SHOW ME THE MONEY!
Help Me, Help You: Getting Paid on Public Works Jobs

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PRIME CONTRACTOR’S CLAIMS AGAINST THE FEDERAL GOVERNMENT

I. INTRODUCTION

Disputes with the federal government amount to taking on the quintessential 800 pound gorilla that has the memory of an elephant. Given both of these characteristics, legal claims against the federal government, beyond the initial tender of claim to the contracting officer, tend to be large, in the millions, or more commonly, in the tens of millions and to get there, the federal government requires that a contractor run the gamut of strict requirements set forth by the Contracts Disputes Act.

II. CONTRACT DISPUTES ACT - BREACH OF CONTRACT

Rex Non Potest Peccare – The king can do no wrong. As sovereign, the U.S. federal government does not consent to the rule of common law and therefore, is immune from lawsuits against it unless it waives its sovereign immunity by statute. A statutory waiver of sovereign immunity must be express and unequivocal. The Contract Disputes Act of 1978 (CDA) is the express, unequivocal statutory waiver of immunity that sets out the procedure for government contractors to submit and resolve claims, and permits government contractors to file lawsuits against the federal government.1 The CDA sets forth the framework of procedures and requirements under which the federal government consents to participate in a dispute through the contracting officer, and under very strict conditions, a lawsuit against the federal government.

The Tucker Act of 1887 initially provided the Court of Federal Claims with “jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 2 Though the Tucker Act granted the Court jurisdiction, it did not create an explicit waiver of immunity for contractors to bring suit against the federal government. With the
CDA, Congress affirmed its waiver of immunity and reconfirmed the jurisdiction of agency boards of contract appeals and the U.S. Court of Federal Claims over government contract claims.³

A. CDA’s Applicability

The CDA governs all claims under express and implied contracts entered into by any agency of the executive branch for:

1. the procurement of property, other than real property in being;
2. the procurement of services;
3. the procurement of construction, alteration, repair, or maintenance of real property; or
4. the disposal of personal property.⁴

Because any waiver of immunity must be express, the right to bring claims under the CDA is strictly construed to only extend to the four specific types of contracts enumerated above.⁵

Claims may only be submitted by a “contractor,” which is defined as “a party to a Federal Government contract other than the Federal Government.”⁶ This means that direct privity is required to fall within the waiver of the CDA; therefore, subcontractors and assignees have no right to bring a claim against the federal government under the CDA on any theory of liability. However, Courts have ruled that sureties can bring claims against the federal government through the “contractor” under the equitable theory of subrogation.⁷ In addition, the federal court has ruled that performance bond sureties that execute takeover agreements become “contractors” in direct privity with the federal government.⁸ Therefore, the takeover agreement creates standing under the CDA for a surety to bring direct claims against the federal government related to the takeover agreement and any terms of the original construction contract subsumed therein.⁹
Though the CDA permits “claims,” it does not define “claim.” Instead Title 48 of the Code of Federal Regulations, aka Federal Acquisition Regulations (FARs), define “claim” as follows:

Claim, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under 41 U.S.C. chapter 71 until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under 41 U.S.C. chapter 71. The submission may be converted to a claim under 41 U.S.C. chapter 71, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.\(^\text{10}\)

Under FAR § 33.215, each government contract is also required to provide this definition, known as the “disputes clause.”\(^\text{11}\)

Under the Act, three basic elements must be present to establish a “claim”: (1) a written demand to the contracting officer, (2) seeking as a matter of right either a sum certain payment or other relief under the contract, and (3) a request that the contracting officer provide a final determination.\(^\text{12}\) If the relief sought exceeds $100,000, the claim must be certified.\(^\text{13}\)

A contractor’s routine voucher, invoice, or other request may technically fit the first part of the regulation’s definition of a “claim,” but is not a “claim” unless converted into one by written notice to the contracting officer that meets all “claim” requirements after the application for payment is disputed by the government or after the contracting officer fails to act within a reasonable time.\(^\text{14}\) The bounds for a “reasonable time” is determined on a case by case basis, but law exists that a five and one-half months delay on a routine invoice, unpaid without explanation, can be unreasonable and therefore warrants submission of a “claim.”\(^\text{15}\) In disputes regarding whether a contractor’s submission is a “claim” or not, the Court of Federal Claims focuses on whether the submission is “routine” or “non-routine.”\(^\text{16}\)
This definition is important because technically, a contracting officer cannot consider a non-routine submission by a contractor that does not meet the minimum requirements for a “claim” as set forth in the regulations.\textsuperscript{17} Even if a contracting officer were to consider and deny relief on a submission that falls short of the “claim” requirements, no further appeal would be entertained as neither an agency board of contract appeals nor the Court of Federal Claims has jurisdiction to consider an appeal of anything short of a “claim.”\textsuperscript{18} In addition, interest does not start to accrue until a “claim” is submitted.\textsuperscript{19}

\textbf{B. CDA Timing}

Claims must be submitted by the contractor to the contracting officer within six years of accrual of the claim.\textsuperscript{20} In addition, claims should be considered prior to final payment since federal contracts generally require the contractor “release all claims against the Government arising under [the] contract, other than any claims the Contractor specifically excepts, in stated amounts, from operation of this release.”\textsuperscript{21} The standard form for final payment under federal contracts includes a final and complete waiver of claims, but does permit contractors to retain rights for outstanding and “to be submitted” claims specifically identified on the form. Therefore, when requesting final payment, contractors should affirmatively identify all pending and possible claims on the final payment requisition in order to preserve rights against the federal government.

\textbf{C. CDA Process}

A contractor’s failure to meet each and every requirement of the CDA process divests the contracting officer of authority to resolve the dispute and divests agency boards and the Court of Federal Claims of jurisdiction to hear any appeal. The four step process is outlined below:

\textit{Step 1:} Each claim by a contractor against the federal government relating to a contract shall be submitted in writing to the contracting officer for a decision.\textsuperscript{22}
**Written:** In *Contract Cleaning Maintenance v. U.S.*, the Federal Circuit held that a “claim” need not be “submitted in any particular form or use any particular wording.” Rather, “[a]ll that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.”

Therefore, a contractor must provide the contracting officer with sufficient information regarding what and how much is being claimed to permit the contracting officer to complete a meaningful review of the claim. This requires that the contractor provide factual information regarding the basis of the claim, the basis for the relief requested, and documentation supporting those assertions (contract provisions, correspondence, drawings, specifications, invoices, etc.). The purpose of the detail is to provide the contracting officer with sufficient detail so that negotiations regarding the claim can commence. A contractor who fails to provide adequate detail risks summary dismissal of the claim.

**Submit:** The Act requires submission of the claim to the contracting officer. The “contracting officer” means an individual who, by appointment in accordance with applicable regulations, has the authority to make and administer contracts and to make determinations and findings with respect to contracts.” Though the definition goes on to say that “contracting officer” includes an “authorized representative of the contracting officer, acting within the limits of the representative’s authority,” when it comes to submission of claims, a contractor should assume that acceptance of claims is outside any representative’s authority.

Though the statute is clear, the Federal Circuit has provided some leeway, ruling that the “submit” requirement of the CDA would be satisfied if a contractor sends a “claim” to its primary contact on the federal project, rather than the contracting officer, asking for a final decision of the contracting officer and the primary contact actually provides the claim to the contracting officer.
This of course poses a risk that no contractor should take – that the primary contact may fail to forward the claim to the contracting officer, even if such action is requested in the claim.\textsuperscript{29}

In practice, this means that a contractor should always submit the claim directly to the contracting officer defined by the contract (each federal contract should list on its face the name of the contracting officer). This may not be the contractor’s primary contact for the project, but instead may be an individual located at the agency’s headquarters, and may be someone with whom the contractor has had no contact with since the contract award. A courtesy copy can always be provided to a primary contact.

**Sum Certain:** A claim seeking monetary relief must set forth the exact amount of relief sought, or contain sufficient information so that the amount can be determined by basic math.\textsuperscript{30} Requesting an approximate amount or relief “in excess of” a certain amount has been deemed inadequate and denies jurisdiction under the CDA.\textsuperscript{31} According to the court in *Metric Const. Co., Inc. v. U.S.*, a sum certain is required because if no specific amount is sought, the contracting officer cannot fully and finally resolve the claim by making payment, as payment would not preclude a contractor from filing suit seeking the difference between the amount paid by the government and some greater amount sought by the contractor that was not specifically stated.\textsuperscript{32} However, requesting relief based on estimates may not bar consideration of a claim, if the supporting documentation sets forth the basis for the estimate.\textsuperscript{33}

**Request a Final Decision:** The CDA requirement that all claims be submitted to the contracting officer has been interpreted to mean that the contractor must request a final decision of the contracting officer, but this request need not be explicit.\textsuperscript{34} If it is reasonably clear from the context of the submission that the contractor is seeking a final decision, that can be enough to meet the regulation.\textsuperscript{35} But to avoid any confusion, when submitting a claim under the CDA, a contractor...
should explicitly request a “final decision of the contracting officer.” Pre-claim submissions, made in an effort to negotiate a resolution of a dispute with the contracting officer, may purposefully omit such “magic words” to distinguish such submissions from CDA claims.

Certification: For claims of more than $100,000, the contractor is required to certify that the claim is made in good faith, that the supporting information and documentation is accurate and complete to the best of the contractor’s knowledge and belief, that the relief requested accurately reflects the amount for which the contractor believes the government is liable, and that the certifier is authorized to certify the claim on behalf of the contractor. A contracting officer is not obligated to render a final decision on a claim of more than $100,000 that is not properly certified as long as, within 60 days after receipt of the claim, the contracting officer first notifies the contractor of the defect in writing. Unlike the “claim” requirements of the FAR, a defect only in the certification of a claim does not deprive a court or an agency board of appellate jurisdiction. The court or agency board can require that a defective certification be corrected prior to the entry of a final judgment. Though a defect in a certification may be corrected at a later date, failure to include any kind of certification for a claim over $100,000 cannot be remedied; without even an attempt at a certification, the submission is not a “claim,” and therefore an appeals board and the court would lack jurisdiction on appeal.

FAR 33.207(c) sets out the exact language of a valid certification as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

Using the exact language set out in the FAR is advised to avoid a claim of deficiency, which can carry with it increased costs and attorneys’ fees and waste time. However, no magic words are
required. A contractor’s certification will generally be accepted if it is a statement under oath that the contractor believes that the claim is not intentionally inflated, that the supporting documentation is accurate and complete, is for amounts for which the contractor believes that the government is liable, and that the person who is certifying the claim is authorized by the contractor to do so. The purpose of the certification is to prevent the contractor from knowingly submitting a fraudulent claim or one for which the government is not responsible. Contracting officers have broad settlement and decision-making powers to negotiate and settle claims, but they are precluded from dealing with claims that potentially involve misrepresentation or fraud. The regulations require contracting officers to refer any claim that is suspected of being fraudulent to “the agency official responsible for investigating fraud.”

As to the supporting documentation, the contractor need not support its claim with a full evidentiary hearing, all that is required is documentation adequate to allow the contracting officer to complete a meaningful review. Finally, the CDA permits that anyone familiar with the project and authorized by the company to legally bind it can make the certification.

The requirement to certify applies if the aggregate amount of the increases and decreases exceeds $100,000. For example, if the claim seeks compensation for $60,000 for additional work and deletes $50,000 worth of work, certification is required.

Step 2: Each claim by a contractor against the federal government relating to a contract shall be the subject of a written decision by the contracting officer.

Contents of Decision: “The contracting officer’s decision shall state the reasons for the decision reached and shall inform the contractor of the contractor’s rights as provided in this chapter. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.” To the extent that the contracting officer finds for the contractor,
even in part, the amount payable to the contractor under the decision is immediately due, even if
the contractor intends to appeal, and is without prejudice to the rights of either party. Therefore,
even if a contractor intends to appeal, it should immediately invoice for all amounts for which the
contracting officer found in its favor.

**Timing of Decision:** For claims of $100,000 or less, the CDA requires the contracting
officer to render her decision within 60 days of receipt of the claim. If the claim is for more than
$100,000, within 60 days of receipt of the claim, the contracting officer is required either (a) to
issue a decision or (b) to notify the contractor of the time within which the decision will be
issued. As to the latter, the CDA requires that the contracting officer issue the decision within a
reasonable time, taking into consideration the size and complexity of the claim and the adequacy
of information in support of the claim provided by the contractor.

In the event of undue delay by the contracting officer, a contractor may request that an
agency board or Court of Federal Claims issue an order directing the contracting officer to issue a
decision within a specified period of time. A failure of the contracting officer to issue a decision
with the period of time specified by the CDA, or as directed by the agency board or court, is
deemed a denial of the claim and authorizes the contractor to appeal in accordance with the CDA.
However, the appeal tribunal may, in its discretion, stay any appeal to obtain a decision from the
contracting officer.

**Step 3:** The contracting officer’s decision on a claim is final and conclusive and is not
subject to review by any forum, tribunal, or federal government agency, unless an appeal or action
is timely commenced.

**Venue:** Two venues are available to contractors for an appeal of a contracting officer’s
decision, the agency board of appeal or the U.S. Court of Federal Claims. Once a contractor files
its appeal in one of these forums, it may not switch forums; generally, filing a claim in either jurisdiction is a binding election (the “Election Doctrine”).

Agency boards are empowered to grant contractors any relief that would be available to them through the Court of Federal Claims and have the same powers as the court to permit discovery, administer oaths and require the attendance of witnesses and the production of documents by subpoena. The Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA), formerly the General Services Board of Contract Appeals, are the two most active agency boards. The ASBCA has jurisdiction to hear appeals from decisions of contracting officers of the Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, and the National Aeronautics and Space Administration. The Civilian Board has jurisdiction to hear appeals from all executive agencies, except the U.S. Postal Service, the Postal Rate Commission, the Tennessee Valley Authority, and those agencies governed by the ASBCA.

Appeals to boards of contract appeals must be made in accordance with that agency board’s rules of procedure. Generally, the procedures require notice that the contractor is seeking an appeal, identifying the contract number, and referencing the contracting officer’s decision. A copy of any filing is required to be sent to the contracting officer. The standard of review before the agency boards is de novo.

The U.S. Court of Federal Claims, located in Washington, D.C., consists of 16 judges appointed by the President with the concurrence of the Senate. Judges in this court are not Article III judges and, therefore, do not have life time tenure. Procedural requirements for filings are set forth in the Rules of the U.S. Court of Federal Claims, which are similar to the Federal Rules of Civil Procedure, and are identical to the Rules of Civil Procedure when it comes to discovery. By
statute, the standard of review in the Court of Federal Claims is de novo; the contracting officer’s decision carries no presumption of accuracy; and so, the court must hear and rule on all evidence. As a consequence, once an appeal is filed, it proceeds much like any other lawsuit filed under a federal statute.

**Timing:** Appeals to the Agency Board must be made within 90 days of receipt of the contracting officer’s decision. Appeals directly to the U.S. Court of Federal Claims must be filed within 12 months of receipt of the contracting officer’s decision. Receipt of the contracting officer’s decision is the date when the decision is physically delivered to the contractor’s address.

**Accelerated Procedures:** The CDA requires that each agency board have accelerated procedures for the appeal of claims less than $100,000. Use of such procedures are at the sole election of the contractor and shall result in a decision on appeal within 180 days from the date the contractor elects to utilize such rules.

In addition, agency boards are required to have a “small claims” procedure for claims in which the amount in dispute is less than $50,000, or $150,000 or less in the case of a small business, as defined by the Small Business Act. The small claims procedure is available at the sole election of the contractor and must be resolved, whenever possible, within 120 days from the date that the contractor elects to utilize such process. Decisions under the small claims procedure against either the federal government or the contractor are final and may not be appealed except in the case of fraud and have no precedential value for future cases.

**Step 4:** Upon decision by an agency board or the Court of Federal Claims, either the federal agency or the contractor may further appeal to the U.S. Court of Appeals for the Federal Circuit. Before the U.S. Court of Appeals for the Federal Circuit, questions of law are reviewed by the court de novo, but questions of fact are final and conclusive unless the decision is fraudulent,
arbitrary or capricious, or so grossly erroneous as to necessarily imply bad faith, or if the decision
is not supported by substantial evidence.\textsuperscript{73}

An adverse decision at the Court of Appeals may be appealed to the U.S. Supreme Court
only if writ of certiorari is timely applied for and granted.

D. Damages

Interest: The CDA provides that the federal government pay interest at the Treasury Rate
on valid claims starting from the date that the contracting officer first receives the claim through
the date of payment.\textsuperscript{74} As long as a claim is filed, even if the certification is defective, the interest
will run from the date of submission of the claim as long as the certification is subsequently
corrected.\textsuperscript{75}

Costs & Fees: By regulation, costs incurred in prosecuting a claim against the government
cannot be recovered,\textsuperscript{76} but the Federal Circuit has held that if a proposal for a change or request
for equitable adjustment,\textsuperscript{77} rather than a claim, is submitted to the government, proposal
preparation and negotiation costs are recoverable as ordinary costs of contract administration.\textsuperscript{78} In
\textit{Tip Top Const., Inc. v. Donahoe}, the Court held that the contractor’s attorneys’ fees and consultant
costs negotiating a change order with the postal agency were recoverable because they were
incurred “for the genuine purpose of materially furthering the negotiation process.”\textsuperscript{79} Though
ultimately the contractor filed a claim under the CDA, fees and costs to negotiate the change order
price in an effort to avoid a dispute was “a legitimate part of the change order process” and is
therefore recoverable.\textsuperscript{80} But it should be noted, that if the contractor submits a proposal or a request
for an equitable adjustment, rather than a CDA claim, the interest available under the CDA does
not begin to run.

III.  FEDERAL PROMPT PAYMENT ACT - INTEREST ON UNDISPUTED
      AMOUNTS OWED.
Under the Federal Prompt Payment Act (FPPA), interest accrues on amounts owed to a contractor starting on the date the payment is due and ending on the date on which the payment is made or after one year, whichever is shorter. The FPPA’s remedies do not apply when the government withholds progress payments due to a bona fide dispute related to payment or contract compliance. Such disputes are governed by the CDA and the remedies available to the contractor, including interest, thereunder.

Therefore, unless it is a circumstance where the government acknowledges it owes the money and just does not pay, contractors cannot collect interest under the FPPA. The FPPA specifically notes that unavailability of funds to the agency is not an excuse for non-payment and does not relieve the agency of the interest penalties. In such limited circumstances, a contractor can make a claim to recover FPPA interest under the CDA, but interest ceases to accrue under the FPPA once a CDA claim is filed. Once a CDA claim is filed, payment of interest is governed by the CDA.

Similar to the CDA, interest is calculated at the Treasury rate in effect at the time that the payment comes due. Every 30 days the accrued interest penalties are capitalized and become part of the principal debt; interest penalties will continue to accrue on the new principal amount until the amount is paid or the limit of one year.

Regulations that govern the FPPA are prescribed by the Director of the Office of Management and Budget and provide that the required payment date is the “date payment is due under the contract for the item of property or service provided;” or if no due date is established by contract, “30 days after a proper invoice for the amount due is received.” More specifically, in the case of a construction contract, interest would accrue on progress payments, whether percentage complete or milestone payments, approved by the agency which remain unpaid for
more than 14 days after the contractor properly submits its payment requisition, unless a longer period is specified in the contract solicitation. Interest also accrues on any retainage approved for release to the contractor and not paid in accordance with the contract, or if nothing is stated in the contract, 30 days after final acceptance.

The FPPA binds the federal government to pay interest, but as to construction contracts, also places obligations on a contractor to pay the government interest in limited circumstances. Specifically, in the event that a contractor, after it has submitted a certified payment request, determines that a portion or all of such payment is for work that fails to conform to the contract terms (an “unearned amount”), the contractor is required to notify the agency of the performance deficiency. The contractor is also obligated to pay the government interest on the unearned amount at the Treasury rate from the date of receipt of such unearned amount until the date that the contractor notifies the agency that the deficiency in performance has been corrected or the date that the contractor reduces the subsequent certified payment application by the unearned amount.

IV. STATE PROMPT PAYMENT ACTS - INTEREST ON UNDISPUTED AMOUNTS OWED.

Almost all states have prompt payment statutes similar to the federal government that require that state agencies make prompt payment of contract monies to contractors on public projects. The statutes vary but, for the most part, they set a deadline by which timely payments must be made and impose an interest penalty on state agencies for late payments. Most statutes exempt interest on amounts over which there is a good faith dispute.

A. Case Study: California

Under California’s Public Contracts Code, contractors on public works improvements are entitled to payment in accordance with the applicable contract and governing codes. Under California’s prompt payment act, public agencies are required to make progress payments within
thirty days of receipt of a properly submitted, undisputed payment request.\textsuperscript{97} Overdue progress payments accrue interest at the annual rate established by the California Civil Procedure Code.\textsuperscript{98} Unlike the FPPA, California agencies are only liable for interest “if funds are available for payment of the payment request.”\textsuperscript{99}

Under California law, retainage is required to be released within sixty days after the date of completion of the work.\textsuperscript{100} The statute defines completion to mean:

(1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement.

(2) The acceptance by the public agency, or its agent, of the work of improvement.

(3) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor.

(4) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion.\textsuperscript{101}

If a dispute exists between the public entity and the contractor, the public entity is entitled to withhold from final payment an amount not to exceed 150\% of the disputed amount.\textsuperscript{102} Improperly withheld retainage incurs interest at a rate of 2\% per month.\textsuperscript{103} Additionally, when an action is brought under the California statute “for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorneys’ fees and costs.”\textsuperscript{104}

B. Case Study: Maine

Under Maine’s prompt payment statute,\textsuperscript{105} prime contractors on public projects involving real property, except projects for the Maine Department of Transportation,\textsuperscript{106} are entitled to payment in accordance with the contract.\textsuperscript{107} If the contract does not set forth the payment terms, the contractor may invoice the state for progress payments at the end of each billing period, defined
as the end of each month in which the work is performed, and submit a final invoice upon completion of the work.\textsuperscript{108} Unless otherwise agreed to by the parties, payment is due from the state agency within twenty days of the end of the billing period or submission of invoice, whichever is later.\textsuperscript{109} Retainage is required to be paid in accordance with the contract or, if not prescribed, within thirty days after final acceptance of the work.\textsuperscript{110}

A state agency may withhold payment for “unsatisfactory job progress, defective construction or materials, disputed work or 3rd-party claims.”\textsuperscript{111} Amounts withheld may equal “the value of any good faith claims against an invoicing contractor.”\textsuperscript{112} Such amounts shall not be deemed “wrongfully withheld.”\textsuperscript{113}

On late payments, interest accrues starting the day after the payment is due at the rate permitted by statute.\textsuperscript{114} If litigation or an arbitration arises and it is determined that the state failed to comply with the contract payment terms, the contractor shall be entitled to 1\% per month of all sums wrongfully withheld as a penalty.\textsuperscript{115} In addition, the prevailing party in any such action, whether contractor or owner, is entitled to recover reasonable attorneys’ fees and costs, and any contract term to the contrary is void.\textsuperscript{116}

V. QUANTUM MERUIT AGAINST FEDERAL GOVERNMENT – ONLY IF VOIDABLE GOVERNMENT CONTRACT.

Contractors who complete work at the request of a contracting officer, without written approval, do so at their own peril. The Court of Federal Claims has held that it does not have jurisdiction to hear cases based on contracts implied-in-law.\textsuperscript{117} Though the contracting officer has the authority to bind the federal government, it can only do so in accordance with laws and regulations. Courts will not imply a contract with the federal government and, even if they did recognize implied contract, sovereign immunity would operate to deny those same courts jurisdiction to consider claims for breach of the implied contracts.
Contractors may be lucky enough to resolve a quantum meruit, unjust enrichment, or implied contract claim with a friendly contracting officer, but if the contracting officer denies the claim and the matter proceeds to appeal, the agency has a strong argument to dispose of the claim on a motion to dismiss. This is true even if the government has benefited from a contractor’s extra work completed at the informal request of a contracting officer. Accordingly, a prudent government contractor should refrain from performing work until it has a change order or equitable adjustment executed by the contracting officer in-hand.

Only one exception has been found to the rule that contractors may not recover for quantum meruit or unjust enrichment from the federal government. That rare exception arises when a contractor seeks recovery after the government attempted to form a contract with a contractor, but a defect prevented the contract from actually coming into existence. So that means that this claim is only available to a contractor if the very existence or validity of a contract is in question.\(^\text{118}\)

In *U.S. v. Amdahl Corp.*, the Federal Circuit examined the precedent and implications of when a government contract violates statute or regulation and is therefore held voidable, rather than void *ab initio*.\(^\text{119}\)

The government has the power to act only through its agents whose authority and manner of exercise thereof is rigidly prescribed and limited by statute, regulation, and judicial and administrative determinations. Failure to follow the applicable rules negates the agent’s authority to enter into a contract binding on the government. To permit otherwise would be to nullify those very statutes, regulations, and determinations—a result clearly contrary to the public interest.\(^\text{120}\)

But in many circumstances it would be unfair and violate good conscience to impose an economic burden on the contractor to absorb all loss from having entered into an illegal contract, especially when the government has accepted a benefit by receiving the goods and services. In such circumstances the contractor cannot recover *under* the contract and, therefore, the court permits the contractor to recover the value of goods and services received by the government.
prior to rescission of the contract on a *quantum valebant* or *quantum meruit* basis, an implied-in-fact contract.\(^{121}\) This recovery is based on the ordinary principles of equity and justice – that the government should not be permitted to retain the services, materials, or benefits while at the same time refusing to pay for them on the grounds that the actions of the contracting officer were unauthorized, unenforceable, or illegal. Since the basis of the recovery is benefit to the government, it follows that if the government received no benefit, then the contractor receives no compensation.

VI. **FEDERAL FALSE CLAIMS ACT & OTHER GOVERNMENT REMEDIES.**

In civil litigation, it is not uncommon for a litigant to exaggerate or “pad” his claim for damages to give room for negotiation. In federal contract disputes, such actions create a serious risk of civil or criminal sanctions, including damages, penalties, and debarment from public contracting. Submission of “false, fictitious, or fraudulent” claims, including padded damages claims, have been punishable by criminal sanctions since the False Claims Act was enacted in 1863 to prevent fraud against the government during the Civil War. Today, the United States has robust civil and criminal false claims acts.

A. **Civil False Claims Act\(^{122}\)**

Though seven actions by contractors create liability under the civil False Claims Act (FCA), most incidents arise when a contractor (A) knowingly presents, or causes another to present, a false or fraudulent claim for payment or approval to the government, (B) knowingly makes or uses a false record or statement material to support a false or fraudulent claim, (C) conspires to get the government to pay a false claim, or (G) knowingly makes or uses a false, material record or statement to avoid or reduce its obligations to the government.\(^{123}\) As with most civil matters, the standard of proof under the civil FCA is the preponderance of the evidence standard.
Under Section 3729(a)(1)(A), liability lies if a contractor (1) knowingly, (2) submits a “claim” (3) that is false. Despite the fact that the civil FCA is an anti-fraud statute, it does not require proof of intent to deceive or defraud as an element to provide liability. Instead, the FCA only requires that the submission of the false claim be done “knowingly,” meaning the contractor, individually or through its employees:

(1) had actual knowledge of the information,
(2) acted in deliberate ignorance of the truth or falsity of the information; or
(3) acted in reckless disregard of the truth or falsity of the information.

However, negligence, gross negligence, and innocent mistakes do not create liability under the FCA.

“Claim” under the FCA is broadly defined as:

any request or demand, whether under a contract or otherwise, for money or property . . . that (i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

This broad definition includes payment requests submitted by a subcontractor to a prime contractor. It should be noted that a demand or request for payment may qualify as a claim even if the government has not paid it or cannot prove actual damages.

“False” is not defined by the statute and therefore has been the subject of much litigation. Of course, circumstances when a contractor seeks payment for equipment or materials not delivered or services not provided clearly meet the definition of “false.” But courts have interpreted “false” to also cover a contractor’s request for payment for work that does not comply with the contract specifications. While other gray areas may fall outside the definition of “false.”
example, a legitimate factual dispute or disagreement over scientific method does not give rise FCA liability\textsuperscript{130} and, generally, matters of contract interpretation cannot support an FCA claim.\textsuperscript{131}

Circumstances may arise when the government has knowledge of the “falsity” of the claim at the time it is made and yet still pay the claim. The government’s actual knowledge, however, is not a complete defense to contractor liability under the FCA, but it is relevant to the issue of “materiality.” Though not an express requirement of the FCA, most courts have held that an alleged false claim must be material for a contractor to incur liability. Courts have defined “material” to mean: likely to have affected the government’s decision to make payment. If the government knew of the falsity and still made payment, courts have held this to be strong evidence that the falsity did not affect the government’s decision to pay and, therefore, was not material.\textsuperscript{132}

Under § 3729(a)(1)(C), a subcontractor can be liable under the FCA for submitting a false claim to a prime contractor knowing that the prime would subsequently submit that claim to the government. Specifically, under the following elements for an FCA conspiracy, both the prime contractor and subcontractor may be liable under the FCA for submission of a subcontractor’s false claim if the contractor and subcontractor had an agreement to commit the fraudulent act which resulted in injury to the government.\textsuperscript{133}

Civil FCA claims are generally brought by the U.S. Attorney General either in a standalone lawsuit or as a counterclaim in a CDA appeal filed with the Court of Federal Claims.\textsuperscript{134} FCA claims cannot be brought as a counterclaim before an agency board of appeals since agency boards lack jurisdiction to hear FCA claims. This means that to bring an FCA claim when an appeal is brought before an agency board, the federal agency must convince the Department of Justice to bring an independent FCA action in the Court of Federal Claims, which generally only occurs in the most egregious of circumstances. On the other hand, when an appeal is filed in the Court of Federal
Claims, FCA counterclaims are more common because all the elements are present: the agency is represented by the Department of Justice, who can bring a counterclaim, and the court has the power to hear the FCA counterclaim.

Penalties under the civil FCA are severe and intended to act as a deterrent. Those penalties can include: (1) treble damages, often measured as triple the difference in value from what the contractor represented to the government and what the government got; (2) monetary penalties of $10,781.40 to $21,562.80 per false claim, adjusted for inflation effective August 1, 2016, which can be awarded even if the government has suffered no damage; and, (3) most severely, debarment, which precludes a contractor from contracting with the federal government for a fixed period of time.

The government also has rights of recovery for fraudulent claims under the CDA. The CDA allows the government to recover from the contractor any fraudulent or misrepresented portions of the contractor’s claim.

If a contractor is unable to support any part of the contractor’s claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government’s costs attributable to reviewing the unsupported part of the claim. Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.

The CDA even takes the effort to define “misrepresentation of fact” to mean “a false statement of substantive fact, or conduct that leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.”

B. Criminal False Claims Act

The criminal FCA provides that a person who knowingly presents a false claim to the government shall be imprisoned and subject to fines. Generally, the criminal FCA has the same requirements of the civil FCA and, like its civil counterpart, a subcontractor may be liable under
the criminal FCA for causing the prime contractor to submit a false claim to the government. If found guilty a contractor may be imprisoned for up to five years and fined up to $10,000 per false claim. Criminal liability is also grounds for debarment.\(^{142}\)

But the two statutes are not identical. For example, unlike the civil FCA, which finds liability for “deliberate ignorance” or “reckless disregard” for the truth or falsity of a claim, the criminal statute requires proof beyond a reasonable doubt that the contractor actually knew that the claim was false.\(^{143}\) As a consequence of this heightened burden of proof under the criminal statute, fewer prosecutions occur under the criminal FCA than the civil FCA. Another dissimilarity is that, unlike its civil counterpart, only the Department of Justice can bring actions under the criminal FCA. No qui tam suits are permitted.

\section{VII. STATE FALSE CLAIMS ACT.}

Several states have followed in the federal government’s footsteps, enacting civil false claims statutes modeled after the federal law. These statutes provide similar remedies, including recovery of treble damages.

\subsection{A. Case Study: California}

In 1987, California became the first state to promulgate a false claims statute modeled after the federal law. The purpose of the California act was similar to the federal statute: “to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities by authorizing private parties (referred to relators) to bring suit on behalf of the government.”\(^{144}\)

For the most part, acts that violate the federal FCA are violations of the California False Claims Act (California FCA).\(^{145}\) The California statute permits the state attorney general to bring civil enforcement actions to recover treble damage and civil penalties against contractors who
knowingly use false statements or documents to obtain payment from the state. In addition, a finding of a violation of the California FCA may result in debarment.

In line with this, the California FCA defines “claim” to mean “any request or demand, whether under a contract or otherwise, for money, property, or services, and whether or not the state or a political subdivision has title to the money, property, or services” that is presented seeking payment or is made to a contractor if the money is to be used on the state’s behalf. But “Claim” does not include payments for employment. The California Act defines “knowingly” similar to the federal act, but fills in a gap in the federal act by expressly requiring materiality as an element of some violations: “Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim” The California FCA also defines “Material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money, property, or services.”

Notwithstanding the terms of the act, damages are reduced against an individual who: Notifies officials of the violation within thirty days of receiving such knowledge, cooperates with any investigation, all before commencement of any action against the individual and without knowledge of an investigation.

Remedies under the act are in addition to all remedies available at common law. Unlike the federal act, actions under the California FCA can be time barred: a California FCA action “shall not be filed more than six years after the date on which the violation . . . is committed, or more than three years after the date when facts material to the right of action are known or reasonably should have been known by the . . . prosecuting authority. . . , but in no event more than 10 years after the date on which the violation is committed, whichever of the aforementioned occurs last.”
Similar to the federal FCA, the California FCA permits whistleblowers to bring qui tam actions to enforce the act on behalf of the state. According to the state attorney general, qui tam lawsuits have resulted in some of the most significant recoveries for the state under the California FCA. Prior to proceeding with prosecution of a qui tam action, a whistleblower is required to file under seal to permit the state attorney general or local prosecuting authority to investigate and, if warranted, intervene in the action.

VIII. CONCLUSION

Overall, lots of procedural hoops exist for a contractor to bring a claim against the government, but conscious and strict adherence to requirements can lead to successful claim.
SUBCONTRACTOR AND LOWER TIER CONTRACTORS’ CLAIMS AGAINST THE GENERAL CONTRACTOR

I. INTRODUCTION

Subcontractors and material suppliers have a variety of ways of getting paid on public works of improvement. The principal statutory remedies available to claimants who have furnished labor, services, equipment, or material to a public project are governed by various federal and state statutes enacted primarily to safeguard those that improve public property financed with public funds. Additionally, rules unique to the contracting authority or rules agreed to in a contract may override or expand upon various statutory protections, unless prohibited by statute or otherwise against public policy.

II. INITIAL CONSIDERATIONS

Before evaluating the particular avenues for recovery for subcontractor and supplier claimants on public projects, it is important for such claimants to consider initial issues such as the forum of the project (which will dictate which state law will apply) and whether the project is a federal, state, or local project (which will dictate what remedies are available and the statutory prerequisites for asserting a proper claim). It may also be essential for the claimant to consider other fundamental questions such as whether the work of improvement is truly a “public work” and the claimant’s relationship to the project.

A. Is the Work of Improvement a “Public Work”?

First, is the work of improvement considered a “public work”? As public private partnerships (also known as a “PPP” or “P3”) become more common around the country, claimants and their attorneys must carefully analyze the jurisdiction’s statutory definition for the term “public work” (or the equivalent) and common law precedent that may dictate whether the claimant must rely upon public or private works remedies, or some hybrid of the two. If the project
is not a public work, the claimant may not be able to rely upon a public works payment bond for payment, but may be able to pursue other statutory remedies such as a mechanics lien.\textsuperscript{161}

Whether a construction project is considered public work may depend on some of the following specific facts and circumstances:\textsuperscript{162} (a) who is the contracting party for the work (\textit{i.e.}, public entity or an investor-owned public utility)\textsuperscript{163}; (b) who owns the land, buildings, or structures to be improved; (c) the source of funding; (d) the purpose or end-result of the project; and, (e) the nature of the claim.\textsuperscript{164}

Generally speaking, the basic rule is that public property is not subject to mechanics lien remedies under principles of sovereign immunity, even when a private structure or other improvement is made on property owned by the public.\textsuperscript{165} Some courts, however, have held that claimants may be entitled to assert mechanics liens against a private developer’s property interest that is less than a fee simple estate.\textsuperscript{166} In some jurisdictions, private property that is directly adjacent to and benefitted by a public work, such as storm drains, curbs, and streets, also can be subject to a mechanics lien on a public works project.\textsuperscript{167}

B. What is the Claimant’s Relationship to the Project?

Second, what is the claimant’s relationship to the project as a whole? Subtle distinctions in privity with contracting parties can present obstacles to recovery. For example, a breach of contract action may be valid only against those in privity, or the law may allow pass through claims on behalf of a subcontractor not in privity with the government.\textsuperscript{168} Furthermore, pass through claims may be limited by the amount that the subcontractor could have recovered from a prime contractor.\textsuperscript{169} Many statutory construction law payment remedies circumvent traditional privity requirements, but they may also have tier limitations for claimants that are sub-tier subcontractors or material suppliers. The claimant’s position in the hierarchy of the construction project may
dictate the notice requirements necessary to preserve statutory remedies. As such, it is imperative for the claimant and its attorney to determine precisely where the claimant falls within the hierarchy of the construction project, i.e., to whom the claimant is furnishing labor or materials.

Ultimately, determining what laws apply and what avenues of recovery are available to a claimant must be ascertained on a case-by-case basis. If, however, a claimant has a basic understanding of the possible issues it may encounter and the right questions to ask, the answers are within reach. This article seeks to provide a summary of common topics of interest, questions all claimants should consider, and strategies claimants can utilize under specific circumstances in certain jurisdictions.

III. COMMON LAW CLAIMS (NONSTATUTORY REMEDIES)

Several traditional common law claims may be available to the unpaid subcontractor or supplier on a public works project. The following presents a brief description of some of the claims that claimants may consider bringing, as well as difficulties claimants may encounter in pursuing those claims.

A. Disagreement at the Core: Breach of Contract

Perhaps the most fundamental claim to recover payment is a breach of contract cause of action. For the unpaid subcontractor or supplier, recovery may be easier said than done.

Generally, a cause of action for breach of contract has six elements: (1) existence of a contract; (2) claimant performed, or was excused from performance; (3) any required conditions precedent to defendant’s performance occurred, or were excused; (4) defendant failed to perform, or did something prohibited by contract; (5) claimant was harmed; and (6) causation. Furthermore, if a defendant responds with counterclaims, then a claimant may also have to prove that any subsequent breach by said claimant was excused due to the defendant’s initial material breach. The materiality of numerous alleged breaches may be the primary source of contention.
in determining liability. Materiality of a breach is determined by factors including the extent to which the (a) claimant will be deprived of a benefit; (b) claimant can be compensated; (c) other party will suffer forfeiture; (d) other party is likely to cure their breach; and (e) other party complies with standards of good faith and fair dealing.\textsuperscript{174}

Like a subcontractor, a material supplier may choose to assert a breach of contract claim against its customer. Such contract claims, however, are rarely based on a traditional construction contract, but rather based on any number of industry forms such as a credit applications and sales agreements, contractor purchase orders, vendor quotations invoices, or sales order confirmations. Although it is well beyond the scope of this article, such contract claims are almost always governed by the Uniform Commercial Code, which governs the parties’ substantive rights, duties, and obligations—especially in a “battle of the forms” situation.\textsuperscript{175}

\textit{1. Pass-Through Claims and Assignment of Claims}

Often times, there will be a changed condition or other valid basis for a subcontractor’s claim for additional compensation and, it is not uncommon, for the prime contractor to agree that the additional cost is the government entity’s responsibility. Since the subcontractor may not be able to independently sue the government entity due to lack of privity,\textsuperscript{176} and the prime contractor prefers to avoid a lawsuit, both contracting parties may agree to jointly seek additional compensation for the subcontractor’s change work from the government. A typical agreement of this type might involve the prime contractor signing a joint agreement with the subcontractor claimant whereby the prime contractor agrees to support and/or pass-through the subcontractor’s claims to the government, and the subcontractor agrees to waive any recovery from the prime contractor that is not paid by the government.\textsuperscript{177} The federal government and approximately eighteen states allow such claims, and one state, Connecticut, expressly prohibits them.\textsuperscript{178}
Assignment is another potential avenue for lower-tier project participants to pursue claims against the government. Although direct claims for breach of contract against a public entity must generally comply with claim presentation requirements of the particular state statutes, a subcontractor may obtain an assignment of claims for the prime contractor. Such an assignment can provide the subcontractor with a means to pursue contract claims against the public entity. It should be noted that claim presentation procedures in a prime contract may be deemed an alternative (or even in lieu of) the claim presentation requirements found in the state’s government or public contract code. 179

2. Alter Ego Doctrine

If a prime contractor is a limited liability corporation (LLC) or a corporation, then its liability to creditors, including lower tier project participants, may be limited to its assets. Parent corporations of an LLC, or investors in a corporation, are usually protected by a legal “corporate veil” that shields assets owned by other persons or entities. The alter ego doctrine pierces that corporate veil to achieve justice.

Generally, two requirements must be met to establish that a person or business is the alter ego of another entity: 180 (1) unity of interest and ownership such that the separate personalities of the person or business and the other entity no longer exist; 181 and (2) if the acts are treated as those of the other entity alone, an inequitable result will follow. 182 The separate identity of a corporation or LLC must be used for legitimate business purposes. When the corporate form is used to evade liability, it may be disregarded, so that the officers, directors, and equity holders can be liable for acts performed in the name of the business.

Like many courts, the California Court of Appeal has identified fourteen factors to analyze unity of interest and ownership. 183 A few of the key factors include: (1) sole ownership of a
business entity by one individual; (2) failure to maintain minutes or adequate corporate records; (3) failure to adequately capitalize a business; (4) the commingling of personal funds with those of the business; (5) treatment by an individual of the assets of the business as his or her own; and (6) the use of a business as a mere shell for the benefit of another person or entity.¹⁸⁴

A claimant should consider this theory of extending liability if it sues a party that is insolvent, or if insolvency is on the horizon. If this is the case, the claimant should add alter ego parties to the original complaint because amending a judgment to add a debtor under the alter ego theory of liability, at least in California, requires proving that the party to be added also controlled the litigation.¹⁸⁵

B. Common Law Bonds

Subcontractors and suppliers should always determine whether a common law payment bond exists. Common law bonds are usually written and executed under an agreement between the parties and are more prevalent on larger public projects. In those instances, first tier subcontractors are required by their subcontract to post payment and performance bonds to secure their performance on a project. Such bonds are not governed by statute, but are dictated by the terms of the bonds themselves. It is important to determine whether a bond is, in fact, a common law bond rather than a statutory bond since the results may be different.¹⁸⁶

C. Quantum Meruit / Unjust Enrichment

In some jurisdictions, a subcontractor or supplier may recover under a quantum meruit theory on a public works contract for reasonable value of services rendered – most often against an “unjustly enriched” prime contractor. It is appropriate where the breaching party has been unjustly enriched at the expense of the claimant and is often the remedy requested upon a claim.
for contract abandonment against a prime contractor or construction manager when the subcontractor performs work that constitutes a material change in the original scope of work. Such quasi-contractual theories of recovery, however, may be limited by statutory requirements or other state laws, especially when quasi-contractual recovery is sought against the public entity.

D. Other Common Counts

A breach of contract complaint usually includes other common law causes of actions such as “open book,” “account stated,” and “goods and services rendered” (aka “labor and work done”). Pleading these causes of action, also called “common counts” has several nuanced advantages. For example, if a breach of contract action fails for lack of the first element—existence of a contract—the elements of these other causes of action may still be satisfied, saving a lawsuit from dismissal. If a subcontractor has provided additional work outside of the scope of the contract, or the dispute revolves around the validity of change orders, these common counts can be particularly helpful because a defendant will likely claim that said additional work was not agreed to in writing. Such a defense may succeed under a breach of contract action, but fail under a “goods and services rendered” action. In California, a “book account” cause of action is available to parties by statute, and generally includes that: (1) a plaintiff accurately stated that defendant owes it money; (2) defendant agreed; and (3) defendant failed to pay. In an action based on a book account in California, the prevailing party may be entitled to attorneys’ fees and costs even if a contract does not provide for them.

E. Word to the Wise: Common Law Claims

All the causes of action discussed above are expensive to litigate because construction cases are inherently complex. Even though attorneys’ fees may be awarded when an attorneys’ fee provision exists, they are far from guaranteed. A humble subcontractor may bring suit against a
prime contractor who is in a much more powerful financial position to drag out litigation as long as possible, eventually causing the subcontractor to concede.

Luckily for those bestowing labor and materials to public works, legislatures recognized centuries ago that common law claims would hardly be sufficient to promote development of the United States. Thus, the federal and state governments developed a wide variety of statutory construction law remedies. Yet, these remedies can also be difficult to satisfy due to various requirements of each unique claim. In order to prevent sole reliance on the common law causes of action above, potential claimants should develop a detailed understanding of the statutory remedies below, and be prepared to enforce them.

IV. STATUTORY CONSTRUCTION LAW PAYMENT REMEDIES

Construction law statutes provide security and leverage to subcontractors and material suppliers. These statutes give claimants additional sources of recovery. The common purpose served by these statutes is to ensure that those who supply labor and materials to a project get paid for the reasonable value of what they furnish.194 In the philosophical words of John Locke, “persons own themselves and therefore their own labor. When a person works, that labor enters into the object. Thus, the object becomes the property of that person.”195

For private construction projects, all 50 states have statutes authorizing mechanics liens giving workers legal rights in the real property that they improve.196 The very first mechanics lien laws in the United States were enacted around 1791, with the goal of speedily developing Washington D.C.197 In California, mechanics lien remedies were included in the original California Constitution, as enacted in 1879.198 The rapid growth of the United States is in large part due to these laws because they promoted new construction by providing contractors, subcontractors, and material suppliers with various forms of payment guarantees or collateral. But mechanics liens are
rarely available for public construction projects. In fact, most states do not allow mechanics liens for public construction projects as a matter of public policy.199

Construction law statutes for public works of improvement replace mechanics liens by providing claimants with reachable assets other than real property.200 That reachable asset is money: funds guaranteed by payment bonds, liens on funds, and stop payment demands; funds subject to penalties if not promptly paid to subcontractors from prime contractors; and, funds subject to the jurisdiction of federal, state, and local government agencies. Many of these remedies are also available on private projects. They are arguably just as or more effective than mechanics liens, assuming claimants can overcome the following hurdles in satisfying the statutory requirements to enforce them.

A. **Power to the People: “Person” Defined in the Statutes for Public Construction Payment Remedies.**

Is the claimant authorized within its applicable jurisdiction to assert these statutory claims or other remedies? Chances are, if the claimant provided work or materials to a public construction job and it is owed money, then the statutes in the claimant’s jurisdiction will give some protection.201 Direct contractual privity is generally a non-issue,202 but subtle distinctions in contractual privity can still have a meaningful impact.203 For example, under federal law and most states, only first- and second-tier subcontractors and suppliers can make a claim against a payment bond.204 Third- and lower-tier subcontractors and suppliers are traditionally considered too remote and are not entitled to recover under a payment bond.

Another common theme appears to be that government agencies in charge of public funds must be on notice, actual or constructive, that subcontractors are doing public work and are authorized to enforce these remedies if they do not get paid. Without a notice requirement, essentially anyone could unilaterally decide to improve public lands and then demand payment for
their work. Thus, generally in all jurisdictions, the law requires strict compliance with notice provisions, discussed in greater detail below. In summary, to be protected by these statutory payment remedies, claimants usually must: (1) provide authorized labor or materials on a construction project; (2) provide some form of notice; and (3) remain unpaid.

**B. Show Me the Payment Bonds!**

The most common public works statutory remedy upon which subcontractor and material suppliers rely is the payment bond. A payment bond is a form of surety bond, a guarantee that claimants will be reimbursed for the cost of work furnished on a public project with the financial backing of a third party. Payment bond claims can also result in an award of interest and attorneys’ fees. All 50 states have some form of payment bond requirements for public construction projects, usually requiring bonds if the jobs are over a certain contract price.

On federal construction projects, and in many states, this may be the most favorable (or only) remedy available. Direct contractors are required to provide payment bonds to the federal Government under the Miller Act for federal construction projects over $100,000. Miller Act payment bonds are “for the protection of all persons supplying labor and material in carrying out the work provided for in the contract.”

State projects are similar. For example, payment bonds are required California public construction projects if the amount of the contract is over $25,000. Many states use the Miller Act as a guide in regulating their own works of improvement with payment bond requirements, known as the Little Miller Acts. Additionally, parties can always require payment bonds in a contract before work begins (for jobs less than the statutory minimum), and it is common practice to do so. “[Surety bonds] are a nearly universal feature of public contracting, and are common features of private contracting as well.”
1. **Too Far Down the Ladder?**

Unfortunately, some claimants are not considered “persons” afforded protection by federal or state payment bond remedies. Third-tier (sub-subcontractors) and lower-tier subcontractors are excluded from payment bond protection in most states. Likewise, many jurisdictions’ statutes exclude material suppliers to second and lower-tier subcontractors from payment bond protection.\(^\text{213}\) There is some precedent, however, which provides that if a first-tier subcontractor agrees to pay directly someone who has furnished labor or material to a second-tier subcontractor, the claimant is then considered to have a direct contractual relationship with the first-tier subcontractor within the meaning the Miller Act or Little Miller Act and may recover against the payment bond.\(^\text{214}\)

It may also be imperative, for purposes of determining the scope of the protected classes under Miller Act and Little Miller Acts, to recognize when the claimant is in privity of contract with a first-tier subcontractor or supplier. If the claimant is in privity of contract with a “supplier,” the claimant may be barred from asserting its payment bond rights as it will be deemed a “supplier to a supplier.”\(^\text{215}\) Courts have identified various factors to analyze whether a party has sufficient “substantiality and importance” with the prime contractor to be deemed a “subcontractor,” including: (a) the nature of the material and work to be performed (custom work or “off the shelf” items); (b) the degree of responsibility assumed by the claimant; and (c) whether the contractor could have protected itself against loss by requiring an appropriate bond or other security from the claimant.\(^\text{216}\) Some courts have required that actual physical labor was required to be performed on-site, and not merely on-site project management, supervision, or administration services to the prime contractor.\(^\text{217}\)
2. **Notice Requirements for Payment Bond Claims**

Although it is not always required, subcontractors and material suppliers should generally serve a preliminary notice in accordance with state law as discussed below to preserve the right to enforce a claim upon a payment bond. Some states adopt the federal law requirement for certain claimants to serve upon the prime contractor (and sometimes the surety) a “bond claim notice,” which is also commonly referred to as a 90-Day Notice under the Miller Act, only after they are done furnishing labor or materials to the project. Under federal law and those states with traditional Little Miller Act requirements, no notice is needed by a person with a direct contractual relationship with the prime contractor, express or implied. All others, however, must give notice to at least the prime contractor within the 90 days after the last furnishing of labor or material.

3. **Commencing an Action on a Payment Bond**

Under federal and state law, a relatively brief statute of limitations exists in which to bring a legal action to enforce a payment bond claim. Under federal law and those following the Miller Act, the lawsuit must be filed no less than 90 days after the amount becomes due to the claimant, but no later than one year after the claimant last furnished labor or materials to the jobsite. In states like California, however, the statute of limitations is based on the last date by which the claimant can utilize another statutory remedy (i.e., the stop payment notice). This means that, in California, a claimant may file an action on a payment bond at any time after the claimant ceases to provide work, but it must not be later than six months plus either 30 days (if a notice of completion is recorded) or six months plus 90 days from actual completion of the project. An action on the statutory payment bond is cumulative with other remedies. Generally, it may be filed as a separate action, without filing an action against the public entity on the stop payment notice, or it may be coupled with a stop payment notice action.
Like a stop payment notice, an action on a statutory payment bond should be filed against the prime contractor and the surety on the payment bond.\textsuperscript{225}

C. Lien on Construction Funds / Stop Payment Notice

Another way some states provide alternative remedies or security to subcontractors and material suppliers is through a “lien on funds.”\textsuperscript{226} While federal law does not provide for this remedy, in California, the so-called “stop payment notice” provides claimants with a security interest in the funds due to be paid out from the public entity to a prime contractor.\textsuperscript{227} Essentially, claimants place a lien on the construction funds of the project and require public entities to stop payments to the prime contractor because the claimant remains unpaid for work furnished to the public project.

In California, a stop payment notice requires a public entity to withhold from the direct contractor sufficient funds due or to become due to the direct contractor to pay the claim stated in the stop payment notice, plus the public entity’s reasonable, anticipated cost of litigation.\textsuperscript{228} How the money is treated after a lien on funds or stop payment notice has been “perfected” varies from state to state. In California, it effectively imposes a trust obligation on the public entity.\textsuperscript{229} Also, in bankruptcy proceedings, it can have favorable effects because claimants may be elevated from an unsecured creditor to a secured creditor.\textsuperscript{230}

Before any dispute arises, preliminary notice should be served, as discussed below. Once a dispute arises, the actual stop payment should be served as soon as possible. A public entity has no duty to anticipate stop payment notices and may make final payment to the direct contractor even when the stop payment notice period has not expired.\textsuperscript{231} If the public entity has already paid the direct contractor, then the stop payment notice will be ineffective.\textsuperscript{232}
Who to serve and the method of service may depend on the type of government agency authorizing the project, as well as state law. The deadline to serve a stop payment notice in California ranges from 30 to 90 days from project completion.

After a stop payment notice has been served, the claimant must file a complaint to enforce its stop payment notice claim and obtain a judgment in its favor, or make a settlement that includes an assignment of the funds. In California, the earliest a claim can be filed is 10 days after the stop payment notice is given, and the latest it can be filed is 90 days after expiration of the period in which a stop payment notice may be filed (i.e., 30 days from a valid notice of completion or 90 days from actual completion of the project). The action must be brought against the public entity as well as the prime contractor. Assuming there is a payment bond, then the payment bond surety should also be named in the complaint in a cause of action to enforce the payment bond claim. If a release bond has been filed, then the release bond surety will replace the public entity as a defendant. If there are multiple claimants, then they may be joined as co-plaintiffs.

D. Construction Trust Fund Statutes

Another common remedy provided by statute in some states is that any funds paid to a contractor intended for work done by a subcontractor or materials supplied shall be held in trust. These statutes are unique in that they go to the extent of creating both a separate identity for funds as well as a vesting mechanism. Normally, a prime contractor would be the trustee, and funds owed to the contractor will vest once the project is completed and all other parties get paid. Some statutes also impose criminal liability on a prime contractor if they do not fulfill their duties. For example, Wisconsin Statute section 779.16 (Theft by Contractors) states that “[a]ll moneys, bonds or warrants paid or to become due to any prime contractor or subcontractor for public improvements are a trust fund…” and any misappropriation shall be punishable as theft.
Most states do not have trust fund statutes *per se*. But even in states that do not have trust fund statutes, fiduciary liability may be imposed pursuant to contract.

E. Prompt Payment Statutory Penalties: California Statutory Scheme

In addition to the remedies discussed above, claimants may seek to collect penalties from public entities and general contractors due to late payment. In California, like many jurisdictions, the time for payment on public works of improvement depends on the type of public entity authorizing the work, whether the payee is a contractor or subcontractor, and whether it is for a progress payment or retention payment.

In California, the timeframe for promptly making progress payments ranges from 7 to 39 days from the date an undisputed payment request is properly submitted. In general, prime contractors have a more onerous burden to pay subcontractors because subcontractors must be paid sooner than contractors. Time for promptly making undisputed retention payments ranges from 60 to 90 days from completion of the work, or for design professionals, 45 days from a written demand to pay. Contractors must pay subcontractors from whom retention has been withheld within 7 days after receipt of retention payment. Prime design professionals must pay design sub-consultants within 15 days after receipt of retention payment. “In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount.”

If a party does not comply with the prompt payment statutes, then it may be subject to penalties; in California, this is either 1.5 percent per month, 2 percent per month, or 10 percent per annum on the amount due under the contract at those times. Additionally, a contractor’s diversion of payments received and owed to a subcontractor is grounds for disciplinary action by the Contractor’s State Licensing Board, and subcontractors have a duty to notify the Board of such
Last but not least, most disputes for prompt payment include provisions for attorneys’ fees, either by contract or the statutes cited to above. Notably however, material suppliers are excluded from certain prompt payment statutes. Payment bond sureties can also be liable for payment of penalties assessed under one of the prompt payment statutes.

F. Common Defenses

Public entities and prime contractors often assert defenses upon the unpaid subcontractor or suppliers’ presentation of a statutory claim for payment. Some of the obvious procedural defenses, (some of which are discussed above,) include: (a) failure to timely serve a preliminary notice; (b) failure to properly serve a preliminary notice upon all required parties; (c) failing to timely serve a payment bond or construction fund lien claim; (d) failing to properly serve the payment bond or construction fund lien claim upon all necessary parties; and (e) failing to timely commence legal proceedings to enforce the statutory remedies. Of course, prime contractors will often point to late or deficient performance of work by its subcontractor or material supplier as an excuse for nonpayment, sometimes coupled with a threat of a corresponding backcharge.

Another common defense arises when a subcontractor is not licensed. In California, unlicensed contractors cannot recover as a matter of public policy. “The licensing requirements provide minimal assurance that all persons offering such services have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business.” The policy requiring licenses, in many states, is more important than preventing a windfall to a project owner. Other states are more lenient, such as Nevada, where unlicensed contractors may still be able to recover under a theory of unjust enrichment.

The terms of the contract also inevitably give rise to various defenses, which may include indemnity provisions or other valid excuses of performance by the public entity or prime
contractor. Often, the public entity or prime contractor defendant will assert that: (a) the claimant has waived its right to statutory remedies; (b) a pay-if-paid or pay-when-paid clause supersedes the claimant’s right to assert statutory remedies; or (c) payment is not yet “due” since it is subject to retention or a statutory right to withhold.

1. **Waiver of Statutory Remedies**

   Whether statutory remedies can be waived also needs to be analyzed on a case-by-case basis. Generally, in California, statutory remedies cannot be waived absent the execution of specifically-worded statutory waiver and release forms:

   An owner, direct contractor, or subcontractor may not, by contract or otherwise, waive, affect, or impair any other claimant's rights under this part, whether with or without notice, and any term of a contract that purports to do so is void and unenforceable unless and until the claimant executes and delivers a waiver and release under this article.\(^{257}\)

   California provides sample forms for valid waivers.\(^{258}\) Critically, waivers are only valid if they substantially mirror the model language in the statute; and a conditional release is effective only if the claimant has been paid. In *Clarke v. Safeco*, the California Supreme Court discussed similar waivers, reiterating that “[t]he Legislature's carefully articulated anti-waiver scheme would amount to little if parties to construction contracts could circumvent it…”\(^{259}\)

2. **Pay-If-Paid Clauses**

   It is not uncommon for prime contractors to insert a “pay-if-paid” clause in a subcontract stating that payment from a public entity to the prime contractor is a condition precedent for payment from that prime contractor to subcontractors.\(^{260}\) In other words, contractors will only have to pay-if-paid. From a policy standpoint, this could severely harm smaller companies by forcing them to finance ongoing work without getting paid progress payments and for change orders.\(^{261}\) Pay-if-paid clauses could also be used to nullify, or at least contradict, most statutory construction
law remedies. Thus, in approximately sixteen states, including California, Nevada, and New York, pay-if-paid clauses in contracts are void and unenforceable as a matter of public policy.\textsuperscript{262}

The contrary rule is that parties are free to negotiate the terms of their contracts, including the risk of nonpayment.\textsuperscript{263} Therefore, some jurisdictions take the position that pay-if-paid clauses in contracts are enforceable as long as they clearly express the intent of the contracting parties and are undeniably clear and unambiguous.\textsuperscript{264} Yet, even in those states, claimants may be able to form a strong argument to strike down the validity of such clauses and circumvent them through other statutory remedies.

3. \textit{Retention and Statutory Right to Withhold}

The law also provides a compromise between ensuring that those supplying labor and materials get paid on the one hand, and ensuring that the work gets done properly on the other hand. To ensure that work is properly completed, prime contractors may withhold a portion of the final amount due to subcontractors or materials suppliers until the project is completed, known commonly as “retention” or “retainage.”\textsuperscript{265} This gives a prime contractor some bargaining power in the event of future disputes. It is usually 5 to 10 percent of the undisputed amount owed, and the prime contractor or owner retains it in case a dispute arises later.\textsuperscript{266}

Retention requirements are usually specified in the contract, and retention is released after substantial completion. Additionally, various laws may apply to the maximum amount a prime contractor can retain and when the retention must be paid.

V. \textbf{WHAT TO DO IF YOU ARE A SUBCONTRACTOR OR MATERIAL SUPPLIER ON A PUBLIC CONSTRUCTION PROJECT TO ENSURE PAYMENT?}

Both at the outset of the public work at issue and during administration of the project, subcontractors and suppliers must be vigilant to ensure that they preserve all common law and statutory avenues for payment. To that end, it is imperative for subcontractors and suppliers to
gather and validate all pertinent project and party information before commencing work or furnishing materials to the public work of improvement. It is also important for claimants to timely serve a preliminary notice (if required) and timely serve all statutory claims upon all necessary parties to preserve all viable avenues of recovery. Of course, both the claimant and its counsel must carefully calendar all applicable statutes of limitations within which to enforce such statutory remedies, if necessary.

At a minimum, subcontractors and suppliers should gather the following before furnishing labor or materials to a public project:

- A detailed job information sheet on the public entity or prime contractor’s letterhead;
- Contact details for the public entity authorized to distribute the funds, and its disbursing officer;
- Contact details and current license numbers with the state contractor licensing board or other agency, including expiration dates of those licenses, for the direct contractor, higher tier subcontractors, and any other parties along the path of payment;
- A copy of the original public works contract, other direct contracts, and any higher-level subcontracts including contract number, project description used by the public entity, street address of the project site, and legal description of the project site;
- A copy of any and all payment bonds, including bond numbers; and
- Contact details of any payment bond surety (not the insurance broker) and corresponding payment bond principal.
It is good practice to organize the above information on a project data sheet for future reference when preparing preliminary notices, construction fund lien notices, and payment bond claims. Finally, of course, all claimants should also investigate the background and solvency of the direct contractor and its customer on the public work of improvement.

VI. CONCLUSION

This article identified common, nationwide themes in statutory remedies for subcontractors and materials suppliers. First, claimants gain a right to payment due to the labor or materials they supply. Second, preliminary notice on the public entity and other parties is generally required to preserve the right to these remedies; contractual privity is not necessarily required to enforce the remedies. Third, contractors generally have a fiduciary obligation to pay their subcontractors and material suppliers in properly distributing public funds.

It is impossible to anticipate all, or even most, of the difficulties a subcontractor or material supplier will encounter on public construction projects. When agreeing to a construction contract, it is prudent to make one assumption—disputes are inevitable. State and federal laws determining who wins in a dispute vary as much as the contracts to do the work. Parties should always seek legal counsel before signing a contract because a little bit of diligent preparation and understanding all avenues of recovery can yield a big return on investment if a claim for nonpayment ensues.

1 41 U.S.C. § 7101 et seq.
4 41 U.S.C. § 7102(a)
5 Id.
7 See e.g. Fidelity & Deposit Co. of Md v. U.S., 14 Cl. Ct. 421, 422 (1988) (“Under this [subrogation] theory, a surety] would be entitled to sue the Government directly to recover, either from retainage or from sums paid after notice of the surety’s interest, amounts the surety has spent on performance or paid to laborers and materialmen. Through the doctrine of subrogation, it would succeed to the rights of the contractor or
of the laborers and materialmen against the Government."); Universal Surety Co. v. U.S., 10 Cl. Ct. 794, 796-97 (1986).
9 Id.
10 48 C.F.R. § 52.233–1.
11 48 C.F.R. § 33.215.
12 48 C.F.R. § 52.233–1.
13 Id.
14 Id.
16 Reflectone, Inc. v. Dalton, 60 F.3d 1572,1577 (Fed. Cir. 1995).
23 811 F.2d 586, 592 (Fed. Cir. 1987).
24 Id.
27 Id.
28 D.L. Braughtler Co., Inc. v. West, 127 F.3d 1476, 1481 (Fed. Cir. 1997).
29 Id. at 1481-82.
32 Id. at 179.
35 Id.
36 41 U.S.C. § 7103(b).
38 41 U.S.C. § 7103(b)(3); 48 C.F.R. 33.207(f).
39 Id.
40 Hamza, 31 Fed. Cl. at 324.
41 48 C.F.R. 33.207(c).
42 48 C.F.R. § 33.209
43 48 C.F.R. § 33.207(e).
44 48 C.F.R. § 33.207(d).
45 41 U.S.C. § 7103(d).
46 41 U.S.C. § 7103(e).
47 48 C.F.R. § 33.211(h)
53 Id.
54 41 U.S.C. § 7103(g).
Nat’l Neighbors, Inc. v. U.S., 839 F.2d 1539, 1542 (Fed. Cir. 1988) (discussing the Election Doctrine, but noting that for a contractor’s choice to be binding, it must be available to the contractor and have jurisdiction over the claim, which would not occur, for example, if the appellate filing was premature).

41 U.S.C. § 7104(c)(2).
41 U.S.C. § 7105(f).

41 U.S.C. § 7104(b)(3).
41 U.S.C. § 7104; 48 C.F.R. § 33.211.

41 U.S.C. § 7106(b).
41 U.S.C. § 631 et seq.
41 U.S.C. § 7106(b).

41 U.S.C. § 7107(b).


According to the court in Bruce Construction Corp. v. U.S., an equitable adjustment is a corrective measure utilized to keep a contractor whole when the federal government modifies a contract. 324 F.2d 516, 518 (Ct. Cl. 1963). The purpose is to safeguard the contractor against increased costs due to the government’s modification and therefore the damages are not measured by value received by the government, but instead is related to the position in which the contractor finds itself due to the change. Id.

Tip Top Const., Inc. v. Donahoe, 695 F.3d 1276, 1283-84 (Fed. Cir. 2012).

Id. at 1284 (quoting Bill Strong Enterprises, Inc. v. Shannon, 49 F.3d 1541, 1550 (Fed.Cir.1995)).


31 U.S.C. §§ 3902(e), 3902(b), 3907(b)(1)(B).


Id.
Id.

Id.

Id.

10 MRSA § 1111 et seq.

10 MRSA § 1112.

10 MRSA § 1113(1).

10 MRSA §§ 1111, 1113(2).

10 MRSA § 1113(3).

10 MRSA § 1116.

10 MRSA § 1118(1).

10 MRSA § 1113(3).

10 MRSA § 1113(4).

10 MRSA § 1118(2).

10 MRSA § 1118(4).


Int’l Data Prods. Corp. v. U.S., 492 F3d 1317, 1325-26 (2007) (holding that recovery under quantum valebant or quantum meruit is not available as the contract at issue was neither invalid nor unenforceable).

786 F.2d 387 (Fed. Cir. 1986).

Id. at 392 (quoting Brous, Terminations for Convenience: A Remedy for the Erroneous Award, 5 PUB. CONT. L.J. 221, 222-23 (1972)).

Id. at 393; see also Int’l Data Prods. Corp., 492 F3d at 1325-26.

31 U.S.C. § 3729 et seq.


U.S. v. Killough, 848 F.2d 1523, 1533-34 (11th Cir. 1988).

U.S. ex rel. Varljen v. Cleveland Gear Co., 250 F.3d 426 (6th Cir. 2001) (holding that a contractor’s failure to comply with the contract specifications can result in FCA injury to the government even if the supplied product is as good as the specified product).


41 U.S.C. § 7103(c)(2).

41 U.S.C. § 7101(9).


U.S. v. Gumbs, 286 F.3d 128, 131 (3rd Cir. 2002).
For example, the federal Prompt Payment Act requires, in contracts awarded by U.S. Government agencies, prime contractors to pay subcontractors (including material suppliers) within seven days from receiving the money from the government agency. 31 U.S.C. §3905(b).

For example, under the federal Miller Act a subcontractor or material supplier may not waive his or her right to a payment bond claim before completing work. If a prime contractor includes such a waiver in a subcontract for a federal construction project, it is void. See 40 U.S.C. §3133(c)(3).


See South Bay Expressway, L.P. v. Otay River Constructors (In re South Bay Expressway, L.P.) (Bankr. S.D. Cal. 2010) (holding that a privately constructed toll road project was not a “public work” and that a mechanics lien could attach to the private entity’s interest).


E.g., —Is the claim regarding unforeseeable subsoil conditions of the land or otherwise related to a private entity’s lease from a governmental entity? Did the government delay access for subcontracted surveyors or other workers onto the property? (If yes, probably public) Or, is the claim regarding work done only on the building itself, perhaps interior decorative structures, and said work was only within the control of private, prime contractors? (Arguably private)

See, e.g., North Bay Constr., Inc. v. City of Petaluma, 143 Cal.App.4th 552 (2006)

See id.; see also Industrial Asphalt, Inc. v. Garrett Corp., 180 Cal.App.3d 1001, 1004 (permitting a mechanics lien against a private entity’s leasehold interest in publicly-owned real property at the Los Angeles International Airport).


Osier & Silberman, supra note 164 at 356.


In California, for claimants to have access to a stop payment notice claim (aka lien on funds in other states) or a payment bond claim, they must give preliminary notice to the public entity authorizing the work and the direct contractor to which work was provided. But laborers and those that have a direct contractual relationship with the direct contractor do not have to give preliminary notice. Cal. Civ. Code §9300.
For a more in-depth review of statutory construction law remedies broken down state-by-state, see endnote 206.

Judicial Council of California Civil Jury Instruction §303 (West 2018).

Restatement (Second) of Contracts §237. Common examples include: subcontractor is not getting paid on a job, work is only part way done, prime contractor demands that subcontractor continue work, subcontractor cannot continue work without getting paid because subcontractor does not have enough financial resources, subcontractor is forced to stop work, subcontractor seeks payment for all work performed, prime contractor counterclaims that subcontractor wrongfully breached the contract by stopping work, for subcontractor to succeed in defending against prime contractor’s counterclaims, subcontractor must prove that prime contractor’s non-payment was a material breach of contract.

Restatement (Second) of Contracts §241.

See Uniform Commercial Code § 2-207.

As a matter of public policy, claimants must have a direct contractual relationship with the public entity in order to bring claims for breach of contract against that public entity; likewise, a subcontractor cannot recover against a public entity as a third-party beneficiary of the prime contract. See Southern Cal. Acoustics Co. v. C. V. Holder, Inc., 71 Cal.2d 719 (1969).

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to protect those whose labor and materials go into public projects.”) (emphasis added, internal quotations omitted).


196 David A. Senter, *FUNDAMENTALS OF CONSTRUCTION LAW* Ch. 5, 132 (Elmore, et al. eds. 2nd ed. 2013).


198 California Constitution, Art. XX, §15 (as enacted 1879) (“Mechanics, material men, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.”). Currently, this provision is codified at Art. 14, §3.


200 It is also interesting to note that people may use the term ‘mechanics liens’ to include other remedies such as stop notices and enforcement of payment bonds. *See* Miller & Starr, Real Estate Newsalert, *Everything Old is New Again: Impact of SB 189 on Mechanics’ Lien Law*, at 1, (March 2011). *See also* California Law Revision Commission, *Recommendation: Mechanics Lien Law*, 37 Cal. Law Rev. Comm’n at 530 (2007) (letter to former Governor Arnold Schwarzenegger).

201 *See, e.g.*, 40 U.S.C. §3133(b)(1) (Rights of persons furnishing labor or material) In general.—Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 [Bonds of contractors of public buildings or works] of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.

*See also* Cal. Civ. Code §9100 (Persons who may give stop payment notice or assert claim against payment bond).

202 O’Rourke et al., *supra* note 199 at 93.

203 *See, e.g.*, 40 U.S.C. §3133(b)(2) (requiring subcontractors who do not have a contractual relationship, express or implied, with the direct contractor furnishing the payment bond to give written notice to said contractor “within 90 days from the date on which the [subcontractor] did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made.”). *See also* Osier & Silberman, *supra* note 164 at 342.

204 40 U.S.C. §3133(b)(1)-(2)


206 *FIFTY STATE CONSTRUCTION LIEN AND BOND LAW*, PREFACE (Laurence Schor ed., 4th ed. 2017). This text is an excellent reference to continue research. It is organized into chapters describing the law in each state and other U.S. territories. It is concise, thorough, and well organized.

207 *See* Madison Restoration Corp. v. Smithsonian Inst., 985 F. Supp. 434, 437–38 (S.D.N.Y. 1997) (holding that because the Smithsonian is a trust instrumentality of the United States, and “[b]ecause a lien cannot attach to Government property, persons supplying labor or materials on a federal construction project were to be protected by a payment bond.”); United States ex rel. Consol. Elec. Distrib., Inc. v. J.D. Grainger Co., 945 F.2d 259, 263 (9th Cir. 1991). States that authorize other remedies, including liens on funds and stop payment notices, for public construction jobs are listed in endnote 226.

208 40 U.S.C. §§3131(b)(2). *See also* Wallick, Robert D. Wallick & John A. Stafford, *"The Miller Act: Enforcement of the Payment Bond" in Law and Contemporary Problems* (1964)). The ‘Miller Act’ was
first enacted in 1935, but substantively it was originally enacted as the Heard Act in 1894. The Miller Act is currently codified at 40 U.S.C. §§3131–3154.


214 See Fluor Corp. v. U.S. ex re Mosher Steel Co., 405 F.2d 823 (9th Cir. 1969 (holding that oral promise by first-tier subcontractor to guarantee payment enabled claimant to recover against payment bond surety).


221 See 40 U.S.C. § 3133(b).


226 O’Rourke et al., supra note 199 at 92. Those states include, but are not necessarily limited to: Alabama, Alaska, Arizona, California, Illinois, Indiana, Kentucky, Louisiana, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, Texas, South Dakota, Washington, and Wisconsin.

227 O’Rourke et al., supra note 199 at 92.


234 It depends on whether the public entity records a notice of completion. The stop payment notice may be served up to 30 days after a notice of completion is recorded, or 90 days after project completion if no notice of completion is recorded. Cal. Civ. Code §9356.

A public entity may record a notice of completion on or within 15 days from the date of completion. Cal. Civ. Code §9204. If no notice of completion is recorded, then project completion occurs on the earlier of acceptance by the public entity or cessation of labor for 60 days. Cal. Civ. Code §9200.

235 Cal. Civ. Code §9502. If the claimant pays the public entity a $10 fee when giving the stop payment notice, the entity must give the claimant notice of the time within which an action must be commenced. Generally speaking, this notice must be given within 10 days after project completion. Cal. Civ. Code §9362.


See In re Gonzales, 22 B.R. 58 (9th Cir. B.A.P. 1982).


Ginn, supra note Error! Bookmark not defined. at §4.138 (providing a summary table of prompt payment statutes in California, time payment is due, and penalties).


A typical pay-if-paid provision might read: “Contractor’s receipt of payment from the owner is a condition precedent to contractor’s obligation to make payment to the subcontractor; the subcontractor expressly assumes the risk of the owner’s nonpayment and the subcontract price includes this risk.” Robert F. Carney & Adam Cizek, Payment Provisions in Construction Contracts and Construction Trust Fund Statutes: A Fifty-State Survey, at *6 (http://www.fullertonlaw.com/docs/pdf/50.pdf).

For example: If a subcontractor (“Sub”) is entitled to progress payments and/or valid change orders under a fixed price subcontract, but the government is refusing to pay a prime contractor (“Prime”) for any reason, and a pay-if-paid clause is enforceable, then the Prime would have little incentive to pursue payment from the government for money owed to the Sub. In fact, if the Prime can push its obligations off onto the Sub through additional subcontract change orders, increasing the Sub’s costs, while decreasing the Prime’s costs, then the Prime could become more profitable by never requesting payment for the Sub’s change orders from the government. The Prime may yet continue to demand the Sub to do additional work pursuant to the contract. Thus, the Sub would be stuck in a ‘change order trap’ because it incurs additional cost without getting paid for additional work.


For example, when a subcontractor invoices a prime contractor for a progress payment, the prime contractor may only pay 90% of the amount invoiced and keep 10% as a retention. Later, if the subcontractor leaves the job without cleaning up (and clean up was included in the contract as being the subcontractor’s responsibility), then the prime contractor may deduct the cost of cleanup from the retention.

Daniel M. Drewy et al., CONSTRUCTION SUBCONTRACTING: A COMPREHENSIVE PRACTICAL AND LEGAL GUIDE, CH. 1, 9 (Aaron P. Silberman et al. eds., 2014).