

# Lien and Bond Changes 2019 — A Review of Statute Changes from the First Six Months

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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.

In terms of new legislation, the first few months of 2019 have been relatively slow; however, a handful of states have enacted changes to statutes that could impact potential mechanic's lien and bond claim claimants. Although most of these changes aren't drastic, in the construction industry, a small change can have significant impact. Of particular interest below is Mississippi HB869, legislating payment bonds on privately owned projects. When a payment bond is provided per statute, the bond may preclude the filing of a lien.

## Recently Enacted or Soon to be Enacted Legislation:

**Arkansas SB344**, which becomes effective 7-9-19, clarifies that for real property, a street address is not a correct description under the Mechanic's or Materialman's Lien statute.

"Arkansas 18-44-117 Filing of lien.

(2)(A) The lien account shall contain a correct description of the property to be charged with the lien, verified by affidavit.

(B) For real property, a street address is not a correct description of the property..."

**Illinois HB5201**, which became effective 1-1-19, addresses the increase in expired mechanic's liens, more specifically, those that have not been released by the lienholder. For residential projects, the recorders' offices in counties with code hearing units may adopt rules establishing a mechanics lien demand and referral process after a public hearing.

"55 ILCS5/3-5010.8 Mechanics lien demand and referral pilot program (c)Establishment of a mechanics lien demand and referral process. After a public hearing, a recorder in a county with a code hearing unit may adopt rules establishing a mechanics lien demand and referral process for residential property. A recorder shall provide public notice 90 days before the public hearing. The notice shall include a statement of the recorder's intent to create a mechanics lien demand and referral process and shall be published in a newspaper of general circulation in the county and, if feasible, be posted on the recorder's website and at the recorder's office or offices.

(d) Notice of Expired Lien. If a recorder determines, after review by legal staff or counsel that a mechanics lien recorded in the grantor's index or the grantee's index is an expired lien, the recorder shall serve a Notice of Expired Lien by certified mail to the last known address of the owner. The owner or legal representative of the owner of the residential property shall confirm in writing his or her belief that the lien is not involved in pending litigation and, if there is no pending litigation, as verified and confirmed by county court records, the owner may request that the recorder proceed with a referral or serve a Demand to Commence Suit.

For the purpose of this Section, a recorder shall determine if a lien is an expired lien if the lien is unenforced..."

**Mississippi HB869**, effective 7-1-19, HB869 created new code (Section 85-7-432 Mississippi Code of 1972) to regulate private project construction bonds. The legislation details the requirements for making a claim against a private works payment bond and lists the parties protected by the payment bond. When a bond is given in accordance with the statute, a lien

will be available only to the prime contractor. On either a privately or publicly bonded project, the legislation requires the prime contractor to provide a copy of the bond upon written request.

“85-7-432. (1) Any person entering into a formal contract for the construction, alteration, or repair of any private building or other private work, before entering into such contract, may furnish to the owner, bonds with good and sufficient surety in which case the bonds shall conform to the requirements of this chapter as follows...”  
“(b) A payment bond shall be payable to the owner but conditioned for the prompt payment of all persons supplying labor or material used in the execution of the work under the contract, for the use of each such person, in an amount not less than the amount of the contract; and...”

“(2) Every person who has furnished labor or material used in the execution of the private work provided for in such contract, in respect of which a payment bond is furnished, and who has not been paid in full for such before the expiration of a period of ninety (90) days after the date on which the last of the labor was performed by him or her or the last of the materials was furnished by him or her and for which such claim is made, provided the same has been approved, where required, by the owner or its architect or engineers, or such approval is being withheld as a result of unreasonable acts of the contractor, shall have the right to sue on such payment bond for the amount, or the balance thereof that is due and payable, but unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment...”

“(3) Any person having direct contractual relationship with a subcontractor, but no contractual relationship express or implied with the contractor furnishing the private work payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made...”

“(4) The only persons protected by such payment bond, subject to the notice provisions of this section are:

(a) Subcontractors and material suppliers of the contractor;  
(b) Sub-subcontractors and material suppliers of those subcontractors named in subsection (4)(a) of this subsection; and  
(c) Laborers who have performed work on the project site.”

“85-7-431. Where a contractor gives a payment bond providing payment protection to subcontractors and material suppliers to the full extent provided by the Mississippi Little Miller Act found at Section 31-5-51 or the private project bond provision at Section 85-7-432, the payment bond shall be in substitution for the liens provided for a subcontractor or materialman in this article. The contractor's right to a lien is not affected by the provision of a bond.”

**New Jersey S865**, concerning public-private partnerships for certain building and highway infrastructure projects, amends and supplements various parts of the statutory law. Effective 2-12-19.

**North Dakota SB2254**, effective 8-1-19, provides that wind turbines and associated facilities that are part of an electric energy conversion facility designed for or capable of generation by wind energy conversion exceeding one-half megawatt of electricity may not be considered improvements for purposes of chapter 35-27 (Construction Liens).

**Wind, Oil & Gas Best Practice:**

When supplying to construction projects involving wind, oil or gas, always check to see whether there are special requirements!

**Virginia HB2409**, effective 7-1-19, will require an update to the Virginia Memorandum for Mechanic's Lien form. The requirements include that the address(es) of the owner of the property sought to be charged must be shown, as well as the date from which interest is claimed.

“43-4 Perfection of lien by general contractor; recordation and notice.”

“...The memorandum shall be filed in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is located. The memorandum shall show the names *and addresses* of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, the time or

times when the same is or will be due and payable, and the date from which interest is claimed, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the benefit of the lien, and giving a brief description of the property on which he claims a lien..."

## **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.

**Arkansas HB1572**, effective 7-9-19, requires payment bonds for general contracts on public projects exceeding \$35,000. Contracts executed by the Arkansas Department of Transportation remain exempt from the bonding requirement.

"Arkansas 18-44-503(a) A contract in a sum exceeding the amount stated in § 22-9-203 providing for the repair, alteration, or erection of any public building, public structure, or public improvement shall not be entered into by the State of Arkansas or any subdivision of the state, by any county, municipality, school district, or other local taxing unit, or by any agency of the state, a subdivision of the state, a county, a municipality, a school district, or any other local taxing unit, unless the contractor shall furnish to the party letting the contract a bond in a sum equal to the amount of the contract."

"Arkansas 22-9-203 (a) Except as provided under § 14-58-105, a contract providing for the making of major repairs or alterations, for the erection of buildings or other structures, or for making other permanent improvements shall not be entered into by the state or an agency of the state or by a county, municipality, school district, or other local taxing unit with any contractor in instances in which all estimated costs of the work exceed the sum of thirty-five thousand dollars (\$35,000)."

**Kentucky SB26**, effective 6-26-19, local public agencies will require payment bonds for contracts awarded in excess of \$100,000.00. (Previously, bonds were required for contracts in excess of \$25,000.00.) On State projects, the threshold remains at \$40,000.00.

"KRSA 45A.435 (1) When a construction contract is awarded in an amount in excess of one hundred thousand dollars (\$100,000), the following bonds shall be furnished.... (b) A payment bond satisfactory to the local public agency, executed by a surety company authorized to do business in this Commonwealth, or otherwise supplied, satisfactory to the local public agency, for the protection of all persons supplying labor and material to the contractor or his subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent (100%) of the original contract price."

**Wyoming HB0065**, effective 2/27/19, for public projects, a bond is required for general contracts exceeding \$50,000.00, or, for general contracts of \$150,000.00 or less, there may be another form of guarantee. A bond is required for State Construction Department projects exceeding \$50,000.00.

"9-2-3004(c)(IV)(C) Before any contract exceeding fifty thousand dollars (\$50,000.00) in amount, for the construction, alteration or repair of any public building or public work or improvement of the state is awarded to any person, the person shall furnish to the state a performance and payment bond executed by a surety company authorized to do business in the state of Wyoming or other form of surety satisfactory to the state, in an amount equal to one hundred percent (100%) of the contract price;

16-6-112. Contractor's bond or other guarantee; when required; conditions; amount; approval; filing; enforcement upon default.

(a) Except as provided under W.S. 9-2-3004(c)(iv), any contract entered into with the state, any county, city, town, school district or other political subdivision of the state for the construction, major maintenance or renovation of any public building or other public structure or for any public work or improvement and the contract price exceeds fifty thousand dollars (\$50,000.00), shall require any contractor before beginning work under the contract to furnish the state or any political subdivision, as appropriate, a bond or if the contract price is one hundred fifty thousand dollars (\$150,000.00) or less, any other form of guarantee approved by the state or

the political subdivision. The bond or other form of guarantee shall be:..."

**Payment Bond Best Practice:** It is recommended to always request a copy of a payment bond when contracting for the project. Make this 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.

### Coming Soon:

**Arizona SB1304** updates the requirement as to when an additional preliminary notice must be served. Effective for any projects where furnishings are first commenced to be furnished from and after 12-31-19, an additional notice will be required if the estimated total price for the furnishings exceeds by 30% or more the total price in a prior notice under the same contract. (Prior to projects commenced on or after 12-31-19, an additional notice is required if the estimated total price for the furnishings exceeds by 20% or more the total price in a prior notice under the same contract.)

"33-992.01 G. A person required by this section to give notice to the owner, to an original contractor, to the construction lender, if any, and to the person with whom the claimant has contracted need give only one notice to the owner, to the original contractor, to the construction lender, if any, and to the person with whom the claimant has contracted with respect to all labor, professional services, materials, machinery, fixtures or tools furnished for the building, structure or improvement, unless the actual estimated total price for the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished exceeds by thirty percent or more the total price in any prior original or subsequent preliminary notice or unless the labor, professional services, materials, machinery, fixtures or tools are furnished under contracts with more than one subcontractor, in which case notice requirements shall be met for all additional labor, professional services, materials, machinery, fixtures or tools."

**Preliminary Notice 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.

**Colorado SB138** specifies that bonding requirements apply to all construction contracts exceeding \$150,000.00, awarded to a private entity, for locally owned public real property, whether using public or private money or financing. SB138 is effective 8-2-19. (Under current law, when an entity enters into a contract with a county, municipality, school district, or, in some instances, any other political subdivision of the state to perform work on certain projects, the contractor is required to execute performance bonds and payment bonds.)

"39-26-105 (3) This section applies to all contracts for more than fifty thousand dollars awarded to a private entity for the construction of any public building or the prosecution or completion of any public works or for repairs upon any public building or public works that is situated or located on publicly owned property using any public or private money or public or private financing."

"38-26-106 (3) This section applies to:

- (a) A contractor who is awarded a contract for more than fifty thousand dollars for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation, or other public works for any county, city and county, municipality, school district, or other political subdivision of the state;
- (b) A contractor who is awarded a contract for more than one hundred fifty thousand dollars for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation, or other public works for this state; and
- (c) All contracts for more than one hundred fifty thousand dollars awarded by any county, city and county, municipality, school district, or other political subdivision of the state to a private entity for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation, or other public works that is situated or located on publicly owned property using any public or private money or public or private financing."

**Oklahoma HB2305** becomes effective 11-1-19 and adjusts the timeframes for filing an action against a payment bond. When contracting with a subcontractor, a bond claim must be made within 90 days from last furnishing materials or services. If contracting with the prime contractor, a bond claim is recommended, but is optional.

Under HB2305, suit to enforce a claim under the bond must be made within 1 year from last furnishing materials or services; however, the deadline for suit will be extended to 2 years from last furnishing materials or services if a claim was made against the bond within 1 year from last furnishing materials or services.

"SECTION 1. AMENDATORY 61 O.S. 2011, Section 2, as amended by Section 2, Chapter 241, O.S.L. 2012 (61 O.S. Supp. 2018, Section 2), is amended to read as follows:

Section 2. A."

"...Any person to whom there is due any sum for labor, material or repair to machinery or equipment, furnished as stated in Section 1 of this title, the heirs or assigns of such person, may file a claim or bring an action on the bond for the recovery of the indebtedness, provided that no action shall be brought on the bond after one (1) year from the day on which the last of the labor was performed or material or parts furnished for which the claim is made unless a prior claim has been filed within one (1) year from the day on which the labor was performed or material or parts furnished, in which case, no action shall be brought on the bond after two (2) years from the day on which the last of the labor was performed or material or parts furnished for which the claim is made."

**Ontario – Construction Act** – The first set of updates to the Ontario Construction Act became effective for projects where, on or after July 1, 2018, the general contract was entered into, the procurement process was commenced by the owner, and the lease (if any) was first entered into.

The following Regulations of the Construction Act have since been updated (May 23, 2019):

- Adjudications Under Part II.I of the Act
- Table to the Regulations (Forms)
- General

On October 1, 2019, the provisions for Prompt Payment (See Part I.1 of the Act) and Construction Dispute Interim Adjudication (See Part II.1 of the Act) will become effective if a contract was entered into, or a procurement process commenced, in respect to an improvement, on or after October 1, 2019.

**Utah HB395**, effective 1-1-2020, amends and enacts provisions related to notices filed with the State Construction Registry. An owner of a private project will have the option of filing a Notice of Intent to Finance on the registry. Each subcontractor that has filed a preliminary notice pertaining to the property may file with the registry a final lien waiver.

"38-1a-604. Notice of final lien waiver.  
(1) After a notice of intent to finance is filed under Section 38-1a-603 on a project property, each subcontractor that has filed a preliminary notice pertaining to the project property may file with the registry a final lien waiver.  
(2) The final lien waiver described in Subsection (1) may be filed on the registry even if no notice of intent to finance was filed on the registry."



**About the Author:**

**Nancy Kennerly**, Executive Director, has assisted credit professionals throughout the US and Canada, for 33 years, to secure their receivables through the mechanic's lien and bond claim process.

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