remedy this unfortunate situation by enacting
the Heard Act in 1894. The Heard Act gave preferential order to the government over subcontractors in recovering funds from a general contractor in contract disputes. As a result, subcontractors often found themselves with the short end of the stick, and were not able to recover since the general contractor had to satisfy its debts to the government before paying them. Congress realized the inherent problems with leaving subcontractors unpaid and set out to remedy the injustice.

In 1935, Congress passed the Miller Act. The Miller Act applies to “construction, alteration or repair of any public building or public work of the United States.” “Essentially, the purpose of the Miller Act is to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings.” Under the Act, a general contractor needs to file two bonds: a performance bond to protect the interests of the United States in getting the work completed, and a payment bond to protect “all persons supplying labor and materials in connection with the work.”

If a general contractor does not pay a subcontractor, the subcontractor can bring suit to recover the money in the payment bond. Claimants not in privity with the subcontractor or general contractor, but who still provided labor or materials may also bring a claim against the bond so long as they give notice to the subcontractor that they will be bringing the action. Generally speaking, the Miller Act guarantees payment for subcontractors through legislation since mechanic’s liens are presumptively unenforceable against the government.

**F. Little Miller Acts**

The Miller Act only applies to parties working on federal projects. Therefore, every state has enacted their own “Little Miller Act” statutes “based upon the Federal Miller Act, that
VI. PAYMENT GUARANTEES AND REMEDIES – PROMPT PAYMENT ACTS, BONDING REQUIREMENTS

A. Federal Prompt Payment Act

The Prompt Payment Act, codified as 31 U.S.C. §3901 through §3907, ensures the federal government will make timely payments to prime contractors. The Act, passed in 1982 and amended in 1988, requires government agencies to pay interest on any payments the agency fails to make by either the payment date provided in the contract or within thirty days of receipt of a “proper invoice.” The Prompt Payment Act originally only applied to prime contractors, but specific protections were extended to subcontractors on federal construction projects through the 1988 amendments.

To qualify for payment under the Prompt Payment Act’s terms, the paying party of a contract must be a government agency as defined by 5 U.S.C. §551. Section 551 defines an agency as an “authority of the government of the United States,” excluding Congress, courts, the governments of territories or possessions of the United States and military authorities. Qualifying agencies must pay their prime contractors either by the date specified in the contract or within thirty days of receipt of a proper invoice. An invoice is determined to be received upon actual receipt of an invoice, or on the seventh day after the date on which the property is actually delivered or accepted. To be considered “proper,” the invoice must contain, or be accompanied by, documentation substantiating the amount requested. Such information includes an itemized list of amounts requested related to the work specified in the contract, the amount owed to each subcontractor, the amount previously paid to each subcontractor, and any additional data or form required by the contracting officer.
If the agency fails to make a payment by the prescribed date, interest begins to accrue starting on the day after the payment due date. The rate of interest is computed at the rate of interest established by the Secretary of Treasury and published in the Federal Register. Agencies must pay interest on late payments for progress payment requests approved by the payable agency, any amount of retainage withheld after approval for release, and final payments based on completion and acceptance of all work.

The 1988 amendments to the Prompt Payment Act established specific safeguards for subcontractors working on federal construction projects. As a result, construction contracts awarded by federal agencies require prime contractors to include a payment clause in their subcontracts, which obligates the prime contractors to pay their subcontractor within seven days of receiving payment from the federal government. The payment clause also requires prime contractors to pay an interest penalty for any late payments to their subcontractor, similar to the fees imposed upon the federal government by the original Prompt Payment Act.

While the Prompt Payment Act operates as an incentive for federal agencies to pay prime contractors in a timely manner, it does not provide any enforcement mechanism to compel agencies to make payments owed. Federal courts have held that, while the Prompt Payment Act does not limit or impair any “contractual, administrative, or judicial remedies” otherwise available to prime contractors and subcontractors, it also does not create a private right of action.

B. State Prompt Payment Acts

Apart from the federal Prompt Payment Act, forty-nine states (as well as Puerto Rico) have enacted some form of prompt payment statute for publicly-funded projects. The only state not presently having a prompt payment statute for public projects is New Hampshire. Most states with prompt payment statutes require public entities to make payment to prime contractors within a
specified window of time – ranging from seven to ninety days from receipt of invoice. While the statutes vary from state to state, many include interest at a prescribed or statutory rate for late payments that mirrors the federal Act, and mandate payment to subcontractors.\textsuperscript{163} In addition to public projects, nearly two-thirds of states have enacted prompt payment statutes that cover private projects as well.

\textbf{C. Bonding}

\textit{1. Public Projects}

Materialman’s liens were recognized in early common law as a form of payment protection for persons furnishing materials and labor on construction projects.\textsuperscript{164} Unfortunately, this protection was not available for subcontractors working on government building projects, as the doctrine of sovereign immunity prevented a claim of lien from being filed on a public building.\textsuperscript{165} To provide an equivalent level of protection, Congress passed the Miller Act in 1935, to require contractors to furnish payment bonds for “the construction, alteration or repair of any public building or public work of the United States.”\textsuperscript{166} The Miller Act presently requires payment bonds for any government building contract exceeding $100,000.\textsuperscript{167} Bonds for public projects, mandated by the Miller Act, are sometimes referred to as “statutory bonds” as opposed to private bonds, which are referred to as “common law bonds.”\textsuperscript{168} Many states enacted their own statutes requiring surety bonds for public projects, referred to as “Little Miller Acts.”

\textit{2. Private Projects}

Private bonds are not required by law, and vary considerably in form, type and extent of protection.\textsuperscript{169} A private bond usually provides for joint and several liability of the principal and surety for payment of the penalty sum of the bond in the event of default.\textsuperscript{170} Unlike with statutory
bonds, the surety’s obligation under a private payment bond may be more limited, depending on the terms of the contract, the subcontract, and the language of the bond itself.

In addition, bonds purchased for public projects may be interpreted as private bonds by courts if they insure more than the statutory minimum required. In *Koch v. Construction Technology*, the Tennessee Supreme Court ruled that a subcontractor did not have to abide by the six-month filing window imposed by the state’s bond statute, since the bond at issue covered more than what a traditional statutory bond required. The court held that if a principal and surety extend rights above and beyond those contained in the statutes, the bond is characterized as a common-law (private) bond and is enforceable as written. Thus, in that particular instance, because the bond provided coverage for “all just claims for damages and injuries to property,” and not only to the statutorily-required claims for labor and materials, the notice and limitations requirements of the state bond statutes did not apply.

3. *Subguard*

Subcontractor Default Insurance provides an alternative option for contractors hoping to safeguard against subcontractor defaults. This product, frequently referred to by its trade name, “Subguard,” is an insurance product rather than a traditional bond. While surety bonds are tripartite agreements between the owner, the contractor, and the surety, Subguard insurance is an agreement between the contractor and the insurer only. Subguard policies are utilized to guaranty coverage equivalent to that as if each subcontractor had individual bonding. With a Subguard plan, the contractor pays a fixed premium rate, lower than the cost of a surety bond, but risks paying a substantial deductible in the event of a loss. The coverage generally covers consequential damages resulting from subcontractor default.
Compared to surety bonds, contractors assume greater responsibility with Subguard policies by possessing a level of control over how subcontractor defaults are handled. This level of control can result in financial reward if losses from defaults are mitigated efficiently, or this level of control can result in a heavy financial burden if the contractor suffers multiple defaults. While a Subguard policy protects contractors from subcontractor defaults, it does not protect subcontractors in the event that the contractor becomes insolvent or refuses to pay the policy. Subguard policies also do not provide coverage for second-tier subcontractors or suppliers. Therefore, while Subguard may be a comparable and perhaps appealing alternative to payment bonds, its protections are not coextensive with those afforded by a payment bond.

VII. **EQUITABLE LIENS AND TRUST FUND ACTS**

A. **Equitable Liens**

The doctrine of equitable lien and is designed to “permit one party due money from another to secure its claim by perfecting an ‘equitable’ lien in funds or property either belonging to the other person but in the hands of a third party, or otherwise owed by a third party to the other person.” The purpose behind an equitable lien is to prevent the situation where a construction lender, whose mortgage primes that of a contractor or subcontractor, is unjustly enriched by both retaining undisbursed construction loan proceeds and achieving the benefit of an improved property.

The availability of an equitable lien as a remedy and the requirements to utilize the theory of equitable lien to recover vary greatly from state to state. For a claim to be asserted utilizing an equitable lien theory, some states require that the project be completed. Other states, in keeping with a jurisprudential requirement of assertion of an unjust enrichment theory, require that there be no adequate remedy at law prior to an equitable lien claim being asserted. Other states take
the requirements to assert an equitable lien a step further and require that there be misrepresentation or wrongdoing on the part of a construction lender.  

**B. Construction Trust Fund Statutes**

A second protection that may be available, depending on the particular state, is created by a construction trust fund statute. Construction trust fund statutes “attach a trust” to monies that are to be paid to contractors and in some cases subcontractors in order to protect labor and material suppliers on construction projects. Particular applicability of the trust to a construction project is dependent upon the particular state statute. For example, in certain states, trust fund statutes only apply to public projects. In other states, trust fund statutes are only applicable to projects that require execution of a lien waiver.

As it relates to remedies available under construction trust fund statutes for misappropriation of funds, again, available remedies vary depending on the particular state’s statute. For example, in some states, there are no civil penalties for misappropriation of construction trust funds but criminal penalties exist. These states’ statutes do not provide a private cause of action to unpaid subcontractors. On the other hand, some states provide both civil and criminal penalties, up to an including attorney’s fees and interest.

**VIII. LIEN WAIVERS**

**A. What Is a Lien Waiver?**

In conventional parlance, a lien waiver is a document offered by a contractor or subcontractor which purports to release (waive) the right to file a claim of lien, in exchange for payment or some other form of consideration. The term is often used beyond this technical application, to refer to any waiver of rights by a lower tier entity in favor of a higher tier entity. Thus, even on a public project, for which no lien right exists, it is common for the party seeking
payment to be required to submit a lien waiver along with an application for payment. A subcontractor may be requested to waive lien rights either before or after construction. However, as discussed below, a waiver of mechanic’s lien rights is presumptively invalid as a matter of law or public policy.

Depending on the jurisdiction, the language of a lien waiver may vary widely. However, in virtually all usages, certain elements are likely to appear. Those elements include the name of the party seeking payment, the name of the project, the amount of payment being sought (and thus the amount of the claim right being relinquished), and the date or period of time covered by the waiver. When advising owners or contractors, lawyers should be reviewing the lien waiver forms before they are used to make sure the waivers actually serve the intended goal, whereas counsel for subcontractors and suppliers should be reviewing the waivers to be sure their clients are not unwittingly sacrificing more rights than necessary.

Typically, a subcontractor will be required to submit a partial or interim lien waiver with each progress payment application and then submit a final lien waiver with the final payment application. The primary distinction between the two is that a partial waiver specifies that the waiver covers only the claim rights up to and including the amount paid to date, whereas the final lien waiver is intended to relinquish all rights of the subcontractor for the project.

In some jurisdictions, lien waivers are not enforceable unless they are either mandated by the contract or supported by independent consideration. The case of Beebe Construction Corp. v. Circle R Co., followed by several states, held that where the parties did not have a written contract, “a waiver of a mechanic’s lien in consideration of payments made by an owner or contractor, which he is legally bound to pay to the claimant, does not constitute valuable consideration so as to make the lien waiver effective and binding.” The Ohio Court of Appeals extended the Beebe
holding to find that unless there is a lien waiver provision in a written contract, the lien waiver must be supported by independent consideration.\(^{200}\)

**B. Types of Waivers: Conditional v. Unconditional**

The language of the lien waiver can have a substantial impact on what rights are being given up. The most significant distinction is between lien waivers that are conditional and those that are unconditional. A conditional lien waiver only becomes effective upon payment. This matters because, while the language of most lien waivers specifies that payment has already been received, in most cases the subcontractor furnishes the lien waiver prior to and in anticipation of payment. Accordingly, providing an unconditional lien waiver can have the effect of surrendering rights whether or not the subcontractor actually gets paid.\(^{201}\)

A waiver may be conditional or unconditional depending on whether the subcontractor has received payment for the work.\(^{202}\) A conditional waiver is appropriate when the claimant is required to execute a waiver in order to induce payment, and it becomes effective only after payment is received.\(^{203}\) An unconditional waiver should not be executed unless the subcontractor has been paid for what is being released because the unconditional language is binding even if the claimant has not been paid.\(^{204}\) The unconditional waiver can even be binding in bankruptcy.\(^{205}\)

**C. Effects of Waivers**

The primary purpose for requiring a lien waiver is to get the subcontractor to waive further claims for payment for the past work provided. The language of a lien waiver should be precise as to what work, amount due, and/or period(s) of time is covered by the lien waiver. Clarity is essential, because ambiguity can lead to loss of claim rights for the waiving party.
Many lien waivers, including the AIA G706A “Affidavit of Release of Liens,” include some option for limiting or excepting the scope of the waiver. On the G706A, the waiver language reads:

The undersigned hereby certifies that to the best of the undersigned’s knowledge, information and belief, except as listed below, the Releases or Waivers of Lien attached hereto include the Contractor, all Subcontractors, all suppliers of materials and equipment, and all performers of Work, labor or services who have or may have liens or encumbrances or the right to assert liens or encumbrances against any property of the Owner arising in any manner out of the performance of the Contract referenced above.

Following that text, there is an “Exceptions” heading, followed by a blank space where the subcontractor can enter in any reserved claims. It is particularly important for a subcontractor to list all reserved claims, including any potential change orders, delays, differing site conditions, or any other potential basis for a future claim for payment other than continued work on the project. Failure to properly reserve claims can result in a waiver of any such claims.

As an example, the subcontractor in Electrical Contractors, Inc. v. Pike Co., had included reservation-of-rights in several interim lien waivers, but omitted such language in a subsequent lien waiver. The court found that the unconditional lien waiver submitted for the subcontractor’s September draw “by its explicit terms released [the contractor] from liability.” Adopting Connecticut law, the federal district court held the subcontractor was barred from bringing a claim for equitable adjustment by the explicit language of the lien waiver.

Using the wrong form can also cost a subcontractor dearly. A full unconditional lien waiver executed by a subcontractor can operate as a complete waiver of all past and future liens, despite the subcontractor’s claim that the waiver was intended to apply only to past work. However, if a final lien waiver form is modified, or contains language that renders it equivocal on whether it
is expected to apply to future as well as past liens, courts may show some mercy on the claiming subcontractor.2¹⁰

The purpose of a lien waiver is not typically to affect the subcontractor’s priority date. However, a subcontractor can end up giving up priority as well as payment claims, depending on how the waiver language is drafted. In one North Carolina case, the trial court interpreted the language of the lien waiver at issue as giving up the date of first furnishing, as well as the amounts paid, and thus put the contractor and its subcontractors behind a bank in terms of priority.2¹¹ On appeal, however, the trial court’s decision was reversed the trial court, but only because the panel found that the language of the lien waiver was not sufficiently clear enough for the court to conclude that waiver of the priority date had been intended.2¹² This outcome follows similar contract-interpretation holdings from other states.2¹³ A lien waiver is distinct from a subordination agreement, the latter of which must often contain specific language and provisions.2¹⁴ Thus, an enterprising owner could in fact demand that the contractor and subcontractors regularly surrender their priority.

D. Statutory Protections

Subcontractors in some states have been furnished statutory protection against being forced to sacrifice lien rights as a condition for employment. In order to be legal, many states require that the waiver cannot take effect until performance has already been provided and the waiver is signed by the waiving party.2¹⁵ Yet, some states do allow a general contractor to waive lien rights for all subcontractors.2¹⁶ A claimant can give partial lien waivers, which “waive certain rights or liens for payments received or through a defined period of time during the course of a project,” or can give a final lien waiver, which waives future claims after payment is received.2¹⁷
In jurisdictions where public policy protections exist, contract language that purports or requires pre-emptive waiving of lien rights prior to commencing work is void and unenforceable. As of this writing, there are only two states – Colorado and Nebraska – that expressly allow “no lien clauses” in contracts.

Beyond guaranteeing at least some right to file a lien, many jurisdictions have also codified lien waiver language. The states that have done so have often recognized that variations in lien waivers can carry dire consequences and place undue risk of non-payment upon the subcontractors and suppliers, who are often least able to control and bear that risk. Thus, under those state laws, a lien waiver must either exactly track, or at least substantially track, to the statutory language in order to be enforceable.

For example, the Utah legislature passed model lien waiver legislation in 2012. Under the new law, a waiver and release was enforceable only if it was “in substantially the form provided” in the subsection, and was “for the circumstance provided” by the law. For progress payments, the lien waiver had to be conditional upon payment, and did not “apply to any retention withheld; any items, modifications, or changes pending approval; disputed items and claims; or items furnished or invoiced after the Payment Period.” A final lien waiver did not have to include the reservations for retainage, disputed claims, and the like, but still only became effective once the waiving party endorsed a check for the amount of the waiver and the check was paid by the depository institution on which it was drawn.

Mississippi also recently created model lien waivers, implementing such language in 2014 and 2015. The new law requires that a right to claim a lien may not be waived in advance of furnishing of labor, services or materials, and any purported pre-work waiver is null, void and unenforceable. When a claimant is required to execute a waiver in exchange for or to induce
payment, the waiver must substantially follow the form set forth in the statute.\textsuperscript{224} The interim lien waiver is conditional “upon the receipt of the sum” identified.\textsuperscript{225} The waiver excepts “those rights and liens that the mechanic and/or materialman might have in any retained amounts,” but does not automatically or explicitly reserve disputed claims.\textsuperscript{226} The final lien waiver is also conditional upon receipt of the sum listed.\textsuperscript{227}

Texas passed its statutory lien waiver in 2011. In Texas, no waiver or release is enforceable unless executed and delivered in accordance with Subchapter L of Chapter 53 of the Property Code.\textsuperscript{228} Texas has explicitly prohibited the use of unconditional lien waivers “unless the claimant or potential claimant received payment in that amount in good and sufficient funds.”\textsuperscript{229} If a lien waiver is required to be given in advance of payment, the waiver must be a conditional waiver using the specific language of the statute.\textsuperscript{230} The interim waiver covers progress payments for all labor, services, equipment, or materials furnished, “except for unpaid retention, pending modifications and changes, or other items furnished.”\textsuperscript{231} The same general prohibition against unconditional waivers applies for final lien waivers.\textsuperscript{232}

California’s Department of Consumer Affairs Contractors State License Board has furnished examples of language to use for waiving claim rights such as the following:

\textbf{Conditional Waiver and Release.} This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job through the Through Date of this document. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn.\textsuperscript{233}

A national trend towards regulating lien waivers appears to be developing. Since the start of the decade, numerous states have considered and/or passed lien waiver legislation. However,
that trend has not been universal. One state, North Carolina, proposed model lien waiver language during a significant round of lien law revisions in 2012, in response to *Wachovia Bank National Association v. Superior Construction Corp.* However, as a result of opposition from lenders and title insurers, who claimed that conditional lien waivers created too much of a risk to their interests, the proposal was quietly scuttled to help move along other lien law revisions.

**IX. CONCLUSION**

The path to payment for subcontractors is littered with potential potholes. There is no question that subcontractors are at the bottom of the construction food chain, especially when it comes to contract provisions. Whether appropriate or not, the risk tends to be crammed down onto subcontractors and suppliers, which makes it that much more essential for counsel advising those parties to be aware of their payment remedies before, during, and after performance. The yellow brick road is there to be traveled, but lawyers for subcontractors and suppliers have to carefully chart the route to the Emerald City for their clients.
ARTICLE 11 PAYMENTS

§ 11.1 Progress Payments

§ 11.1.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Architect, and certificates for payment issued by the Architect, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the part of the Contractor or Subcontractor for breach of trust, or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

§ 11.1.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:
§ 11.1.3 Provided an application for payment is received by the Contractor not later than the «□» day of a month, the Contractor shall include the Subcontractor’s Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Architect. The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Owner. If the Architect does not issue a certificate for payment or the Contractor does not receive payment for any cause which is not the fault of the Subcontractor, the Contractor shall pay the Subcontractor, on demand, a progress payment computed as provided in Sections 11.1.7, 11.1.8, 11.1.9 and 11.2.

§ 11.1.4 If the Subcontractor’s application for payment is received by the Contractor after the application date fixed above, the Subcontractor’s Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

§ 11.1.5 The Subcontractor shall submit to the Contractor a schedule of values prior to submitting the Subcontractor’s first Application for Payment. Each subsequent application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor’s Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require, and unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor’s applications for payment.

§ 11.1.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor’s Work as of the end of the period covered by the application for payment.
§ 11.1.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as follows:

§ 11.1.7.1 The amount of each progress payment shall first include:

.1 That portion of the Subcontract Sum properly allocable to completed Work:

.2 That portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor’s Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing; and

.3 The amount, if any, for changes in the Work that are not in dispute and have been properly authorized by the Contractor, to the same extent provided in the Prime Contract, pending a final determination by the Contractor of the cost of changes in the Subcontractor’s Work, even though the Subcontract Sum has not yet been adjusted.

§ 11.1.7.2 The amount of each progress payment shall then be reduced by:

.1 The aggregate of previous payments made by the Contractor;

.2 The amount, if any, for Work that remains uncorrected and for which the Contractor has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201-2017 for a cause that is the fault of the Subcontractor;

.3 For Work performed or defects discovered since the last payment application, any amount for which the Contractor may withhold payment in whole or in part, as provided in Article 9 of AIA Document A201-2017, for a cause that is the fault of the Subcontractor; and

.4 Retainage withheld pursuant to Section 11.1.8 of this Agreement.
§ 11.1.8 Retainage

§ 11.1.8.1 For each progress payment made prior to substantial completion of the
Subcontractor’s Work, the Contractor may withhold the following amounts as retainage from the
payment otherwise due:

(Insert a percentage or amount to be withheld as retainage from each Application for Payment.
The amount of retainage may be limited by governing law.)

§ 11.1.8.1.1 The following items are not subject to retainage:

(Insert any items not subject to the withholding of retainage, such as general conditions,
insurance, etc.)

§ 11.1.8.2 Reduction or limitation of retainage, if any, shall be as follows:

(If the retainage established in Section 11.1.8.1 is to be modified prior to substantial completion
of the entire Work, including modifications for substantial completion of portions of the
Subcontractor’s Work as provided in Section 9.2.3, insert provisions for such modification.)

§ 11.1.9 Upon the partial or entire disapproval by the Contractor of the Subcontractor’s
application for payment, the Contractor shall provide notice to the Subcontractor. If the
Subcontractor disputes the Contractor’s decision regarding a Subcontractor’s Application for
Payment in whole or in part, the Subcontractor may submit a Claim in accordance with Article 6.
When the basis for the disapproval has been remedied, the Subcontractor shall be paid the
amounts withheld.

§ 11.1.10 Provided the Contractor has fulfilled its payment obligations under the Subcontract
Documents, the Subcontractor shall defend and indemnify the Contractor and Owner from all
loss, liability, damage, or expense, including reasonable attorney’s fees and litigation expenses,
arising out of any lien claim or other claim for payment by any of the Subcontractor’s
subcontractors, suppliers, or vendors of any tier. Upon receipt of notice of such lien claim or other claim for payment, the Contractor shall notify the Subcontractor. If approved by the applicable court, when required, the Subcontractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

§ 11.2 Substantial Completion

When the Subcontractor’s Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor’s Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the Prime Contract for the Subcontractor’s Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor’s substantially completed Work to the same percentage of retainage as that on the Contractor’s Work covered by the certificate.

§ 11.3 Final Payment

§ 11.3.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor’s Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a
certificate for payment covering the Subcontractor’s completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.

(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

§ 11.3.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor’s Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final application for payment.

§ 11.4 Interest

Payments due and unpaid under this Subcontract shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)
Addendum B

ConsensusDocs 750 - Agreement Between Constructor and Subcontractor

ARTICLE 8 - PAYMENT

8.1 SCHEDULE OF VALUES As a condition precedent to payment, Subcontractor shall provide a schedule of values satisfactory to Constructor not more than fifteen (15) Days from the date of execution of this Agreement.

8.2 PROGRESS PAYMENTS

8.2.1 APPLICATIONS Subcontractor’s applications for payment shall be itemized and supported by substantiating data as required by the Subcontract Documents. If Subcontractor is obligated to provide design services pursuant to §3.8, Subcontractor’s applications for payment shall show its design professional’s fee and expenses as a separate cost item. Subcontractor’s application for payment shall be notarized and if allowed under the Subcontract Documents may include a properly authorized Interim Directive. Subcontractor’s application for payment for the Subcontract Work performed in the preceding payment period shall be submitted for approval by Constructor in accordance with the schedule of values if required in §8.2.2 through §8.2.4. Constructor shall incorporate the approved amount of Subcontractor’s application for payment into Constructor’s application for payment to Owner for the same period and submit it to Owner in a timely fashion. Constructor shall promptly notify Subcontractor of any changes in the amount requested on behalf of Subcontractor.

8.2.1.1 RETAINAGE The rate of retainage shall be [_____] percent ([_____]%), which is equal to the percentage retained from Constructor’s payment by Owner for the Subcontract Work. If the Subcontract Work is satisfactory and the prime
agreement provides for reduction of retainage, Subcontractor’s retainage shall also be reduced when Constructor’s retainage of the Subcontract Work has been so reduced by Owner.

8.2.1.2 TIME OF APPLICATION Subcontractor shall submit progress payment applications to Constructor no later than the [_____] Day of each payment period for the Subcontract Work performed up to and including the [_____] Day of the payment period indicating work completed and, to the extent allowed under the subsection below, materials suitably stored during the preceding payment period.

8.2.2 STORED MATERIALS Unless otherwise provided in the Subcontract Documents, applications for payment may include materials and equipment not yet incorporated in the Subcontract Work but delivered to and suitably stored on or off the Worksite including applicable insurance, storage, and costs incurred transporting the materials to an off-site storage facility. Approval of payment applications for such stored items on or off the Worksite shall be conditioned upon submission by Subcontractor of bills of sale and required insurance or such other procedures satisfactory to Owner and Constructor to establish Owner’s title to such materials and equipment, or otherwise to protect Owner’s and Constructor’s interest including transportation to the Worksite.

8.2.2.1 TIME OF PAYMENT Progress payments to Subcontractor for satisfactory performance of the Subcontract Work shall be made no later than seven (7) Days after receipt by Constructor of payment from Owner for the Subcontract Work. If payment from Owner for such Subcontract Work is not received by Constructor, through no fault of Subcontractor, Constructor will make payment to Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed.
8.2.2.2 PAYMENT DELAY If Constructor has received payment from Owner and if for any reason not the fault of Subcontractor, Subcontractor does not receive a progress payment from Constructor within seven (7) Days after the date such payment is due, as defined in the subsection immediately above, or, if Constructor has failed to pay Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed, Subcontractor, upon giving seven (7) Days’ written notice to Constructor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to Subcontractor has been received. The Subcontract Amount and Time shall be adjusted by the amount of Subcontractor’s reasonable and verified cost of shutdown, delay, and startup, which shall be effected by an appropriate Subcontractor Change Order.

8.2.3 PAYMENTS WITHHELD Constructor may reject a Subcontractor application for payment in whole or in part or withhold amounts from a previously approved Subcontractor application for payment, as may reasonably be necessary to protect Constructor from loss or damage for which Constructor may be liable and without incurring an obligation for late payment interest based upon:

8.2.3.1 Subcontractor’s repeated failure to perform the Subcontract Work as required by this Agreement;

8.2.3.2 except as accepted by the insurer providing Builders Risk or other property insurance covering the Project, loss or damage arising out of or relating to this Agreement and caused by Subcontractor to Owner, Constructor, or others to whom Constructor may be liable;
8.2.3.3 Subcontractor’s failure to properly pay for either labor, materials, equipment, or supplies furnished in connection with the Subcontract Work, provided that Constructor is making payments to Subcontractor for that portion of the Subcontract Work in accordance with this Agreement;
8.2.3.4 rejected or defective Subcontract Work which has not been corrected in a timely fashion;
8.2.3.5 reasonable evidence of delay in performance of the Subcontract Work such that the Work will not be completed within the Subcontract Time, and that the unpaid balance of the Subcontract Amount is not sufficient to offset the liquidated damages or actual damages that may be sustained by Constructor as a result of the anticipated delay caused by Subcontractor;
8.2.3.6 reasonable evidence demonstrating that the unpaid balance of the Subcontract Amount is insufficient to cover the cost to complete the Subcontract Work; and
8.2.3.7 uninsured third-party claims involving Subcontractor or reasonable evidence demonstrating that third-party claims are likely to be filed unless and until Subcontractor furnishes Constructor with adequate security in the form of a surety bond, letter of credit, or other collateral or commitment sufficient to discharge such claims if established.

No later than seven (7) Days after receipt of an application for payment, Constructor shall give written notice to Subcontractor, at the time of disapproving or nullifying all or part of an application for payment, stating its specific reasons for such disapproval or nullification, and the remedial actions to be taken by Subcontractor in order to receive payment. When the above reasons for disapproving or nullifying an
application for payment are removed, payment will be promptly made for the amount previously withheld.

8.2.4 SUBSTANTIAL COMPLETION

8.2.4.1 Upon substantial completion of the Subcontract Work or a designated portion thereof, Constructor shall assume responsibility for security and protection of the Subcontract Work pending the achievement of Substantial Completion of the Project. However, acceptance of the Subcontract Work for the purpose of allowing succeeding Work to proceed shall not result in the commencement of the warranty period for the Subcontract Work unless otherwise provided in the prime agreement.

8.2.4.2 Unless otherwise provided for in the prime agreement, partial Owner occupancy or use of completed portions of the Subcontract Work shall constitute Substantial Completion of that portion of the Subcontract Work and the warranty period applicable to the Subcontract Work shall commence upon the achievement of Substantial Completion of the Project and acceptance by Owner under the terms of the prime agreement.

8.3 FINAL PAYMENT

8.3.1 APPLICATION Upon acceptance of the Subcontract Work by Owner and Constructor and receipt from Subcontractor of evidence of fulfillment of Subcontractor’s obligations in accordance with the Subcontract Documents and the subsection below, Constructor shall incorporate Subcontractor’s application for final payment into Constructor’s next application for payment to Owner without delay, or notify Subcontractor if there is a delay and the reasons for the delay.
8.3.2 REQUIREMENTS Before Constructor shall be required to incorporate Subcontractor’s application for final payment into Constructor’s next application for payment, Subcontractor shall submit to Constructor:

(a) An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontract Work have been paid, satisfied, or are to be paid with the proceeds of final payment, so as not to encumber Owner’s property, Constructor, or Constructor’s surety;

(b) As-built drawings, manuals, copies of warranties, startup and testing required in §3.26, and all close-out documents and satisfaction of close-out procedures if required by the Subcontract Documents.

(c) Release of any liens, conditioned on final payment being received, and in such form as may be required by the Subcontract Documents;

(d) Consent of surety to final payment, if required;

(e) A report of any outstanding known and unreported accidents or injuries experienced by Subcontractor at the Worksite;

(f) Other data, if required, such as receipts and releases.

8.3.3 TIME OF PAYMENT Final payment of the balance due of the Subcontract Amount shall be made to Subcontractor within seven (7) Days after receipt by Constructor of final payment from Owner for such Subcontract Work.

8.3.4 FINAL PAYMENT DELAY If Owner or its designated agent does not issue a certificate for final payment or Constructor does not receive such payment for any cause which is not the fault of Subcontractor, Constructor shall promptly inform Subcontractor in writing. If final payment from Owner for such Subcontract Work is not received by
Constructor, through no fault of Subcontractor, Constructor will make payment to Subcontractor within a reasonable time.

8.3.5 WAIVER OF CLAIMS Final payment shall constitute a waiver of all claims by Subcontractor relating to the Subcontract Work, but shall in no way relieve Subcontractor of liability for the obligations assumed under §3.20 and §3.21, or for faulty or defective work or services discovered after final payment, nor relieve Constructor for claims made in writing by Subcontractor as required by the Subcontract Documents before its application for final payment as unsettled at the time of such payment.

8.4 LATE PAYMENT INTEREST Progress payments or final payment due and unpaid under this Agreement shall bear interest from the date payment is due at the prevailing statutory rate at the place of the Project. However, if Owner fails to timely pay Constructor as required under the prime agreement through no fault or neglect of Constructor, and Constructor fails to timely pay Subcontractor as a result of such nonpayment, Constructor’s obligation to pay Subcontractor interest on corresponding payments due and unpaid under this Agreement shall be extinguished by Constructor promptly paying to Subcontractor Subcontractor’s proportionate share of the interest, if any, received by Constructor from Owner on such late payments.

8.5 CONTINUING OBLIGATIONS Provided Constructor is making payments in accordance with this Agreement, Subcontractor shall reimburse Constructor for costs and expenses for any claim, obligation, or lien asserted before or after final payment is made that arises from the performance of the Subcontract Work. Subcontractor shall reimburse Constructor for costs and expenses including attorneys’ fees and costs and expenses incurred by Constructor in satisfying, discharging, or defending against any such claims, obligation, or lien, including any action brought or judgment recovered. If any Law or bond requires Subcontractor to take any action
before the expiration of the reasonable time for payment referenced in §8.2.5 in order to preserve or protect Subcontractor’s rights with respect to mechanic’s lien or bond claims, then Subcontractor may take that action before the expiration of the reasonable time for payment and such action will not: (a) create the reimbursement obligation recited above, (b) be in violation of this Agreement, or (c) be considered premature for purposes of preserving and protecting Subcontractor’s rights.

8.6 PAYMENT USE RESTRICTION Payments received by Subcontractor shall be used to satisfy the indebtedness owed by Subcontractor to any person furnishing labor or materials, or both, for use in performing the Subcontract Work through the most current period applicable to progress payments received from Constructor before it is used for any other purpose. In the same manner, payments received by Constructor for the Subcontract Work shall be dedicated to payment to Subcontractor. This applies to this Agreement only, and is not for the benefit of third parties. Moreover, this section does not restrict commingling funds nor require separate accounts for deposits. Nothing in this section creates a fiduciary duty on the Parties, nor creates any tort cause of action or liability for breach of trust, punitive damages, or other equitable remedy or liability for alleged breach.

8.7 PAYMENT VERIFICATION If Constructor has reason to believe that Subcontractor is not complying with payment terms in this Agreement, Constructor may contact Subcontractor’s subcontractors and suppliers to ascertain whether they are being paid by Subcontractor in accordance with this Agreement.

8.8 PARTIAL LIEN WAIVERS AND AFFIDAVITS As a prerequisite for payments, Subcontractor shall provide, in a form satisfactory to Owner and Constructor, partial lien and claim waivers in the amount of the application for payment and affidavits covering its
subcontractors and suppliers for completed Subcontract Work. Such waivers shall be conditional upon payment. In no event shall Subcontractor be required to provide an unconditional waiver of lien or claim, before receiving payment or in an amount in excess of what it has been paid.

8.9 SUBCONTRACTOR PAYMENT FAILURE Upon payment by Constructor, Subcontractor shall promptly pay its subcontractors and suppliers the amounts to which they are entitled. If Constructor has reason to believe that labor, material, or other obligations incurred in the performance of the Subcontract Work are not being paid, Constructor may give written notice of a potential claim or lien to Subcontractor and may take any steps deemed necessary to assure that progress payments are utilized to pay such obligations, including but not limited to the issuance of joint checks. If upon receipt of notice, Subcontractor does not (a) supply evidence to the satisfaction of Constructor that payment owed has been paid; or (b) post a bond indemnifying Owner, Constructor, Constructor’s surety, if any, and the premises from a claim or lien, Constructor shall have the right to withhold from any payments due or to become due to Subcontractor a reasonable amount to protect Constructor from any and all loss, damage, or expense including attorneys’ fees that may arise out of or relate to any such claim or lien.

8.10 SUBCONTRACTOR ASSIGNMENT OF PAYMENTS Subcontractor shall not assign any payment due or to become due under this Agreement, without the written consent of Constructor, unless the assignment is intended to create a new security interest within the scope of Article 9 of the Uniform Commercial Code. Should Subcontractor assign all or any part of any payment due or to become due under this Agreement to create a new security interest or for any other purpose, the instrument of assignment shall contain a clause to the effect that the assignee’s right in and to any money due or to become due to Subcontractor shall be subject to the claims of all persons, firms, and corporations for services rendered or materials supplied for Subcontract Work.
8.11 PAYMENT NOT ACCEPTANCE Payment to Subcontractor does not constitute or imply acceptance of any portion of the Subcontract Work.
6 *Id.*
7 *Id.*
8 *Id.* at 7.
10 *Id.* at 14.
11 *Id.*
12 *Id.* at 15.
13 Drewry et al., *supra* note 5, at 7.
14 Berman & Hess, *supra* note 9, at 12.
16 *Id.* at 35.
17 *Id.* at 38.
18 *Id.*
19 Berman & Hess, *supra* note 9, at 8; *see also* Drewry et al., *supra* note 5, at 9-10 (referring to pass-through clause as a flow-down provision, they “make all notice provisions and other obligations that the contractor has applicable to the subcontractor as well, even though those duties, obligations, and requirements are not expressly states as bearing upon the subcontractor.”)
21 Berman & Hess, *supra* note 9, at 7.
22 *Id.* at 8.
23 *Id.*
24 *Id.* at 9.
25 *Id.* at 19.
26 Id.
27 Id.
28 Id. at 20.
29 Id. at 25.
30 Id.
31 Id. at 27.
32 See supra p. 8.
33 See Berman & Hess, supra note 9, at 17.
34 Id. at 18.
35 See Baker & Sorteberg, supra note 3, at 102.
36 Id. at 105.
37 Id. at 97.
38 Id. at 104.
40 See Berman & Hess, supra note 9, at 39.
41 Id.
42 Id. at 50.
43 Id.
44 V. James Dickson & Mark A. Cobb, Payment, in CONSTRUCTION SUBCONTRACTING: A COMPREHENSIVE PRACTICAL AND LEGAL GUIDE 72 (Aaron P. Silberman, Joseph C. Kovars, & Tracy L. Steedman eds., 2015).
46 Holloway, supra note 2, at 108.
47 Id. (citing Kings Elec. Co. v. United States, 341 F.2d 632 (Ct. Cl. 1965)).
48 See Baker & Sorteberg, supra note 3, at 101.
49 Id. at 101 (citing United States v. Spearin, 248 U.S. 132 (1918)).
50 See e.g. id. at 101 (“directive to work in a different sequence, to work in a different method, or to place contractually required utilities outside of the limits of work,” improper rejection of work, delays in the delivery of owner-furnished equipment, restricted access to the site).
51 Holloway, supra note 2, at 107.
52 Id. at 112.
55 Id.
56 Id.
57 Wm. R. Clarke Corp. v. Safeco Ins. Co. of Am., 15 Cal. 4th 882, 891-92, 64 Cal.Rptr.2d 578 (1997).


See, e.g., Swanda Bros. v. Chasco Constructors, Ltd., 2012 U.S. Dist. LEXIS 138352, *9-11 (W.D. Okla. Sept. 26, 2012) (“reasonable time” provision of pay-when-paid clause is to allow GC time to secure payment from owner, provided GC is undertaking such efforts).

American Subcontractors Association, supra note 53.


Id. at 419.


Id.


Id. at § 29-6-230.


Id. at § 22C-3.


Siegfried & Laurie, supra note 15, at 37.


See Drewry et al., supra note 5, at 9.

See Stockenberg, supra note 77, at 2.

Id.

Id.

See, e.g., Arizona and Maryland.

See N.Y. GEN. BUS. LAW § 756-c (West 2017).

See Drewry et al., supra note 5, at 9.
87 See Stockenberg, supra note 77, at 2; see also, e.g., Connecticut, Louisiana, Tennessee;
Deborah S. Griffin, 50-State Survey of State Retainage Statutes for Private Construction (Jan.
88 Vincent T. Pallaci, Esq., Retainage and the Law, NY CONSTRUCTION LAW UPDATE (Aug. 26,
2012 at 5:49 p.m.), http://newyorkconstructionlawupdate.blogspot.com/2012/08/retainage-and-
law.html
89 Dennis C. Bausman, PhD., Retainage Practice in the Construction Industry, in CONTRACTORS’
KNOWLEDGE QUEST RESEARCH SERIES, 9 (Nov. 2004),
90 See Stockenberg, supra note 77, at 2.
91 Id.
92 See Pallaci, supra note 88.
93 See Stockenberg, supra note 77, at 4.
94 Id. at 5.
95 Id.
96 Dickson & Cobb, supra note 44, at 70.
97 Siegfried & Laurie, supra note 15, at 38.
98 Dickson & Cobb, supra note 44, at 70.
99 Id. at 70-71.
100 See id. at 71 (citing ARK. CODE ANN. § 22-9-604 (2012); N.C. GEN. STAT. § 22C-4 (2012)).
101 See Dickson & Cobb, supra note 44, at 71 (citing TENN. CODE ANN. § 66-34-104 (2012); MD.
CODE ANN., STATE FIN. & PROC. § 15-108 (2013)).
102 See Dickson & Cobb, supra note 44, at 71 (citing IND. CODE § 36-1-12-13.1 (2012); 8 PA.
STAT. ANN. § 193 (2013)).
103 Paul S. Sugar & Michael A. Schollaert, Mechanic’s Liens and Statutory Remedies, in
MARYLAND CONSTRUCTION LAW DESKBOOK 247 (Joseph C. Kovars & Michael A. Schollaert
104 Id.; see also James D. Fullerton, CONSTRUCTION LAW SURVIVAL MANUAL: MECHANIC’S
LIENS, PAYMENT BONDS, CONTRACTS, CLAIMS AND BANKRUPTCY 514 App. 43 (2015),
105 See Sugar & Schollaert, supra note 103, at 247.
106 Susan Brooke, After the Dance: Substantial completion and Beyond: Subcontractor
Viewpoint on Insolvency Issues, AMERICAN BAR ASSOCIATION 7 (2002),
https://www.americanbar.org/content/dam/aba/directories/construction_industry_knowledge_base/barkasy.authcheckdam.pdf.
107 See Fullerton, supra note 104, at 598 (citing Vermont Statutes, Title 9, §§ 1921-1928).
108 N.C. GEN. STAT. § 44A-23 (West 2017).
109 See Fullerton, supra note 104, at 528 (citing CAL. CIV. CODE § 8400).
110 See Fullerton, supra note 104, at 542 (citing Official Code of Georgia §§44-14-360 to 366).
111 Major Change to Mechanic’s Lien Law, LEHIGH VALLEY BUSINESS (Jul. 16, 2012),
112 See Sugar & Schollaert, supra note 103, at 255.
113 Maryland also requires that the claimant prove that the material was in fact incorporated into
the structure. Id.
114 James Waite, Esq., Legally Speaking: Using Mechanic’s Liens, RENTAL MANAGEMENT
See Sugar & Schollaert, supra note 103, at 252.

Id.

Id.

Id. at 248-50.

Id. at 252.

See Sugar & Schollaert, supra note 103, at 249; see also VIRGINIA CONSTRUCTION LAW DESKBOOK (Richard F. Smith ed., 2016).

See Sugar & Schollaert, supra note 103, at 250.


Id. § 6.

Fullerton, supra note 104, at 515.


California, Washington, Oregon, Arizona, Idaho (for contracts greater than $2,000); Montana, Wyoming, Colorado, Utah, South Dakota, North Dakota, Minnesota, Iowa, Missouri, Louisiana (for projects over $25,000); Arkansas, Tennessee, Wisconsin, West Virginia, Rhode Island, Connecticut, Virginia (on residential projects); North Carolina, South Carolina, Florida.

See Fullerton, supra note 104, at Ch. 9; see also MD. CODE ANN. REAL PROP. § 9-102 (e) (West 2017).

See Fullerton, supra note 104.

CAL. CIV. CODE § 8204 (West 2017).

O’Rourke, et al., supra note 128, at 88.

Id. at 89.

See Brooke, supra note 106, at 8.


Claimants must also be careful not to overstate the lien amount. As one court put it, “criminal sanctions . . . constituted the appropriate response to any egregious overstatement of liens.” CDC Builders, Inc. v. Riviera Almeria, LLC, 51 So. 3d 510 (Fla. 3d DCA 2010), review denied, 70 So. 3d 587 (Fla. 2011).

See Fullerton, supra note 104, at 594 App. 43.

See Fullerton, supra note 104, at Ch. 9.


Id.

Id.

Id.

See Wallick & Stafford, supra note 140.

40 U.S.C. § 270 (a)

See Tomlinson, supra note 141.
See Tomlinson, supra note 141.

40 U.S.C.A. § 3131 et seq.

See Tomlinson, supra note 141.

Kate M. Mauel, Legal Protections for Subcontractors on Federal Prime Contracts p. 4

https://fas.org/sgp/crs/misc/R41230.pdf

31 U.S.C. §3901 (a)(4)(A)

5 C.F.R. §1315.14(b)(1)

Id.

Id. §3902(b)

5 C.F.R. §1315.4(c)(1)

31 U.S.C. §3905(b)(1)

Id. §3905(b)(2)


See, e.g., ARIZ. REV. STAT. § 34-221 (one percent per month; seven days to pay subcontractor after payment received); GA. CODE § 13-11-4(b) (ten days to pay subs), § 13-11-7 (one percent per month unless otherwise agreed); VT. STAT., Tit. 9, § 4002(d) (interest at statutory rate), § 4003(c) (seven days after receipt of payment, or upon receipt of invoice).

Robert D. Wallick, The Miller Act: Enforcement of the Payment Bond, LAW AND CONTEMPORARY PROBLEMS 514 (1964),

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3010&context=lcp

Id.


40 U.S.C. § 3131(b); but see 48 C.F.R. § 28.102-1(b) (setting $150,000 threshold for requirement of payment bonds).


Id.


Id.

Id.

Id. at 74-75.


Id.


(SE) v. Ace Am. Ins. Co., 161 F. Supp. 3d 1227, 1237 (S.D. Fl. 2015) (general liability policies, unlike subguard policies, do not cover economic losses, such as consequential damages).

179 Bausman, supra note 177, at 14.
180 Id. at 15.
181 Id.
182 Id.
183 6 Bruner & O’Connor Construction Law § 19:43.
184 See, e.g., Emerald Designs, Inc. v. Citibank F.S.B., 626 So.2d 1084 (Fla. 4th DCA 1993) (found that allowing lender to retain undisbursed construction loan funds as well as security for the loan through the ability to foreclose would result in unjust enrichment); see also, 3 Bruner & O’Connor Construction Law § 8:149.
185 See, e.g., Ball Kelly, LLC v. Bank of Am., N.A., 2011 WL 5523672 at *3 (D.C. KS 11/14/2011) (“This court does not believe that Kansas would elect to recognize an equitable lien on undisbursed loan proceeds, particularly on an uncompleted construction project.”).
188 See e.g., ISSC, Inc. v. Baugh Skanska Inc., 160 Fed. Appx. 628, 630 (9th Cir. 2005) (interim unconditional lien waiver waived Miller Act rights for materials delivered prior to date specified in waiver, even if contractor had not satisfied all invoices).

See id. (citing ARIZ. REV. STAT. § 33-1008(D)(2)).

See BCI Bebout Concrete, 2007 Bankr. LEXIS 3067 at *20-23.


Id. at *54.

Id. at *55.


See, e.g., Georgia. Id. at 542.

See Pennsylvania. Id. at 588.

See Sugar & Schollaert, supra note 103, at 274.

See, e.g., N.C. GEN. STAT. § 44A-12(f) (“An agreement to waive the right to file a claim of lien on real property….., which agreement is in anticipation of and in consideration for the awarding of any contract…. Is against public policy and is unenforceable.”); Mich. Code § 570.1115(1) (“A personal shall not require, as part of any contract for an improvement, that the right to a construction lien be waived in advance of work performed.”).

C.R.S. § 38-22-119; Neb. Code § 52-144(1) (“A written waiver of construction lien rights signed by a claimant requires no consideration and is valid and binding, whether signed before or after the materials or services were contracted for or furnished.”).

Utah Code Ann. § 38-1a-802(4)(a).

Id. § 38-1a-802(4)(b).

See id. § 38-1a-802(4)(c).

Miss. Code Ann. § 85-7-419(1).

Id. §§ 85-7-419(2) (interim), (3) (final).

Id. § 85-7-433(1).

See id.

Id. § 85-7-433(2).


Id. §§ 53.283, 53.284(c)(1).

Id. § 53.284(b).

Id.

See id. § 53.284(e)(1).


Wachovia Bank Nat’l Ass’n, 213 N.C. App. at 349.
Additional thanks are given to Luke P. Larocca of Simon, Peragine, Smith & Redfearn, New Orleans, LA; to Natalie Kutcher and Sheri Dickson, who clerked at Safran Law Offices, for their efforts in researching and writing portions of this paper; and to Carrie L. Ciliberto, Esq. for obtaining permission to use the AIA and ConsensusDocs standard contract language.

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