

Lien and Bond Changes 2017 — A Review of Statute Changes from the First Six Months

By Kristin Alford of NCS

Payment bond thresholds and requirements, Public Private Partnerships (P3s), and forthcoming statute changes for North Carolina and Ontario, have made the list of top statute changes for the first half of 2017.

The U.S., U.S. Possessions and Canada each have their own mechanic's lien and bond claim statutes, offering security to those that supply labor or materials for the improvement of real property. This also means, at any given time, dozens of various governing entities are evaluating and re-evaluating their current statutes. It's important to monitor the legal activity to ensure you take the proper steps to secure your company in the event of non-payment.

A handful of states have enacted changes to statutes that could impact potential mechanic's lien and bond claim claimants. Though most of these changes aren't necessarily drastic, a little change can have a significant impact.

Changes in Payment Bond Thresholds & Bonding Requirements

Several states have made changes to payment bond thresholds and/or bonding requirements. Several of these changes have increased the threshold for bond requirements, which could significantly impact those furnishing to public projects.

Idaho SB1074, effective 7-1-17, requires payment and performance bonds for public projects of \$50,000.00 or more.

Prior to the passage of this bill, bonds were required on all projects, regardless of contract amount.

"Idaho 54-1926. Performance and payment bonds required of contractors for public buildings and public works of the state, political subdivisions and other public instrumentalities — Requirements

for bonds — Governmental obligations. Before any contract equal to or greater than fifty thousand dollars (\$50,000) for the construction, alteration, or repair of any public building or public work or improvement of the state of Idaho, or of any county, city, town...

(2) A payment bond in an amount to be fixed by the contracting body but in no event less than eighty-five percent (85%) of the contract amount, solely for the protection of persons supplying labor or materials, or renting, leasing, or otherwise supplying equipment to the contractor or his subcontractors in the prosecution of the work provided for in such contract."

Indiana HB1117 was effective upon passage. Under Title 5, a state educational institution may waive the requirement for a contractor to obtain a payment bond if the amount to be paid under the contract is less than \$500,000.00.

A contract of \$500,000.00 for an improvement to a state educational institution may seem low; frequently the contracts for these projects are in the millions. However, it's important to remember, a lien cannot attach to public property. If there is no payment bond, the only other remedy available may be to pursue your debtor for the amount unpaid.

North Dakota SB2146, effective 8-1-17, requires payment and performance bonds for public projects exceeding \$150,000.00.

North Dakota, like Idaho, has raised the threshold for its bond requirement. The requirement went from \$100,000.00 to \$150,000.00. This means a public project with a general contract value of less than \$150,000.00 is not required to be bonded.

"48-01.2-10. Bonds from contractors for public improvements.

1. Unless otherwise provided under this

chapter, a governing body authorized to enter a contract for the construction of a public improvement in excess of one hundred fifty thousand dollars shall take from the contractor a bond before permitting any work to be done on the contract. The bond must be for an amount equal at least to the price stated in the contract. The bond must be conditioned to be void if the contractor and all subcontractors fully perform all terms, conditions, and provisions of the contract and pay all bills or claims on account of labor performed and any supplies, and materials furnished and used in the performance of the contract, including all demands of subcontractors."

Virginia H2017, effective 7-1-17, amends the thresholds for requiring a performance and payment bond.

A bond will be required on general contracts exceeding \$500,000.00, and on general contracts for Commonwealth transportation projects exceeding \$350,000.00.

"§ 2.2-4337. Performance and payment bonds. 2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the public body."

On non-transportation projects between \$100,000.00 and \$300,000.00, the bond requirement may be waived if the contractor has been prequalified by the public entity.

Washington passed two bills, both effective 7/23/17.

- SB5734, provides that contracts up to \$150,000.00 may be exempt from the performance and payment bond requirement, if 10% of the contract amount

is retained by the owner for 30 days after the date of final acceptance.

- HB1538, prior to formal acceptance of the project, a subcontractor may request that the prime contractor provide a bond for the subcontractor's portion of the retainage. The bond must be provided within 30 days. The prime contractor may withhold the bond premium for the portion of the subcontractor's retainage bond.

Payment Bond Best Practice: Always request a copy of the payment bond when contracting for the project. Make this request a normal part of doing business, just as you would when obtaining project information and reviewing creditworthiness. In the event of furnishing to a public project, and there is no payment bond required/available, take additional credit precautions.

Changes in Public & Private Partnerships (P3s)

P3s continue to make headlines this year, though not as prolifically as in years past. More states are partnering with private entities for the improvements to public infrastructure; the costs can be much lower for the public entity and the private entity can profit from their involvement.

Arkansas SB651, effective 6-7-17, creates The Partnership for Public Facilities and Infrastructure Act to regulate public-private partnerships for public facilities and infrastructure.

SB651 (now Act 813) brings P3s to Arkansas. P3s have significant benefits; however, it's important to note that part of this Act exempts city, county and highway projects from the P3 statute. According to an article from Bernhard, a large commercial contractor who served as an advisor on the bill's development, the Act focuses on state projects.

"...Act 813 only applies to instrumentalities of the state, including higher education facilities, boards and commissions, and will benefit projects ranging from parking facilities and wastewater facilities to central energy plants, medical facilities and schools."

Oklahoma SB430, effective 11-1-17, creates Title 74 of the Oklahoma Statutes known as Oklahoma Public and Private Facilities and Infrastructure Act. This act provides procedures and requirements for qualifying infrastructure projects.

Kansas SB55, effective 7-1-17, Kansas statute will require a contractor, on a public-private partnership project valued at more than \$100,000.00, to furnish a payment and performance bond equal for the full contract amount. The bonds must allow for the recovery of attorney fees and related expenses.

“Be it enacted by the Legislature of the State of Kansas: Section 1. (a) Prior to entering into a contract in any sum exceeding \$100,000 with an owner that involves a public-private agreement, the contractor shall furnish to the owner or owner’s agent the following bonds, which shall be placed with good and sufficient sureties as determined by the public owner and shall become binding upon the award of the contract by the owner or owner’s agent to the contractor”

P3s, now enacted in nearly 40 states, are still a young phenomenon. At the time of your contract, take the time to determine the rights available to you on a P3 project, and confirm whether a payment bond has been provided. Although investigating rights may take a bit of time at project onset, it will save you significant time & headache in the event there are payment problems later.

Changes in Residential Notices, Notices of Substantial Completion & Common Interest Developments

Arkansas (*its second appearance on our list*), California, and Nova Scotia round out our list of 2017 changes.

Arkansas HB1750, became effective 6-7-17. The exceptions as to when a notice is required for a lien upon a residential project have changed. If the sale is a direct sale, the notice is not required. A direct sale will be defined as when the property owner orders materials or services directly from you, and you are not a home improvement contractor or a residential building contractor.

Best Practice: Always serve a preliminary notice, even if it’s not required. It is better to serve a notice and discover it was not required than to neglect sending a notice and possibly lose your lien rights.

California AB534, effective 1-1-18, provides that with respect to a work of improvement on a common area within a common interest development (previously referred to as a condominium project), if statute requires service of a notice or claim to or on the owner of common

area property, the notice may be served upon the association, as an agent of the owners of separate interests. Also, provisions have been made for the separate interest owner to record a lien release bond.

“This bill would authorize the owner of a separate interest in a common interest development to remove the separate interest from a lien against 2 or more separate interests by either paying to the holder of the lien the fraction of the total sum secured by lien that is attributable to the owner’s separate interest or recording a lien release bond, as specified.”

Nova Scotia, effective 6-30-17, Schedule A under Section 48 of the Nova Scotia Builders’ Lien act will require the owner of a project to post a notice of substantial performance within 10 days after the date on which a contract between a contractor and an owner is substantially performed. Additionally, the owner must post a notice of subcontract completion within 10 days after the date on which a subcontract is certified complete. The notices must be posted on the Construction Association of Nova Scotia’s website and at the job site office, if there is one. Exceptions are provided for certain owner-occupied, single-family dwellings.

Coming Soon: North Carolina & Ontario

North Carolina HB707, effective 10/01/2018, amends the statutes providing for the cancellation or renewal of a Notice to Lien Agent.

In 2013, North Carolina introduced the Lien Agent and Notice to Lien Agent. The Notice to Lien Agent is filed online via www.LiensNC.com and alerts the lien agent of potential lien claimants.

With the passage of HB707, *section § 44A-11.2 (Identification of Lien Agent; Notice to Lien Agent; Effect of Notice)* institutes a “shelf-life” of 5 years for the Notice to Lien Agent.

Just as it is now, lien claimants will file their Notice when they begin furnishing, and that will initiate the 5-year term. If at any time during the 5-year term the lien claimant is paid in full, the claimant would cancel their Notice. Alternatively, at the end of the 5-year term, if the lien claimant has not been paid or if the project is ongoing, the claimant can renew their Notice extending the term for another 5 years.

When the Notice is renewed, protection continues from the original date of the notice.

“(t) If a Notice to Lien Agent is timely renewed prior to cancellation or expiration pursuant to this section, the renewal shall maintain and relate back to the original delivery date of the Notice to Lien Agent.”

If the claimant does not renew or cancel their Notice by the end of the 5 years, the Notice will automatically expire.

Ontario: In the Fall of 2016, experts released their review of the Construction Lien Act and subsequent recommendations on how to improve the Act.

While the full report is quite extensive, here are a few of the suggested changes to the lien & suit phases.

- The lien filing period may be extended from 45 days to 60 days
- “Termination” would trigger the lien deadline clock
- The suit filing period may be extended from 45 days from the lien filing period to 90 days

In May, Bill 142 passed through a round in Ontario’s Legislative Assembly. After two additional readings, the changes to Ontario’s statute are anticipated to become effective in early 2018. (Learn more about these changes when you read [Highlights of the Recent Review of Ontario’s Construction Lien Act.](#))

Check back for additional statute changes as we progress through 2017.

About the Author and NCS:

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