Just Because You Are Right Doesn’t Mean You Will Win

Roy S. Cohen
Founder and President of Cohen Seglias Pallas Greenhall Furman PC

This session is eligible for 2 Continuing Education Hours

To earn these hours you must:
- Have your badge scanned at the door
- Attend 90% of this presentation
- Fill out the online evaluation for this session
Introduction

For those of you who do not know me, my name is Roy Cohen. Our firm is the largest construction litigation firm in Pennsylvania and the third largest on the East Coast. We represent over 1000 construction and construction related companies in over 30 states. We have eight (8) offices and fifty-two (52) lawyers.

CSPG&F Offices

- Philadelphia, PA
- New York, NY
- Baltimore, MD
- Pittsburgh, PA
- Wilmington, DE
- Morgantown, WV
- Harrisburg, PA
- Iselin, NJ
# States In Which We Have Handled Construction Claims

- Massachusetts
- Rhode Island
- Connecticut
- New York
- New Jersey
- Pennsylvania
- Delaware
- Maryland
- District of Columbia
- Ohio
- Indiana
- Illinois
- Virginia
- West Virginia
- Kentucky
- Arkansas
- Oklahoma
- Tennessee

- Texas
- Missouri
- California
- Arizona
- Nevada
- Florida
- Utah
- North Dakota
- Indiana
- Hawaii
- Colorado
- Montana
- Michigan
- New Hampshire
- Vermont
- Wyoming
- South Dakota
CSPG&F Representation

- Public Owners
- Private Owners
- Construction Managers
- General Contractors
- Major Trade Contractors
- Architects/Engineers
- Sureties
- Supply Houses
- We are equal opportunity offenders
- We work for whoever hires us first

Models for Problems

In the past 25 years, we have worked on all types of construction projects:

- Stadiums
- Retail
- Power Plants
- Prisons
- High Rise Offices
- High Rise Residential
- Universities
- Cranes
- Federal Projects
- Public and Private Schools
- Airports
- Police Headquarters
- Parking Facilities
- Science Labs
- Distribution Centers
- Marinas and docks
Private Projects

• Negotiate contracts
• Monitor course of construction projects
• File bid protests and injunctions at time of bid
• Mediate, arbitrate and litigate disputes that arise during construction

Basic Mantra About Construction

1. Construction is based on time.
   • Time is money.
   • Most construction projects don’t finish on time.

2. Construction is a game; just because you are right, doesn’t mean you will win.
   • He who plays the game better, wins.
   • Our job is to teach subcontractors to play the game better.
3. Electrical contractors are the most likely to be impacted on a project.
   - Question is when you will be impacted, not if.
   - Our job is to make sure subcontractors are ready when a project is delayed, compressed and accelerated.

4. Size of the contract does not limit the amount of money a contractor can lose.
   - $2,500 contract results in $1,000,000 liability
   - $3,500 contract results in $350,000 liability

5. Trusting others often results in a loss of money.
   - The GC/CM is not your friend on a problem project

6. Tension between GC’s/CM’s and Subs
   - GC’s/CM’s bid at 1½% net overhead and profit and whatever they can steal
   - Subs bid at 10%-20% overhead and profit
• Client is electrical contractor
• Hired by large New York Construction Manager to replace original sub
• Hired on a time and material basis
• Hourly rates agreed to in writing
• Client completes job on time
• Submits T&M invoices totaling $1,200,000
• Construction Manager says “you made too much money. We want you to issue us a $500,000 credit.”
• Client asks if that is their legal defense

• Still no payment
• We file a lien on the client’s behalf
• The filing of the lien forces Construction Manager’s hand
• Ultimately, we agree to a $160,000 credit, not $500,000
• Key is to be aggressive
7. GC/CM contracts inherently unfair
   • Slanted against sub
   • Sub who awarded job does not have right price
8. Make GC/CM – sub relationships even more one-sided
   • GC/CM typically bullies

9. Our job is to teach subs how to:
   • Better negotiate contracts
   • To push back against the bullying
   • Send correct notices and
   • Refrain from signing away rights

10. Goal is to help subcontractors be able to negotiate fair settlement without litigation
Focus of the Seminar

• Make sure all of you realize what can happen to electrical subcontractors who do not
  – Negotiate contract correctly
  – Give timely notice of impact
  – Exclude pending claims from monthly partial releases

• Fail to request extensions of time and reserve the right to request additional money for delay, disruption and inefficiencies from change orders;
• Proceed with claims for delay, disruption, inefficiencies and pending change orders;
• Make sure I have your attention. I am going to discuss a series of recent cases which show what happens when notice and partial releases of liens are not properly documented and reviewed
• Review key contract provisions for negotiations
• Review key draft letters for notice and acceleration
• Review damages which electrical contractors should pursue

• No one ever calls us to tell us about a successful construction project
• We have a jaundiced view of construction
  – Only know how subcontractors get hurt
• We are a repository of bad stories
• Then we teach others how to negotiate contracts better
• How and when to give proper notice
• What documents to modify
• What documents not to sign
• Goal is to get subcontractors on level footing for project closeout with CM/GC

Typical Project

• We see contractors experience
  • Delay
  • Compression
  • Acceleration
  • Cumulative Impact
Electrical Contractor Projects Gone Bad

• Prior electrical contractor cases from around the country
• Not cases from law books but from real life
• Learn from other people’s problem projects

Trusting a General Contractor Can be Dangerous to your Health
NSA Data Center

- Project is a $1,400,000,000 data center in Utah being built by the Federal Government
- BDB is the construction manager (Balfour Beatty; Big D, DPR)
- Truland Systems from Reston, VA was the electrical and took contract for $187,000,000, even though it had no local labor
- Truland hired our client an electrical contractor out of Salt Lake City, to provide local labor

- Contract was T&M but had a “pay if paid” provision included (which is totally inconsistent)
- Nevertheless, Truland paid client every two weeks regardless of whether Truland was paid by BDB or not
- As of the summer of 2014, client had billed Truland $71,000,000 T&M and been paid $63,000,000
- Because the switchgear equipment procured by Truland from Siemens was defective and malfunctioned ten times in 13 months, the government withheld money from BDB and BDB withheld money from Truland.
• Truland contend that it has paid client $18,000,000 more than BDB has paid it for client’s work and wants its money back
• Client has sued the sureties for BDB and Truland in Federal Court in Utah for $8,000,000
• BDB has filed a Demand for Arbitration with the American Arbitration Association against Truland and others seeking $39,000,000

• Truland has now tried to join client in the BDB arbitration and our client has filed objections to the consolidation
• Truland filed for Chapter 7 Bankruptcy protection on July 23, 2014
• Arbitration action is stayed, Federal Court action against sureties continues.
Lessons to be Learned

• Make sure contract given to you by construction manager says what the real deal is
• Conflicting provisions (T&M and Pay if Paid) create ambiguity and provide an excuse for Truland’s surety

Huntsman Hall – University of PA

• Project to build new business school, funded by Huntsman family from Utah
• Minority electrical sub not low bidder, but awarded the job due to need for minority participation
• Electrical sub bid 82,000 man-hours and not low bidder
• Job is nine (9) stories; 1-3 is base building and 4-9 is the Tower
• Job falls seriously behind due to steel, masonry and glass delays
• Major water infiltration delays much of the electrical work
• University threatens GC/CM – L.F. Driscoll, now owned by StructureTone out of NY
• Says no LD’s → either finish by August or incur actual damage of $90,000,000
• Job was nine (9) months behind with six (6) months to go and electrical sub needed to work 3 eight hour shifts per day
• In addition, GC/CM hires six (6) additional electrical contractors to supplement minority electrician

• Each of six (6) electrical subcontractors provides ten (10) men and work T&M in floors 4-9
• Minority sub plans to peak at 35
• Actually peaks at 192; not including additional sixty (60) men (10X6)
• Minority sub finishes with 232,000 man hours vs. estimate of 82,000 man hours which excludes the hours for the other six subcontractors
• Quickly, minority sub has no more money to bill because owner won’t approve change orders due to delays caused by other subs
• GC agrees to pay minority sub’s payroll each week
• GC says “Trust Me” to sub
• As soon as the project gets a Temporary Certificate of Occupancy, GC stops paying for electrical subs’ cost
• Electrical Sub winds up owing Union $800,000 for unpaid benefits
• Electrical Sub owes its surety $1,500,000 for unpaid suppliers; owes its bank $500,000 for financing labor costs
• After $4,000,000 claim from electrical sub is rejected, electrical sub doesn’t back down. It files suit

• Ultimately electrical sub settles for $3,000,000
• Electrical sub did not get rich but was able to pay off Union, surety and his bank and was able to stay in business
• Reliance on GC’s promises almost fatal
Lessons Learned

• When a Contractor or Owner says “trust me” – run for the hills

• Same with “we’ll make a deal at the end of the project”

• At some point, when things are out of control, you need to rely on the contract provision that says “No extra work without a signed change order”

• Can’t back down; simply too easy to be taken advantage of

• Learn when your period of maximum leverage is

World Trade Center II

• Our client is structural steel contractor out of Oklahoma City
• Two Projects
• One is museum
• One is VSC
• Owner is Port Authority of NY and NJ
• CM on 911 Museum is Bovis
• CM on VSC job is Tischman
• Both jobs see massive change orders
• 911 Museum was $7,000,000 job with $6,000,000 in change orders
• VSC was $7,289,240 job with $5,190,000 in change orders
• Both experienced major delays, extended general conditions and suspensions.
• Suspensions on 911 Museum caused by fight between 911 Commission and Port Authority as to who would pay for change orders
• Suspension on VSC caused by major redesign to update blast proof materials
• Change order process arbitrary and irrational
• Change orders pending for years even though work is completed

• Change orders rejected because of timing or because Panel from CM chose not to understand the basis for the extras
• Suit filed
• Court says it wants cases settled
• Client has financed $13,000,000 in change orders for three years
• Owner and CM hoping client gets desperate and takes pennies on the dollar
• Client financially strong
• Mistake was made in performing all change order work without demanding financing
How It Got Resolved

- Client failed to follow the convoluted claims process in the contract
- Contract, as modified by statute, required going through a kangaroo claims panel before getting to court
- The client’s in house expert was basically treating this stage as a nuisance and not putting his best foot forward
- Ultimately, the REA and TIA had to be re-written and repackaged
- Focus on change orders rather than claims
- Settled last month using a change order negotiation process
- Port Authority now backs out of deal and case is now before the court

Dover Township Sewer Authority

- Client was low bidder on electrical portion of a waste water project bid by the Authority
- Client's bid was 100% lower than next low bidder
- During a bid scope review, the Authority’s engineer was advised that our client did not have the Division 25 work (Controls) because the project specifications called for the Division 25 work to be done by the general contractor
• The engineer for the Authority said he would confirm that the general contractor had the Division 25 work in its bid
• Our client was awarded the electrical work by the engineer, even though the engineer knew our client did not have the Division 25 work included
• Our client's surety withdrew its bid bond because of the 100% differential in the electrical bid prices
• Our client put up $445,000 in cash as security in lieu of the bid bond

• Once the project began, the Authority engineer insisted that it was always the intent of the Authority to have the electrical contractor do the Division 25 work
• Our client was forced to perform and finance the Division 25 work
• The project finished nine (9) months behind schedule because the general contractor wrongly showed both "trains" being performed simultaneously, in contravention of the project specifications which called for the two (2) "trains" being performed consecutively
• The Authority blamed our client for the job finishing late, paid the general contractor and engineer extra out of our clients bid deposit and refused to reimburse our client for its retainage, bid deposit, Division 25 expenses or extended general conditions
• Our client lost its bonding capacity for a year and performed almost no work in 2012 because it's prior split between public and private work was 70/30 and it had no bonding capacity

• We have now sued the Authority, the engineer and the general contractor under alternate theories for its retainage, bid deposit, Division 25 costs, extended general conditions and loss of bonding capacity, and the Township Supervisors who oversee the authority have now offered to settle the dispute for the bid deposit, retainage and interest
• The moral of the story is don't give up. Keep pressing your claim. As long as you document it well and press forward, you will generally prevail
The General Contractor is Not Your Friend on a Bad Project

Two Recent Projects in Which Owner Grants General Non-Compensable Extension of Time

- Elkins Readiness Center, Elkins WV
  - Job was to be completed by September 2011
  - Major delays experienced by site work contractor who quit, the masonry contractor who was under manned, and the general contractor, who was late in supplying the wood decking, which also delayed all the interior work
  - General Contractor, March Westin, failed to request extension of time until just before substantial completion date
– Job ultimately delayed 252 days until the late spring of 2012
– March Westin, three (3) months after substantial completion date, asks for 192 days for weather related, non-compensable delay, which was granted by the owner
– Our client, the electrical contractor on the Project, never agreed to the fact that the 252 days of delay was weather related or non-compensable

– Our Client filed a Demand For Arbitration seeking $600,000 in delay, inefficiency, changes orders and extended general conditions
– In the end, March Westin's expert cannot justify anything other than 45 days of the 252 is weather related
– Our client had no duty to accept the "non-compensable" designation agreed to by March Westin and is scheduled for mediation July 21
– While March Westin originally denied all liability and even asserted a counterclaim, they have now made an offer and the case is expected to settle prior to mediation
• FBI Building- Clarksburg, WV
  – Turner is the GC
  – Our client is the interiors contractor
  – The job was to be completed by December 2012
  – There have been major delays relating to the discovery of pyrite, the excavation and resourcing of the first floor and late deliveries from Turner for general contractor supplied door bucks, etc.
  – The job is now scheduled to be substantially complete in October 2014

– Turner, without consultation with its subcontractors, submitted and agreed to a 385 day non-compensable extension of time
– Our client is now asserting a claim for 2,500,000 because the delays are not non-compensable and were the fault of Turner and other subcontractors
– The moral of the story is a subcontractor does not have to accept the general contractor’s acceptance of a non-compensable extension of time from the owner
Failure to Give Proper Notice or to Exclude Waivers Makes it Much Harder for Subcontractors

Solar Projects in NJ

• February 2011
  – Got a call from long time electrical client
  – Tells us he is in trouble and needs our help
  – Owed $9,200,000 in contract balance on a solar project
  – Had financed completion of 18 schools to the tune of $11,489,055
  – Being sued for $4,000,000 in damages
  – Total at issue - $27,800,000
• Arbitration starts in 30 days (March 15)
• No discovery allowed by agreement
• His lawyers had lost every motion thus far
• We agree to take the case
• Demand discovery and an extension of time
• Get 6 week extension
• Get case settled with him recovering $7,500,000 without paying any claims on eve of trial

• Investor who hired Electrical took risk that it could build solar systems for 4 school districts in NJ and get them on line while the SREC Market was high and continue to make money on the sale of energy to the schools over the next 15 years
• Electrical agreed to engineering design and built these 18 systems for a fixed price with sharing of profits on the 15 year investments.
• Like most electrical contractors, this client wanted to form a close bond with the investor and do other similar projects.

What Happened
• There were delays during the construction process.
• Delays included
  – Notice to Proceed for many schools late
  – Adverse weather (hurricane, snow)
  – Permitting delays
  – Municipal delays
  – Differing site conditions
  – Additional work demanded by the individual schools
The extra cost events and change orders included:

- owner-requested changes in fencing;
- installation of additional canopy lighting;
- repair to existing site utilities;
- engineering of underground utility duct banks;
- replacement of unsuitable soil;
- removal and replanting of existing trees at the owner's request;
- adjustment to a room divider;
- engineering and construction of a steel structure to avoid roof penetrations;

- engineering and construction of a steel structure to avoid roof penetrations;
- interconnection for utility upgrades;
- removal of light poles for canopies;
- interconnection upgrades as a result of the failure of the main electrical gear;
- moving power lines to conform to JCP&L easements;
- installation of new electric services at three of the schools; and
- cancellation costs for utility startups as well as increased labor costs due to loss of productivity.
• Delays in obtaining materials
• Schools to be completed in 180 days
• Most of the 15 schools completed between 180-270 days late
• Electrical subcontractor completed work on all 18 schools which are all generating electricity for the benefit of investor
• Investor receives proceeds from these operating systems

• Investor receives proceeds from these operating systems
• SREC prices fell precipitously during the period of delay to the detriment of the investor
• Electrical never requested extensions of time for any of the delays
• Electrical assumed force majeure provision would cover the delays
• Investor relied on liquidated damage provision as justification for withholding $9,200,000 for contract balance, $2,300,000 in change orders
• Investor was also seeking $4,000,000 in claims for lost profits
• Investor, who accepted electrical subcontractor as a teammate on these 4 school jobs as well as 42 other joint venture bids they submitted over 15 months, tried to hold electrical subcontractor to the strict interpretation of the contract provisions when problems arose
• Investor argued electrical subcontractor was not entitled to the full duration of its contract schedule because it accomplished many of its tasks as a volunteer during pre contract period

• Electrical should have known to beware because at the last minute, during contact negotiations, investor substituted LD’s of $1,000 a day per school district (4) to $1,000 per day per school (18) increasing Electrician's exposure by 45%.
• Investor also knew solar industry rapidly evolving and all parties struggling to adapt to new technology including municipalities and state agencies
How Did It Settle?

• Big time construction lawyer from Boston hired by investor, replaced local NJ lawyer who was not familiar with construction
• Boston based lawyer recognized weaknesses of his client’s position on force majeure/LD’s
• New lawyer aware Investor had actual notice of delays on projects and of shipments of materials
• New lawyer recognized that based on “as adjusted schedule,” Electrician had more than enough float to establish that it had performed its work timely

What Lessons Were Learned

• Do not agree to impossible dispute resolution clauses
• Appreciate liquidated damages
• Make sure the final contract contains what you agreed to
• Understand force majeure and notice obligations
• Pay attention to flashing red lights
Forest County Prison

- Owner is Department of General Services of PA
- CM is O’Brien Kreitzberg
- Client is largest electrical in Western PA
- 29 Building prison in Northwest PA
- Job was bid to be constructed from west to east
- Job was a cut and fill job and went from high to low
- After initial rebid, owner realizes job cannot be built west to east, will take too long
- No time to change plans – so owner changed the schedule to go from east to west

- Eleven (11) days after all subcontractors signed their contracts, the owner changed the schedule to go from east to west
- All subcontractors disagree with change in sequence but sign off on the revised schedule
- Change resulted in major earth work delays
- Rock became a major delaying factor and converted job from two (2) summers with one (1) winter to two (2) winters
- Delays prevented buildings from being closed in before the onset of winter weather
Weather Delays But No Time

• Subs directed to accelerate only to wind up being delayed ten (10) months
• Owner waits until after original substantial completion date to select type of security system
• All buildings tied into this security system
• Electrical sub accelerated and delayed
• Filed suit for $3,300,000
• Total claims for eight (8) sub claims total $13,400,000
• Case tried for eight consecutive weeks and then briefed
• Four (4) weeks before the fall elections, Gov. Rendell, through a messenger tells me to get all my clients to the State capitol in the next two days
• Each one settles for 100% plus attorney’s fees
• Mistake they made was signing off on an unworkable schedule

Lessons Learned

• Public work very different from private work
• Its good to know your elected officials
• With that said, there are still guiding principles
  – Don’t sign schedules without exception
  – Know your notice requirements
  – Make timely claims
  – The terms of the contracts very often include statutes or codes without even directly referencing them
PP&L Scrubber Project
Washingtonville, PA

- Scrubber project
- Design-Bid-Build for GC
- Lump sum contract for electrical ($16,000,000 including overhead and profit)
  - Became Design-Build
- Design team failed to timely complete design and drawings requiring:
  - The issuance of frequent and incomplete new drawings and intermediate sketches;
  - The need for over 225 Requests for Information

- Approximately 130 Drawing Change Requests (DCRs)
- Over 80 Field Work Orders (FWOs)
- The use of overtime and shift work for 43 weeks of the 67.6 week project.
  - No overtime in bid
- Planned peak of 130
- Actual peak of 280
- 550 men work on job
- Continuous changes leading to a significant increase in Project scope
• Ultimately, the EC expended almost 500,000 labor hours, which equals 350,000 labor hours over what it estimated. By contrast, the Project completed in approx. 70 weeks, only 16 weeks longer than planned.
• Total cost $31,500,000 (not including overhead and profit) vs. $16,000,000 including overhead and profit.
• Adjusted contract after Change Orders - $25,900,000
• Need $34,500,000 to be whole
• Signed partial releases of liens every month

Notice is Key

• Notices relating to impact must be sent
• Can be simple emails
• More detailed the notice the better

As reported at our daily and weekly progress meetings, as well as our monthly executive progress reviews, we are continuing to pursue the completion of our work on the turnover packages and the bulk work, as rapidly as is reasonably possible under the current circumstances. We have however, encountered impacts to our performance through no fault of our own and that are beyond our control. We have continued to keep your field representatives informed of these delays and of their effect on overall job completion. You may be assured that we have and will continue to minimize, as best we can, the effects of these delays on our work.

Specifically, we have been or continue to be impacted in the following areas and ways:
No Time Extension = Acceleration

• Notice of both possibilities
• Demand an extension of time

Contractor Knew of Problems

• GC even submitted a claim to owner

IMPACTS TO ELECTRICAL DESIGN

Late transmittal of vendor information and documents with "oxide"

The one line diagrams were impacted as changes in motor horsepower revised the distribution configuration.

Inexpensive embedded PVC conduits could not be used for equipment because equipment locations were not known at the time of the underground design issue; more expensive above grade raceway systems were required. Larger more expensive cables were required to carry increased loads. Larger more expensive raceways were required to carry the larger cables.

Many re-submittals were required to the vendor and sub vendor drawings because of initial issues with missing information and subsequent revisions with the same missing information, because of failure to incorporate contracts. This effort caused severe delays, design rework and loss of productivity. Therefore, had to make revisions to the cable schedule, raceway schedule, cable schedule, conduit design drawings, cable tray drawings, PDS model, and wiring diagrams, to conform to the information. Substantial redesign to the cable tray system was required to accommodate the final mix of cable types. This redesign occurred after the cable trays were released issued for construction and during installation of the cable tray resulting in some rework.
Notice is Not Enough

- Change Orders can waive your rights
- Modify the change order language

Modified Language

This change order has been issued to provide an interim mechanism for making payment to Subcontractor for the costs of all resources necessary to complete the change order work described herein including, but not limited to labor, equipment, tools, consumables, materials, supervision, overheads, services, and profit. As such, it represents the maximum amount that Subcontractor is entitled to as full and complete compensation for these costs. It does not include the impact costs, if any, that may accrue as the cumulative result of subsequent or contemporaneous change order work. For its part, Subcontractor reserves its right to seek recovery of such impact costs, if any, upon proof of entitlement in accordance with the requirements of the Subcontract. For its part, Company reserves the right to audit Subcontractor's books of account at the conclusion of the Work for the limited purpose of assuring that Subcontractor has not had a multiple recovery for the costs claimed in this and in any other Change Orders. In the event of any such multiple recovery, Subcontractor will return such monies to Company.

- Be careful when signing monthly releases too
Still a Problem

Even though parties agreed to language, GC kept trying to change it

In addition to the above, has added language to the COR description, when currently, the only language recognized by and is the agreed to language (Acknowledgment) between Mr. Thomas (1st) and Mr. Callahan (2nd), therefore reject this language.

Make Sure Language Is Right

Old language re-appeared

EXCEPT as stated below, the Construction Schedule and Subcontract Milestones remain unchanged:

None.

7. ACKNOWLEDGEMENT

The adjustments set forth in this Change Order represent full and final compensation due to Subcontractor for the changes referred to herein. Subcontractor further releases all other claims, if any (except those previously submitted in writing in strict accordance with the Subcontract), for additional compensation under the Subcontract including, without limitation, any rights Subcontractor may have for additional cost or schedule adjustments that have arisen prior to the date of this Change Order. Except as set forth above, all other terms and conditions of the Subcontract remain unchanged.

NECA 2014 CHICAGO
Keys to Recovery

- Knowledge of acceleration
- Notice
- Refusal to execute releases
- Modification of releases

Pushing Back Against General Contractors Works
FBI Office Building- Clarksburg WV

- Turner is CM on the Project; Owner is US Government; Tenant is FBI
- Gill Simpson of Baltimore (27th largest electrical in the country is the electrical contractor)
- Electric Subcontract is $18,000,000
- Job to be completed by Dec 2012
- Major delays on the project caused by architectural design changes, tediously long inspections by FBI, discovery of pyrite below the first floor, requiring it to be jack hammered up and re-poured and delayed deliveries of Turner supplied materials

- Job now projected to be completed by early 2015
- Gill-Simpson was projecting a 50,000 man hour overrun
- Gill Simpson terminated by Turner in mid January 2014
- Our client asked by Turner to complete the electrical portion of the Project on a T&M basis, no risk
- The client mobilizes January 31, 2014 with understanding its work will be performed on a T&M basis with no risk
- Turner then sends is its standard Form 36G Contract, which contains all the threats, penalties and sanctions in its regular contract
Our client objects and says this was supposed to be a T&M arrangement without risk; this contract is just the opposite.

Turner says mark the Form 36G up how you want. We have to have this form of agreement because it is a federal project.

Our office totally emasculates the form 36G to reflect the true intent of the parties.

Turner comes back and drafts an amendment to the form 36G saying the job will be T&M for 4 months and then will switch to a fixed price.

The client calls us and says this is not the deal we agreed to, what do I do?

We instructed the client to write to Turner and say:

“We have been on the job for 5 weeks without pay and now seem to have no meeting of minds. If we don’t get this resolved immediately, we will pull our men and our equipment from the job.”
Email from Client to Turner Stated:

- “This is not the deal that you and I agreed to. It is important that Turner provide Client with a no risk T and M contract promptly. Client has and continues to demonstrate that we are working in Turner’s best interest. If you feel differently, please advise, and we can begin our exit from the project while Turner finds another electrical contractor. Call me to discuss”

Within 30 minutes Turner responds and says “don’t pull off the job. We will provide you the proper contract language right away.”

Ultimately, the amendment Turner agreed to read:

- “All work performed by Client will be done on a time and material basis with the understanding that Turner and Client could mutually agree to at some time in the future to a change into a fixed price contract. Client will use its best efforts to achieve the current schedule, as adjusted by Turner. Client will man the job with sufficient labor to meet the current schedule and will agree to hire additional manpower if Turner so directs. Turner’s sole recourse against Client, if Turner believes Client is not timely or adequately progressing the job, shall be to either (1) supplement the forces of Client, at Turner’s cost or (2) terminate Client for convenience and pay Client only for labor and material which was expended since the previous payment application.”
LAX – Los Angeles

- Airport project in California
- EC bid to GC was significantly lower than the next bidder (approximately $600,000.00) - 96% low
- EC failed to include a certain type of computer monitor system
- Estimator going through a rough patch
- GC did not undertake any verification of EC’s bid prior to accepting it.
  - GC did not conduct a scope by scope analysis of EC’s bid.

- GC was in receipt of EC’s equipment list and could have easily identified the insufficient and/or missing equipment contained in the bid.

- Issue came up during course of project, and EC sought a less expensive substitution
- GC willing to do so but sought credit from EC because substituted equipment much less expensive
Unilateral Mistake

• Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake, and
  – the effect of the mistake is such that enforcement of the contract would be unconscionable, or
  – the other party had reason to know of the mistake or his fault caused the mistake.

Unilateral Mistake

• A party bears the risk of a mistake when:
  – the risk is allocated to him by agreement of the parties, or
  – he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
  – the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.
What Did the GC Know?

• Price disparity may put GC on notice of mistake
• Courts in California have held a subcontractor liable for the costs of a mistake “only if the general contractor reasonably relied on the mistaken bid.”
• “If the mistake should have been apparent to the general contractor because there was a substantial variance between that bid and the next lowest bid, or for any other reason, the general contractor is not entitled to rely on that bid.”

And When Did He Know It?

• Amount of disparity to raise a red flag differs by jurisdiction
  – Utah - price disparity of 290% was sufficient to allow a subcontractor to withdraw its bid
  – Illinois - 50% disparity was a defense
• The importance of a de-scope
• If the sub should have found the issue or the GC raised general concerns, the Contractor may have a defense
  - A sub submitted a bid to the GC that was nearly 50% lower than the second lowest bidder.
  - Because of the large discrepancy between the bids, the GC advised the sub that its bid was quite low and requested that the sub review and verify its bid.
  - The sub submitted a second bid that was still lower than the second lowest bidder.
  - The GC relied on the sub’s second bid when submitting its bid on the prime contract.
  - When the GC was awarded the prime contract, the sub refused to perform, alleging that its bid was erroneous as it failed to include certain work in its bid.

- “Once having alerted [the sub] to the possibility of error in its bid, [the GC] should not be held knowledgeable of or responsible for any subsequent mistake allegedly resulting in the second bid as a matter of law.”

- Also, subcontractor can avoid issue by discovering problems in bid and coming clean prior to acceptance
  - M.F. Kemper Construction Company v. Los Angeles, 37 Cal.2d 696, 235 P.2d 7 (1951)
Four Easy Ways to Lose Money

• Bid project wrong
• Negotiate contract wrong
• Fail to document project timely
• Fail to recover cost overruns

Types of Contracts

• Purchase order
• Standard form
• Company form
Form Contracts

- Few really exist from a supplier point of view
- As a result, Contractors try to shoehorn into a subcontract form
- Do not agree to this!
- You will agree to responsibilities and risks that should not be yours
- Or, spend hours re-writing the form

Contractor Written Forms

- Who do you think they favor?
- Must be carefully tailored to the specifics of your project
- Mark them up
- Several critical provisions
Important Contract Issues

- Paid if Paid – Pay when Paid
- No Damage for Delay
- Jurisdiction
- Electronic Schedule Updates
- Notice Provisions
- Dispute Resolution
  - Mediation/Arbitration/Litigation
- Termination for Convenience/Cause
- Need to Sue Other Primes on a Multi-Prime Project

- Need to coordinate with other subcontractors
- Schedule requirements
  - GC Tickets
  - Refusal to Accept
- Pricing Change Orders
  - Overhead and Profit
  - Supervision
  - Cumulative impact
  - Repricing change orders if total change orders in excess of 20%
• Pricing acceleration
  • Additional men results in additional supervision
  • Tools
  • Rentals
  • Safety
  • Testing
  • Trucks
  • NECA 1 vs. NECA 2 vs. NECA 3

• Finance Acceleration
• Liquidating Agreements
  – Must retain right to settle on own terms
  – Must retain right to try our own case
• He who writes more wins
  – Written notice
  – Emails
• Partial Release of Liens
  – Address at time of contract
Timing of Payment

- Specified time
- Pay-if-paid
- Pay-when-paid

Pay-If-Paid

PAYMENT FROM THE OWNER TO THE CONTRACTOR IS A CONDITION PRECEDENT TO PAYMENT FROM THE CONTRACTOR TO THE SUBCONTRACTOR PURSUANT TO THIS ARTICLE.
Pay-If-Paid

– Contingent = If I don’t get paid, you don’t get paid
– “Condition precedent”
– This is a provision that a sub should avoid at all costs.
– On the other hand, a GC doesn’t want to pay when it hasn’t been paid
– Sub is taking the risk of an owner’s nonpayment.
– Payment bonds can be similarly conditioned.

Pay-If-Paid vs. Pay-When-Paid

• “Condition Precedent” language
  – New case law that that may not be enough
  – Courts now require a clear indication that subcontractor was accepting risk of Owner insolvency
• Without key language, it’s a “pay when paid” clause
State By State – Pay If Paid Provisions

<table>
<thead>
<tr>
<th>STATE</th>
<th>INTERPRETATION OF PAY IF PAID PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Courts have enforced pay-if-paid clauses in conditions precedent to payment. However, a contractor’s notice of change order will trigger a contingent pay-if-paid clause as the subcontractor.</td>
</tr>
<tr>
<td></td>
<td>Anniversary Brumley &amp; Sons Contractors v. Snead, 491 So. 2d 735 (Ala. 1986) Valley Steel Company v. Arnold Fabricators, 161 So. 2d 432 (Ala. 1964)</td>
</tr>
<tr>
<td>Alaska</td>
<td>Courts will likely construe as having provisions requiring the contractor to remit payment within a reasonable period of time.</td>
</tr>
<tr>
<td>Arizona</td>
<td>To order to be valid pay-if-paid provision, a clause must: (1) require contractor’s written affirmation from owner to be a condition precedent to payment; (2) describe the funds provided by the owner’s payment as the advance of payment to the sub-contractor, and (3) inform subcontractors that they have assumed the risk of the owner’s failure to pay.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Only specific pay-if-paid provisions in conditions precedent to payment when the subcontractor’s (entire) and expressly provts for it. Absent such provisions, a subcontractor’s right to payment is dependent upon performance of the subcontractor, not upon the receipt of payment by the contractor.</td>
</tr>
<tr>
<td></td>
<td>Pantry, Universal Inc. v. Rombach, 295 S.W. 2d 831 (Ark. 1957)</td>
</tr>
<tr>
<td>California</td>
<td>Provisions are void and unenforceable as contrary to public policy.</td>
</tr>
</tbody>
</table>

This document is a summary of state law on the enforceability of pay-if-paid provisions in construction contracts. It is not intended to be a comprehensive legal treatment of the respective laws. The information herein does not contain legal advice and is for informational purposes only. All individual circumstances vary greatly, readers should contact an attorney for legal advice regarding the enforceability of such contract provisions.

For the Reference of NECA 2014 Chicago
Attendees Only
This document is a summary of state law on the enforceability of pay-if-paid provisions in construction contracts. It is not intended to be a comprehensive legal treatment of the respective laws. The information herein does not contain legal advice and is for informational purposes only. An individual circumstance may vary greatly; readers should consult an attorney for legal advice regarding the enforceability of such contract provisions.

<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Statute or Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>There is no case on point in Hawaii.</td>
</tr>
<tr>
<td>Illinois</td>
<td>There is no case on point in Illinois. However, the Mechanics’ Lien Act provides that a provision making payment from the contractor to subcontractor contingent upon payment from the owner to the contractor is not a defense to actions under the Act. The Act applies to both public and private owners. Illinois Mechanics’ Lien Act, 70 IL. Comp. Stat. 540 (1992).</td>
</tr>
<tr>
<td>Indiana</td>
<td>There is no case on point in Indiana. See, e.g., Hill Contracting Co. v. Foley &amp; Depuy, 579 N.E.2d 61 (Ind. Ct. App. 1992) (holding that pay-if-paid clauses do not violate Indiana public policy).</td>
</tr>
<tr>
<td>Iowa</td>
<td>Pay-if-paid provisions are enforceable provided the general contractor is not responsible for the owner’s failure to pay. (National Bank &amp; Trust Co. v. Sharpe, 193 N.W. 2d 777 (Iowa 1972)).</td>
</tr>
<tr>
<td>Kansas</td>
<td>There is no case on point in Kansas. However, Kansas courts generally uphold conditions precedent to payment in construction contracts. Under the Kansas Statutes, the provisions in Private Construction Contract Act, though, pay-if-paid clauses are unenforceable unless the subcontractor agrees to the terms in writing after July 1, 2007, and after that time for single-family residences having an aggregate family residential housing amounting of less than six rooms. Prior to this Act, a Kansas federal court stated pay-if-paid provisions would only be unenforceable if it was clear from the contract that the provisions were meant to constitute a condition precedent to pay.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>There is no case on point in Kentucky. However, a federal case interpreting Kentucky law suggested that such clauses are enforceable only if they clearly and unambiguously make a condition precedent to payment. A &amp; J Plumbing, Inc. v. John W. Otley Co., 898 F. Supp. 2d 119, 121 (W.D. Ky. 2012).</td>
</tr>
<tr>
<td>Louisiana</td>
<td>There is no case on point in Louisiana. However, in a decision interpreting a pay-if-paid provision, the Louisiana Supreme Court suggested that pay-if-paid provisions are not unenforceable, but that the court will construe the contract to require actual and unambiguous payment. Dodd, Michael J. and D. Duran Findley, State-by-State Guide to Construction Contracts and Claims</td>
</tr>
<tr>
<td>Maine</td>
<td>Because payment to contractors and subcontractors is governed by the Maine Prompt Payment Act regardless of the contract terms, it is unlikely that pay-if-paid provisions are not enforceable. Dodd, Michael J. and D. Duran Findley, State-by-State Guide to Construction Contracts and Claims</td>
</tr>
</tbody>
</table>
the clause effectively negates a party’s statutory rights (e.g., Maryland mechanics’ lien statute or Maryland prompt payment statute). Dodd, Michael and J. Duncan Findley, State-By-State Guide to Construction Contracts and Claims, § 22-04[B] (2009).

Massachusetts

There is no case on point in Massachusetts. However, Massachusetts courts have noted that such clauses may be enforceable if clearly expressed.


Michigan

Provisions are enforceable where it is clear that the parties intended to create an express condition precedent to the subcontractor’s right to payment.


Minnesota

Provisions will be enforced only if they contain unequivocal, unambiguous language establishing payment from the owner as a condition precedent to a subcontractor’s payment.


Mississippi

Provisions will be enforced only if it is a “clear and unequivocal expression” of the parties’ intent to shift the risk of non-payment to a subcontractor.


Missouri

Provisions are enforceable if condition precedent is established by clear and unambiguous language; otherwise, the provisions will be interpreted as a liquidation mechanism.


Montana

There is no case on point in Montana.

Nebraska

There is no case on point in Nebraska.

Nevada

There is no case on point in Nevada. However, it is likely that such clauses will be enforced provided they are narrowly and reasonably written.

Dodd, Michael and J. Duncan Findley, State-By-State Guide to Construction Contracts and Claims, § 31-03[G] (2006); see Seaward Constr. Co. v. City of Escondido, 118 N.E. 128 (1919) (this case is considered analogous to the pro-pay concept).

New Jersey

Pay-of-payment clauses are binding and valid defenses to claims for payment.


New Mexico

There is no case directly on point in New Mexico. However, in the course of the New Mexico Prompt Payment Act, the New Mexico Supreme Court appears to indicate that such a condition precedent to payment may be ignored if the fulfillment of the condition is unlikely. However, the United Court, applying New Mexico law, has predicted that New Mexico courts would enforce a pay-if-paid provision if the issue were raised before them.


New York

Pay-if-paid provisions are enforceable in New York because they are consistent with public policy.


North Carolina

Unlike N.C. Gen. Stat. §22C-2, both pay-if-paid and pay-when-paid clauses are unenforceable.

North Dakota

There is no case on point in North Dakota.

Ohio

Enforceable if it states in unequivocal terms that the owner’s payment is a condition precedent to the contractor’s obligation to pay its subcontractors. Moreover, pay-when-paid clause does not create a condition precedent, but instead serve as a liquidation mechanism.


However, contractors may still file claims on public projects while payment is pending under either a pay-if-paid provision or pay-when-paid provision, so as to comply with statutory schedulers and preserve their rights. Ohio R.C. § 4113.02(e).
<table>
<thead>
<tr>
<th>STATE</th>
<th>INTERPRETATION OF PAY-IF-PAID PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td>Pennsylvania permits parties to freely contract with regard to payment terms. However, the courts will not treat a pay-if-paid clause as a condition precedent to payment unless the language clearly indicates the parties intended it. Dodd, Michael J. Duncan Findlay, <em>State-By-State Guide to Construction Contracts and Claims</em>, 1:40.01(J) (2006); United Plant Glass Co. v. Metal Titan Indus., Inc. 525 A.2d 468 (Pa. Com-. 1987).</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>There are no cases on point in Rhode Island. <em>Note that the Restatement (Second) of Contracts finds pay-if-paid clauses acceptable and that Rhode Island courts frequently turn to the Restatement to fill gaps in state law.</em> Dodd, Michael J Duncan Findlay, <em>State-By-State Guide to Construction Contracts and Claims</em>, 1:40.01(J) (2006).</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Pay-if-paid clauses are enforceable under the Subcontractors' and Suppliers' Payment Protection Act. Moreover, it is likely that South Carolina courts will interpret pay-if-paid language to constitute a pay-when-paid timing mechanism. Dodd, Michael J. Duncan Findlay, <em>State-By-State Guide to Construction Contracts and Claims</em>, 1:40.01(J) (2006); S.C. Code Ann. § 29-6-30.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>There is no case on point in South Dakota.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Clauses are unenforceable unless there is clear, unequivocal language which expressly shifts to the subcontractor the risk of non-payment from the owner. Gulf Constr. Co. v. Self 667 S.W.2d 674 (Tenn. App. 1984).</td>
</tr>
<tr>
<td>Texas</td>
<td>There are no cases on point in Texas. However, the Texas Court has interpreted pay-when-paid clauses to constitute merely timing mechanisms and not conditions precedent to payment. In re Davidson Lumber Sales, Inc. 633 F.3d 1560 (10th Cir. 1995).</td>
</tr>
<tr>
<td>Utah</td>
<td>There is no case on point in Utah. However, the Utah Court has interpreted pay-when-paid clauses to constitute merely timing mechanisms and not conditions precedent to payment. In re Davidson Lumber Sales, Inc. 633 F.3d 1560 (10th Cir. 1995).</td>
</tr>
<tr>
<td>Vermont</td>
<td>There are no cases on point in Vermont. However, it is believed that the Vermont Prompt Payment of Construction Invoices Act would render pay-when-paid provisions unenforceable. Dodd, Michael J. Duncan Findlay, <em>State-By-State Guide to Construction Contracts and Claims</em>, 1:40.01(J) (2006); see Vt. Stat. Ann. Tit. 9, § 4099.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Pay-if-paid clauses are enforceable so long as the provision clearly expresses the intent to create a condition precedent to payment that shifts the risk of non-payment to the subcontractor. Gatewayway Constr. Co. v. S.B. Ballard Constr. Co. 464 S.E.2d 340 (Va. 1995); see also Pils Servs. v. NCI Indus. Sys., 2008 U.S. Dist. LEXIS 45792 (E.D Va. June 30, 2008). Note, however, that in a certain cases a payment bond (i.e., guaranteeing payment to the subcontractor), an underlying subcontract with pay-if-paid language will probably not be enforced because it defeats the purpose of the payment bond. See Moore Bros. Const. Co. v. Benson &amp; Root, Inc. 2017 F. 2d 747 (7th Cir. 2003).</td>
</tr>
</tbody>
</table>
| Washington   | There is no case on point in Washington. However, under the analysis set forth in *Anzalone Electric v.!
§ More acceptable to courts than the Pay-If-Paid clause.
§ “Reasonable time”
§ What is a reasonable time?
§ Try and limit the period of time when the money is deferred

<table>
<thead>
<tr>
<th>STATE</th>
<th>INTERPRETATION OF PAY-IF-PAID PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mortl M. Peake Co. 583 P.3d 646 (1078), it is likely that Washington courts would refuse to enforce pay-if-paid provisions.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Pay-if-paid provisions are enforceable and do not violate West Virginia public policy.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Pay-of-paid clauses are void and unenforceable.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>There is binding legal precedent on pay in Wyoming on pay-of-paid provisions.</td>
</tr>
</tbody>
</table>

Pay-When-Paid Clauses
Contractor shall make payment to Subcontractor within seven (7) days of Contractor’s receipt of payment.
No Damage for Delay

If the Subcontractor shall be delayed in the commencement, prosecution or completion of the work or shall be obstructed or hindered in the orderly progress of the work by any act, neglect or default of the Contractor, the Owner, the Architect, another contractor or subcontractor or by any cause beyond the control of the Subcontractor, then the time fixed for completion of the work shall be extended for a period equivalent to the period of the delay incurred by the Subcontractor as determined by the Contractor; but no extension shall be granted unless a claim in writing therefor is presented to the Contractor within seventy-two (72) hours of the start of such delay, obstruction or hindrance.

The Subcontractor expressly agrees not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance for any cause whatsoever, including but not limited to the aforesaid cause, and agrees that its sole right and remedy in the case of any delay, obstruction or hindrance shall be an extension of the time fixed for completion of work unless and to the extent that the Contractor recovers the same from the Owner.

• What does this mean?
• How enforceable is this provision?
Illinois
Exceptions recognized for delay caused by bad faith (cunning, wrongful or wilful conduct), delay not within contemplation of parties, delay of unreasonable duration, and delay attributable to reasonable ignorance or incompetence of engineer.

ADB Steel Contractors, Inc. v. C. Bar & Sons, Inc. 542 N.E. 2d 1215 (Ill. 1989)

Indiana
Indiana courts generally enforce excusable provisions. However, they are not particularly favored, and exceptions exist where the contractor can show:
1. The owner actively interfered with the project.
2. The delays were caused by the owner’s fraud or bad faith.
3. The delays were caused by unforeseeable circumstances.
4. There is a significant disparity in bargaining power.
5. The contract is unreasonable.
6. The transaction affects the public interest.


Iowa
Claims are generally enforceable, but will not be enforced where delay (1) is result of fraud or active interference upon part of one who seeks benefits thereof, or (2) is of such duration as to justify contractor in abandoning contract.

Cuppinger Bros., Inc. v. City of Waterloo. 187 N.W.2d 80 (Iowa 1962).

Kansas
While no case on point exists, the Kansas Supreme Court has suggested that it would enforce no-damage-for-delay provisions provided that the contractor was a commercial one, armed into business by sophisticated parties, where the contract was not unconscionable and the parties were on equal footing.


Kentucky

Louisiana
Louisiana courts generally enforce non-damage-for-delay provisions. Although such provisions will not be enforced in public contracts to the extent they violate the right of a contractor to recover for delays caused by the public entity.


Maine
There are no cases in Maine deciding the enforceability of no-damage-for-delay provisions.


Maryland
If the language of no-damage-for-delay provision is clear and unambiguous, it will be literally applied.

infraction screening:
1. material overrunning;
2. excess allowances;
3. bond or
4. surety reproduction.


Massachusetts
Generally upheld and enforced.


*Note: for public contracts, Massachusetts law requires a written order to delay work on a public construction project as a condition to a contractor’s recovery of damages occasioned by delay in the project attributable to the awarding authority. See Mass. Gen. Laws ch. 30 § 900, see also Kentucky.

Michigan
No-damage-for-delay provisions are generally enforceable, but will not be enforced where any one of the following exceptions exists:

1. The delay was caused by the active interference of the other contracting party.
2. The delay was of a kind not contemplated by the parties.
3. The delay was caused by an abandonment of the contract.
4. The delay was caused by the fault of the other contracting party.


2. Minnesota

There is no case on point in Minnesota. However, such provisions have been prohibited in public works contracts.


Minnesota Torque Conveyors v. SCE Inc., 717 So. 2d 322 (Miss. App. 1998)

2. Missouri

There is no case on point in Missouri. However, communications suggest that Missouri would generally uphold these provisions, although they have been prohibited in the public arena.


2. Montana

There is no case on point in Montana.

2. Nebraska

No damage for delay claims generally enforceable in Nebraska. In fact, the Nebraska Supreme Court has held that a contractor cannot recover acceleration damages when no change or delay provision is included in the contract, and that such a provision should be construed by the court.

2. Nevada


2. New Hampshire

No damages for delay provisions are generally enforceable in New Hampshire. Courts do not protect an owner acting in bad faith to intentionally interfere with and delay construction progress.

2. New Jersey

The provisions are enforceable except where the delay is caused by active interference or bad faith (typically meted against an owner).


2. New Mexico

There are no cases on point in New Mexico.

2. New York

Four exceptions to enforceability:
1. Delay caused by the contractor or owner’s bad faith, willful, malicious or grossly negligent conduct.
2. Unforeseen delays.
3. Delays or impossibility for the contractor or owner, or
4. Delays resulting from the contractor/owner’s breach of a fundamental obligation of the contract.

2. North Carolina

No damage for delay provisions are enforceable provided the contractor is clear and unimpeccable. However, such
North Dakota
There is no case on point in North Dakota.

Ohio Exceptions exist where delay caused by the parties at the time of contracting (this is a question of first for the year).


Statutory exceptions exist when delay is caused by the owner. Ohio R.C. § 4113.12(B)(2) voids the
application of the taxes for delay clause, as a matter of public policy, when the delay is caused by the
App. 5, 2008).

An additional statutory exception exists for subcontractor. Ohio R.C. § 4113.12(C)(2) voids the
application of a no damages for delay clause, as a matter of public policy, when the delay is caused by
other than the owner or the contractor, with which the subcontractor is in privity.

Oklahoma
There is no case on point in Oklahoma. However, there is no statutory prohibition on such clauses.


Oregon The Oregon Court of Appeals has added a no delay, no damages delay clause. However, there is no case for
determining what, if any, exception apply to the rule. Moreover, such clauses are prohibited in public
contracts when the delay is unreasonable.


Pennsylvania Pennsylvania law has been interpreted to include application and, therefore, either delayed and clearly defined, subject to the following exceptions:

NECA 2014 CHICAGO

September 28, 2014

For the Reference of NECA 2014 Chicago
Attendees Only
No Damage for Delay Clauses

- Enforceability depends on jurisdiction and facts
- In some states, such as New York, Massachusetts, Connecticut, Maryland, etc., a “no damage for delay” clause means the contractor gets no recovery regardless of whether you call it delay, disruption, inefficiency, acceleration, etc.
- Exceptions in some States
  - Active owner interference
  - Unreasonable duration of delay
  - Wrongful conduct
  - Type of delay not within contemplation of parties
What is a Mechanics Lien?

• A claim, enforceable by law, that secures payment to contractors for work performed in construction or in repairing real property. The lien is attaches to property and remains on it until it is paid or discharged.
• The lien is against real estate and not an owner.
• Liens are typically enforced by filing a separate action to obtain a judgment on the lien and then forcing a sale of the property to satisfy the lien.

Liens Do Not Guarantee Payment

• A lien is not a guarantee that a contractor will be paid for its work.
• Why not?
• What happens when 1st position lender forecloses?
• Is there enough equity in the property?
What Can be Done?

Strategy Number 1: Avoid problem projects!

- Track record and/or reputation of party
- Verify financing for work and get assurance in the form of a letter of credit, set-aside agreement etc.
- Require joint checks
- D&B reports
- Beware of “single purpose” entities

What is Needed to File a Lien?

- Depends on the jurisdiction
- Oral, written, express or implied contract to improve property?
  - Change Order issue
- Improvements (erection, construction, alteration, demolition or repair) to real property?
  - Site work alone enough?
Practical Considerations

• Have a diary system for your lien rights
• Review the status of payment on each project monthly
• In states that require written contracts to lien, make sure you have signed change orders before doing work
• File liens when you have not been paid
• Be careful when issuing partial and final releases and make sure they are contingent upon payment

Sample Lien Waiver Clause

Lien Waiver. If Contractor posts a bond guaranteeing payment for goods, materials, and equipment supplied, labor or services provided to the project by Subcontractor, then Subcontractor hereby agrees to waive its right to file a mechanics' lien and that no mechanics' liens, notices, or claims, or materialman's liens, notices, or claims, or any other liens or claims of any kind whatsoever will be filed, enforced, or maintained with respect to the goods, materials, and equipment supplied, labor or services performed pursuant to this Purchase Order against the project for which they are supplied or performed, or against the Owner, real property, building, or other improvements of which the project is a part, or any part or parts thereof or the appurtenances thereto by Subcontractor, its successors and assigns.
Waiver of Liens

• Is it permitted in your jurisdiction?
• How does it differ from a release of liens?
• Some jurisdictions allow others to waive your rights to file a lien without your knowledge!

Other Lien Concepts to Watch Out For

• Can you lien public projects?
• Can you lien for alteration or repair work if the owner has sold the property in “good faith” to a third party?
• Can you lien where the contract for an improvement to real property is between the contractor and the tenant?
  • Has the owner has agreed to the improvement in writing?
Filing and Notice Requirements

- When must a lien be filed by?
  - Last day of work
- What information must be in the lien?
  - Information required by Statute.
- How and when must a lien be served on an Owner?
- Must proof of service be filed?
- Any pre-filing notice required?
  - Subcontractors, Sub-subcontractors and material suppliers
- Some states require pre-work notification!
  - Again, Subcontractors, Sub-subcontractors and material suppliers
- Form and Service of Notice must be as required by Statute.
- Any error will likely render the lien defective.

Last Day of Work

- Key concept in the majority of states
- Starts the clock ticking
- Generally, the repair of defective work, which may include punch lists, is not contract work.
- Warranty work is not contract work.
- Improvements may not always need to be completed to have lien rights.
Mechanic’s Lien Filing Requirements

**September 28, 2014**

For the Reference of NECA 2014 Chicago Attendees Only

---

**Mechanic’s Lien Filing Requirements**

<table>
<thead>
<tr>
<th>STATE</th>
<th>NOTICE REQUIREMENTS</th>
<th>TIME REQUIREMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>owner of real property is named</td>
<td>within 40 days after last payment of work or materials has been made.</td>
</tr>
<tr>
<td>Arizona</td>
<td>notice of lien must be filed within 90 days after last payment of work or materials has been made.</td>
<td></td>
</tr>
<tr>
<td>California</td>
<td>owner of real property is named</td>
<td>within 180 days after last payment of work or materials has been made.</td>
</tr>
</tbody>
</table>

---

**NECA 2014 CHICAGO**

---

This document is a summary of your local Mechanic’s Lien Filing Requirements. It is intended to be a comprehensive set of instructions for the requirements. The information here does not constitute legal advice and is for informational purposes only. As individual circumstances vary greatly, readers should consult an attorney for legal advice regarding Mechanic’s Lien Filing Requirements.
### Colorado

Notice of lien to File Lien Statement must be served by personal service or registered mail on both the owner and the prime contractor. An affidavit that such service has been made must be filed along with the Lien Statement.

*Notice of lien to File Lien Statement must be served at least 10 days before filing the lien statement.*

Generally, a Lien Statement must be filed within four months from the day on which the claimant last provided labor or material. Extensions cannot be made for the days in which work was not performed, but not withheld. Failure to file before the four months will result in the lien being void.

Certificate of Mechanics’ Lien must be recorded on the 2nd Monday of the month during the project.

### Connecticut

All accidents occurring on the premises must be reported to the owner and general contractor (or general contractor's agent) within 30 days of occurrence, in writing, or as otherwise required by the contract.

Notice of lien to File Lien Statement must be filed along with the Lien Statement.

*Notice of lien to File Lien Statement must be filed before the four months from the date of the last payment.*

Certificate of Mechanics’ Lien must be recorded on the 2nd Monday of the month during the project.

### Nevada

Notices of non-conformance, if required by the contract, must be served within 30 days of the last work performed. Notices must be served to the owner and contractor. Failure to serve such notices within the required time frame will result in the lien being void.

Certificate of Mechanics’ Lien must be recorded on the 2nd Monday of the month during the project.

### District of Columbia

Notices must be filed with the Office of Recorder of Deeds in the District of Columbia. Notice must be filed within 10 days of the last payment.

Certificate of Mechanics’ Lien must be recorded on the 2nd Monday of the month during the project.

---

1. A statement of claim to the owner of the work indicating the amount due within 10 days of the last payment.
2. A notice of default to the owner of the work indicating the amount due within 10 days of the last payment.
3. A certificate of non-conformance to the owner of the work indicating the amount due within 10 days of the last payment.
4. A certificate of mechanics lien to the owner of the work indicating the amount due within 10 days of the last payment.
<table>
<thead>
<tr>
<th>State</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>Florida requires notice to owner if in priority of interest with owner.</td>
</tr>
<tr>
<td></td>
<td>Contractors must provide notice to owner within 60 days after the last</td>
</tr>
<tr>
<td></td>
<td>payment of labor or material.</td>
</tr>
<tr>
<td></td>
<td>Subcontractors have the same notice requirements as contractors.</td>
</tr>
<tr>
<td></td>
<td>Subcontractors must notify the owner within 90 days after the last payment</td>
</tr>
<tr>
<td></td>
<td>of labor or material.</td>
</tr>
<tr>
<td>Georgia</td>
<td>Georgia requires notice to owner and notice to contractor if in priority of</td>
</tr>
<tr>
<td></td>
<td>interest with contractor.</td>
</tr>
<tr>
<td></td>
<td>Notice must be provided within 30 days of last payment of labor or materials</td>
</tr>
<tr>
<td></td>
<td>or within 45 days of notice to contractor if in priority of interest with</td>
</tr>
<tr>
<td></td>
<td>contractor.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Hawaii requires notice to owner and notice to contractor if in priority of</td>
</tr>
<tr>
<td></td>
<td>interest with contractor.</td>
</tr>
<tr>
<td></td>
<td>Notice must be provided within 90 days of last payment of labor or materials</td>
</tr>
<tr>
<td></td>
<td>or within 45 days of notice to contractor if in priority of interest with</td>
</tr>
<tr>
<td></td>
<td>contractor.</td>
</tr>
<tr>
<td>Illinois</td>
<td>Illinois requires notice to owner and notice to contractor if in priority of</td>
</tr>
<tr>
<td></td>
<td>interest with contractor.</td>
</tr>
<tr>
<td></td>
<td>Notice must be provided within 90 days of last payment of labor or materials</td>
</tr>
<tr>
<td></td>
<td>or within 45 days of notice to contractor if in priority of interest with</td>
</tr>
<tr>
<td></td>
<td>contractor.</td>
</tr>
</tbody>
</table>

For the Reference of NECA 2014 Chicago
Attendees Only
### Illinois

- Must file notice of intention to liens labor or materials within 90 days from the last payment of labor or materials.
- Notice of lien must be given to the owner and the contractor within 30 days of the work performed.

### Iowa

- If lien is filed within 90 days from the date of the last furnishing of labor or materials, it is not used to seal notice to owner.
- If lien is filed after 90 days, subcontractor must serve notice of lien upon the owner, and any notice received within 10 days of the filing must be served to the contractor at the time of service of the subcontractor notice.

### Oregon-Occupied Dwellings

- If the original contractor and owner have no written contract, the contractor must provide written notice to owner of the lien at the time of service of the subcontractor notice.

### Kansas

- Subcontractor must file a notice of lien within 10 days after the last furnishing of materials or labor to owner or to contractor.

### Kentucky

- All lien claimants must file a notice of lien within 7 days of the filing of a lien statement.
- Entities not in privity with the owner must notify the owner, in writing, within 75 days after the last furnishing of labor or materials.
Louisiana

Written notice of contract should be filed before work begins.

If the contract amount is over $50,000.00 and the notice of contract has been filed, general contractors have 60 days from the date which the owner and contractor sign and file a notice of acceptance to file the lien claim. Subcontractors have only 30 days.

If no notice has been filed, subcontractors have 60 days from entry of the filing of notice of termination or substantial completion or abandonment of work. Contractor will only be able to assert privilege against owner if contract amount is less than $50,000.00, in which case contractor has 60 days to file claim.

Maine

Contractor must file either notice of lien or notice that labor or material will be finished and that lien may be claimed in the registry of deeds prior to the sale to a bona fide purchaser.

Subcontractor and materials vendor must file either notice of lien or notice that labor or materials will be finished and that lien may be claimed in the registry of deeds prior to the sale to a bona fide purchaser, whether

the property is residential or commercial. With

residential property, they also must give notice to the
owner prior to the owner’s payment to contractor in order to avoid the defense of payment.

Maryland

Claims against those other than prime contractor must serve the owner with a notice of intention to claim lien within 120 days of whom the claimant last performed work or supplied materials.

Entities with no direct contract with the owner must, after sending the appropriate lien notice, file a Petition to Enforce a Mechanic’s Lien.

Entities with direct contract need only file Petition to Establish Mechanic’s Lien.

Suit must be filed within 180 days after the claimant last performed work or furnished material. Claimant other than the prime contractor also must give the owner notice within 120 days of last work or furnishing materials, which notice must set forth certain statutory prescribed information.

Petition to Enforce the Lien must be filed within one year after the filing of the Petition to Establish Mechanic’s Lien.

Massachusetts

All Entities

Notice of Contract must be recorded no later than the earliest of 60 days after the filing of notice of substantial completion, 90 days after the filing of notice of termination or 90 days after the last finishing of labor or materials.

General Contractor, Subs. Subs. & Suppliers

Statement of Account must be filed no later than the earliest of 90 days after the filing of notice of substantial completion, 120 days after the filing of notice of termination or 120 days after the last finishing of labor or materials.

Lawsuit to enforce mechanic’s lien must be commenced within 90 days of the recording of the statement of account. Must be recorded in the land records within 30 days of filing.
<table>
<thead>
<tr>
<th>State</th>
<th>Notice Requirements</th>
<th>Lien Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>Every subcontractor, supplier or laborer must provide a Notice of Nonpayment to the owner and general contractor within 20 days after providing their first labor or material. If labor, Notice of Nonpayment must be served within 30 days after wages were actually due but not paid.</td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>All lien claimants must serve formal pre-lien notices on the owner. A general contractor’s pre-lien notice must be included in any written contract with the owner. If no written contract, a general contractor’s pre-lien notice must be delivered within 30 days after work is substantially completed or improvement is agreed upon. Subs, material suppliers, and other claimants must be served upon the owner within 45 days after the claimant has commenced work. Several exceptions to pre-lien notice requirements exist generally where the preliant use of the property is commercial. See Minn. Stat. § 514.021.</td>
<td>Lien statement must be filed within 120 days after the lien claimant has substantially completed or improved the property. Action to foreclose on the lien claim must be commenced, and defendant-lender/owner must be made a party to the suit (by unswearing service) within one year from the date it last provided labor or materials.</td>
</tr>
<tr>
<td>Missouri</td>
<td>Entity that contracts directly with the owner must give a written notice to the owner as a condition precedent to establishing a mechanics lien claim before receiving payment in any form. Entities without contracts with the owner must give written notice to the owner at least 10 days before filing a lien statement.</td>
<td>Suit to enforce the lien must be filed within 12 months of the date when the indebtedness secured by the lien became due. Lien statement must be filed within six months after the indebtedness has accrued. Suit to foreclose on mechanics lien must be commenced within six months after filing the statement.</td>
</tr>
<tr>
<td>Montana</td>
<td>Generally, in order to claim a lien, a person must give notice of the right to claim a lien to the owner at least 20 days after the date on which the services or materials are first furnished. When payment is made by or on behalf of the contracting party from funds provided by a bank for the purpose of paying for the particular real estate improvement being built, the notice period is extended to 45 days (not applicable to owner-occupied residences). Several exceptions exist to Notice requirement. See Mont. Code. Ann. § 71-5-331.</td>
<td>Lien must be filed no later than 90 days after the final furnishing of services or materials on the project by the contractor, or the owner files a notice of completion. Lien cannot be filed before the person claiming it has substantially furnished services or materials (unless claimant is prevented from fulfilling the obligation). Copy of lien must be served upon each owner and filed with the county clerk and recorder. Action to foreclose on the lien must be brought within 2 years from the date of filing of the lien.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>There are no mandatory pre-lien notice requirements. The act provides the optional pre-lien notice to be given, including Notice of Right to Assert Lien. See Neb. Rev. Stat. §§ 51-135, 141, 143, 144.</td>
<td>Lien must be filed no later than 120 days after the final furnishing of services or materials. A copy of the recorded lien must be sent to the owner within 10 days after recording the lien.</td>
</tr>
</tbody>
</table>
Nevada

All entities who do not have a direct contract with the owner must serve a preliminary notice of right to lien upon the owner (who must also serve it upon general contractor). Must be provided at any time after the first delivery of material or performance of work or services under the contract. Lien claimant then has the right to lien for work or materials provided within the 31 days before the date the notice of right to lien is given and for work or materials provided anytime thereafter.

Foreclosure action must be brought within 2 years of the filing of the lien.

Notice of lien must be recorded within 90 days of the completion of the work, the last delivery of material or the last performance of work, whichever is later.

If a notice of completion is recorded by the owner, a lien claimant must record the notice of lien within 40 days of the notice of completion.

Notice of lien must be served upon the owner within 10 days.

Suit in foreclosure of the lien must be filed after thirty days but before six months after the recording of the lien. This may be extended an extra six months by written agreement between the owner and the lien claimant before the expiration of the original six month period.

New Hampshire

Private Improvement Lien

Contractor as owner need not provide notice.

Subcontractors and others not in priority must provide written notice to the owner that he intends to claim a mechanic’s lien before performing labor or furnishing materials. If notice is given before providing labor or materials, every 30 days the subcontractor must provide the owner a written account of the labor performed or materials furnished during the proceeding 30 days.

Private Improvement Lien

Right to lien exists for 120 days after the last date upon which services were performed or materials were provided.

Lien is perfected by judicial attachment by bringing suit against the owner and filing the lien in the appropriate locations.

Public Improvement Lien

Suit must be filed in the county of the project within one year of the claim filing. A copy must be given to the principal and owner of the project.

New Jersey

For all non-residential work, prior notice to the property owner is not required. For non-residential work, the contractor may choose to file a Notice of Unpaid Balance and Right to File Lien (NUB) to notify subsequent purchasers, mortgagors or lien creators of the possibility of a subsequent lien.

However, there is an entirely different procedure for residential construction (one- or two-family dwellings or condominiums or cooperative units). For residential liens, the claimant must file (lodge for record) and serve a NUB no later than twenty (20) days after the last date of work, and then commence an arbitration proceeding to determine the validity of the contractor’s claim. Upon receipt of a favorable Arbitration Award, the contractor must file (lodge for record) the lien within ten (10) days of receipt of the Award, but in no event may the lien be filed more than one hundred and twenty (120) days after the contractor’s last date of work.

For non-residential work, the construction lien claim may be filed (lodge for record) from the date that payment is due, but in no event later than ninety (90) days following the date on which the last labor, materials or equipment was provided. Service of the lien claim upon the owner and other affected parties must be made within ten business days of the filing.

For residential work, the construction lien claim may only be filed after an Arbitration Award is issued and in no event later than one hundred and twenty (120) days following the date on which the last labor, materials or equipment was provided.

Suit must be filed within one year of the date upon which the last labor, materials or equipment was furnished to the project. However, the claimant may be required to commence suit within thirty (30) days after receiving a notice from the owner or contractor (in the event the lien claimant is a subcontractor), requiring payment bond.
**New Mexico**

Notice of Right to Lien is required in certain instances—
for any lien on property other than residential of four
dwellings or less, if the claimant intends to claim a lien
for work done or materials supplied of greater than
$5,000, the claimant must, within 60 days of actually
providing work or materials, give written notice of its
intention to file a claim in the court of nonpayment.

Provisions of these Notice Acts apply to residential

**New York**

Private Improvement Lien

Notice of lien may be filed at any time during
performance, but no more than 8 months from the
termination of the labor or the last materials on the
job (four months for a single-family dwelling). An
exception to this limitation period has recently been
added for renovation under New York legislation.

Lien for unpaid retainage (but not progress payments
or change orders) must be filed up to 60 days after
retainage was due to be released.

Public Improvement Lien

For a lien against monies due or to become due to the
contractor, notice of lien may be filed any time up to
30 days after completion and acceptance of the
project. Notice of lien must be filed with the head of
the public agency and to the comptroller or chief fiscal
officer of the public agency. Public improvement liens
are not filed with the County Clerk. Within five days

The lien claimant to establish its claim by
judgment.

Original contractors must file a claim of lien
within 120 days after the completion of the
contract.

Other contractors must file within 90 days of the
substantial completion of the building,
construction, or structure, the alteration or
repair, or the performance of any labor or any
material claim to file a lien.

Claimants must file or be served within 3 years from the date of the filing.

A lien is good for one year, but, except for a
lien on a one-family house, may be extended
for an additional year, without court order, by
filing a notice of extension. A court order is
required to extend the lien on a one-family
house. The lien may be further extended only
by court order for another one-year period.
<table>
<thead>
<tr>
<th>State</th>
<th>Notice Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>All contractors must serve written notice upon the owner that if payment is not made within 21 days of the mailing of the notice, a lien will be perfected. Notice must be recorded with the register of deeds. In addition, a lien may be filed for amounts due or to become due within 90 days after the act is commenced or for personal services within 30 days before commencement.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Subcontractors and materialmen must serve notice of lien on the owner within 180 days after the date the subcontractor or materialman first provided work or material. If notice of lien is filed after 120 days, a claim for the amount may be filed within 21 days of the notice or commencement.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Second-tier and below subcontractors and materialmen are entitled to judgment for work done and materials furnished within 30 days after the date on which the last of the labor or materials was furnished. A bond in the amount of the balance due may be posted before a lien is filed.</td>
</tr>
<tr>
<td>Oregon</td>
<td>All original contractors performing residential construction are required to provide a Notice of Right to Lien within 30 days after the completion of construction. Original contractors and subcontractors on non-residential projects must provide a Notice of Right to Lien at any time after the issuance of a permit.</td>
</tr>
</tbody>
</table>

**For the Reference of NECA 2014 Chicago**  
Attendees Only  
79
### Pennsylvania

A first or second tier subcontractor/supplier must give the owner formal written notice of his intention to lien in work at least 30 days before the lien is filed. No notice of lien is required of prime contractors. Service of notice must be by first-class, registered or certified mail on the owner or its agent, or by personal service on an adult in the same manner as service of a summons. If service cannot be made by the above means, then it must be made by posting a notice on improvement.

The lien must be filed with the County Prothonotary, a public court official in Pennsylvania, within six (6) months after last provision of the work for which the lien claim is being made. Within thirty (30) days of filing the lien, service of the lien must be made upon the owner in the same manner as service of a summons. If service cannot be made as above, notice of filing must be posted on a conspicuous public part of the improvement.

Suit on the lien must be filed within two years of date on which the lien claim is filed.

### Rhode Island

Any person contracting directly with an owner of property in order to file their lien, must send a notice to the owner by certified mail within 10 days of the contractor commencing work or furnishing materials on the project, or otherwise the contractor shall have no rights under the Mechanic’s Lien Act. In addition, pursuant to the Rhode Island Contractor’s Registration Act (Section 5-42-30) the statutory notice of Mechanic’s Lien must be placed before the signature clause. Notwithstanding, if a contractor complies with the Contractor’s Registration Act, the contractor need not comply with the 10 day notice by certified mail.

Must mail and record Notice of Intention to claim a lien within 40 days after doing the work or furnishing the materials. (Architects and engineers must mail and record before the later of 200 days of performance of the work or 10 days after the actual and visible commencement of construction.)

Notice of Lien Pendente must be filed within 40 days of the recording of the Notice of Intention.

Must also provide notice to all parties with an interest in the improvement (via published advertisement). Advertisement must also be mailed to all persons who have filed a notice of intention with respect to the property.

### South Carolina

A person performing labor or service shall send the owner of the property or person to whom the labor or service is performed a Notice of Lien within 30 days of the completion of the work or services.

A Notice of Lien must be recorded not later than 90 days after the completion of the work or services.

A person may file a complaint for the payment of labor or services within 60 days of the recording of the Notice of Lien.

### South Dakota

Notice of all lien claims must be provided to owner.

Lien must be filed with the clerk of the county court within 90 days after ceasing to perform labor or services.

Notice of lien must be filed within 60 days after ceasing to perform labor or services.

A complaint for the payment of labor or services must be filed within 90 days after the completion of the work or services.

For the Reference of NECA 2014 Chicago Attendees Only
For the Reference of NECA 2014 Chicago
Attendees Only
<table>
<thead>
<tr>
<th>State</th>
<th>Notice Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washington</td>
<td>Public Works - Lien Against Retained Percentage: Must file written notice of claim with public body within 45 days after completion of the contract work.</td>
</tr>
<tr>
<td></td>
<td>Private Projects - Notice of Lien Claim must be recorded within 90 days of the last day claimant performed work or provided material. (For residential contracts, the requirement and time period apply to each residential unit).</td>
</tr>
<tr>
<td></td>
<td>Must provide notice to owner within 14 days of date claim is recorded.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>General contractors - notice of lien must be recorded within 180 days after completion of the contract.</td>
</tr>
<tr>
<td></td>
<td>Subcontractors and materials - notice of lien must be served upon the owner within 180 days from furnishing of last material or labor, and must be recorded within 180 days of the same.</td>
</tr>
<tr>
<td></td>
<td>Persons providing supplies to owner - must record lien within 180 days after furnishing of last supplies.</td>
</tr>
<tr>
<td></td>
<td>Persons providing supplies to contractor or subcontractor - notice must be served upon owner within 180 days and must be recorded within the same period.</td>
</tr>
<tr>
<td></td>
<td>Persons performing work or labor or providing service for owner - must record notice within 180 days.</td>
</tr>
<tr>
<td></td>
<td>Mechani or Laborer - must serve notice on owner within 180 days and file in clerk's office within the same time period.</td>
</tr>
<tr>
<td></td>
<td>Suit to enforce a lien must be commenced within six months of the filing of the notice of lien.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Preliminary notice must be included in prime contract.</td>
</tr>
<tr>
<td></td>
<td>Lien claim must be filed within 6 months of the filing of the notice of lien.</td>
</tr>
</tbody>
</table>
Notice

- All claims and issues: extras, delays, pay, etc.
- What does the contract require?
- You should avoid notice provisions which require notice within a short period of time
- You should avoid notice provisions which require the full amount and scope of the damages
- You must know what the prime contract requires
- Public vs. private concepts
- Don’t have to be adversarial
Monthly Evaluations

• Each month project executive and project manager should discuss where are we and why are we here.
• If the job is behind schedule, a question should be asked as to why.
• If the job is behind schedule because of something the company has done, effort should be made to correct it.
• If the job is behind for reasons unrelated to the company, the question should be asked have we put the owner on notice, have we written the right letters, have we taken pictures and videos, have we documented this?

Mr. John Doe
Doe Building Corporation
1234 Main Street
Annapolis, PA 14001

REF: XYZ Electric
SAP Project

Dear John:

I am writing to advise that XYZ Electric has been and is being delayed on this project by reason of the acts of Doe Building Corporation and/or its sub-contractors. As a result, the job is _______ weeks behind schedule. Our prior to Doe Building Corporation was promised __________ weeks duration. As present, XYZ’s work is being accelerated and is determined

As a consequence, XYZ hereby requests a calendar day extension of time. If Doe Building Corporation fails or refuses to grant this extension of time, XYZ shall have no choice but to exercise this right to a compensatory acceleration. All additional costs incurred by XYZ as a result of this acceleration shall be reimbursed to Doe Building Corporation daily for signature. At the conclusion of the job, XYZ shall present a Change Order Request to claim for the increased cost caused by this compensatory acceleration.

I trust you will give this matter your immediate attention and advise XYZ of Doe Building Corporation’s decision on its request for an extension of time.

Very truly yours,

James Smith

[Signature]
MEMORANDUM

Date: April 10, 2000
To: Gilliane Building Corp.
From: XYZ Electric
Subject: Status of Electric Activities on the CHA Housing Project

General: The unexpected restraints on this project have put us ___ days behind schedule. The failure of the
preceding trades to make work available in accordance with the approved schedule has forced XYZ Electric to
work out of sequence and thus inefficiently. XYZ is making every effort to minimize the schedule impacts,
but as of this point, cannot accurately predict the full schedule and cost impact until all restraints are removed.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Location</th>
<th>Status</th>
<th>Comments/Restraints/Impacts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electrical Demo</td>
<td>Buildings 116-119</td>
<td>Delayed</td>
<td>Asbestos abatement continues to block access to these buildings.</td>
</tr>
<tr>
<td>Electrical Rough-In</td>
<td>Buildings 122, 133</td>
<td>Delayed</td>
<td>Framing behind schedule; no access</td>
</tr>
<tr>
<td>Electrical Rough-In</td>
<td>Buildings 134, 135</td>
<td>Underway</td>
<td>Some work ongoing, but slower than expected</td>
</tr>
<tr>
<td>Electrical Rough-In</td>
<td>Buildings 136, 137</td>
<td>Impacted</td>
<td>due to framing and undervalue plumbing delays.</td>
</tr>
<tr>
<td>Electric Service</td>
<td>Community Center</td>
<td>Stopped</td>
<td>Forced to demolize due to presence of water infiltration.</td>
</tr>
<tr>
<td>Underground Electric</td>
<td>Playground</td>
<td>Underway</td>
<td>Piles of dirt and debris block access of boom trucks</td>
</tr>
<tr>
<td>Site Lighting</td>
<td>Buildings 116-119</td>
<td>Delayed</td>
<td>Slower than anticipated because of missing drywall.</td>
</tr>
<tr>
<td>Fixturing</td>
<td>Buildings 123-126</td>
<td>Impacted</td>
<td></td>
</tr>
<tr>
<td>Fixturing</td>
<td>Buildings 127-130</td>
<td>Underway</td>
<td></td>
</tr>
</tbody>
</table>

For the Reference of NECA 2014 Chicago
Attendees Only
Scope of Work

• Plans and Specifications
  – Design spec vs. Performance specs
  – Spearin Doctrine (1918)
  – Owner impliedly warrants the information, plans and specifications which an owner provides to a general contractor
• Exclusions and clarifications

Questions on Scope

• A bidder who has questions about scope of work needs to raise it immediately pre-bid or as soon as discovered.
• This includes in letter form, on partial release of lien forms, emails, etc.
• Documentation is key
Integration Clause

This subcontract constitutes the entire agreement between the parties and supersedes all proposals, correspondence and oral agreements between the contractor/construction manager/general contractor and subcontractor/sub-subcontractor and supplier, if any. Except as otherwise provided for herein, no changes, amendments or modifications to the terms hereof shall be valid unless reduced to writing and signed by the parties hereto.

PROPOSAL

Incorporation by Reference

Incorporation. Contractor has entered into an agreement with OWNER, dated [OWNER CONTRACT DATE] (“Primary Agreement”). The terms and conditions of the Primary Agreement, as they relate to this Purchase Order, are incorporated herein as though more fully set forth; provided, however, that where a conflict or ambiguity exists between the Primary Agreement and this Purchase Order, the terms and conditions of this Purchase Order shall govern. In signing below, Vendor acknowledges that all such documents have been made available for review, inspection and copying.
Incorporation by Reference

- The prime contract may be incorporated by reference in a subcontract
- The Subcontractor must see it and get a copy if possible
- Things to look for:
  - Dispute resolution: arbitration or litigation
  - The payment terms (the 180 day payment!)
  - Notice (24 hours!)

Change Orders/Additional Work

- What does the contract require?
  - Get it in writing
  - Who must authorize?
- Public vs private
- What is a Construction Change Directive?
- Time must be considered
Beware Release by Change Order

CHANGE ORDER NO. 18 (cont’d)

5. SCHEDULE ADJUSTMENT

Except as stated below, the Construction Schedule and Subcontract Milestones remain unchanged:

NOTE:

7. ACKNOWLEDGEMENT

The adjustments set forth in this Change Order represent full and final compensation due to Subcontractor for the changes referred to herein. Subcontractor further releases all other claims, if any (except those previously submitted in writing in strict accordance with the Subcontract), for additional compensation under the Subcontract including, without limitation, any rights Subcontractor may have for additional cost or schedule adjustments that have arisen prior to the date of this Change Order. Except as set forth above, all other terms and conditions of the Subcontract remain unchanged.

Include Delay Language

This excludes all delays, disruptions and inefficiencies experienced by the contractor to date or associated with this particular increased scope of work.
Sample Letter Re Change Order

To: John Doe
Doe Building Corporation
123 Avenue
Anytown, CA 90201

Re: XYZ Electric
SAP Project

Dear John,

As you know, our Change Order Envelope No. ___ contained a notation that the price quoted includes all causes for delay, disruption and inefficiency. You have agreed to that by our owner and architect will not approve the Change Order Envelope with that language included. At a consequence, XYZ Electric is amending Change Order Envelope No. ___ without such proviso. Nevertheless, this letter is intended to please Doe Building Corporation, the owner and the architect, to notify that XYZ Electric’s price for the change order included way out of the original quote. XYZ Electric reserves the right to dismiss a claim for these costs at the end of the project.

Very truly yours,

James Smith

Partial/Final Releases

- Read them carefully
- Can be a complete waiver of claims
- No such thing as “duress”
- Except out
The Dreaded Monthly Release

1. The undersigned does hereby release all Construction Liens Rights, Mechanics’ Liens, Stop Notices, and Equitable Liens resulting from labor and/or materials, contract work, equipment or other work, rents, services or supplies heretofore furnished in and for the construction, design, improvement, alteration, additions to or repair of the above described project.

7. In addition to the foregoing, this instrument shall constitute a “***final and complete***” release of all debts, rights, claims, demands and demands of the undersigned against the Contractor and Owner, to the extent and as to liabilities arising out of or pertaining to the above referenced project and whether known or unknown and whether presently ascertainable or not, which the undersigned and/or its successors and/or assigns ever had, now have, or ever will have, against the foregoing, by reason of delivery of materials and/or performance of work relating to the Project up to and including the date hereof, including, but not limited to, all claims for damages associated with delay, disruption, acceleration, inefficiency or extra work. If partial, all such rights and claims on the project are released up to and including the ___ day of ______, 20__.

Sample Release

For the Reference of NECA 2014 Chicago
Attendees Only 91
Sample Letter re Partial Release of Lien

Mr. John Doe
Doe Building Corporation
1234 Main Street
Anchorage, PA 19001

RE: XYZ Electric
SAP Project

Dear John:

Enclosed please find the Partial Release of Lien form which has been executed by XYZ Electric for payment through . Please note that this partial release of lien does not waive any claims for delay, disruption or inefficiency which XYZ Electric has already assisted about under separate order. This letter is intended to give you an notice that any claims previously documented regarding delays, disruptions and inefficiency remain pending.

Very truly yours,

James Smith

---

Termination for Cause

• What is termination for cause?
• Does GC have to give reason?
• Does GC have to give opportunity to cure?
• Does GC have to give notice?
Termination for Convenience

- What is it?
- How does it differ from a termination for cause?
- Enforceable!
- Profit and overhead on work not performed?
- Most Owners strike the right to profit

Sample Purchase Order
(Standard Letterhead)

PURCHASE ORDER

Date:

Vendor:

Project Identification:

TERMS & CONDITIONS

1. Conditional Acceptance. John Doe, Inc. ("Contractor") accepts Vendor's offer or quotation to supply goods and materials, and to perform work and services, as described below, expressly conditioned upon Vendor's accept to these terms and conditions.

2. Conditions. Vendor agrees that, unless the terms and conditions of this Purchase Order and Vendor's offer or quotation conflict, or when construed together are ambiguous, the terms and conditions of this Purchase Order shall control, and govern, the parties' agreement.

3. Performance and Acceptance. Vendor agrees that, in the absence of its written consent to these terms and conditions, performance of all or part of this Purchase Order, in any manner whatsoever, shall constitute acceptance of such and every term and condition of this Purchase Order.

4. Scope of Work and Price. Vendor shall supply all goods and materials, and to perform all work and services, as more fully described below, in consideration of the total sum of $94.00.

5. Shipping. Unless otherwise noted otherwise in the Scope of Work, all shipments are to be F.O.B. site. All goods and materials are to be delivered as a single delivery, rather than in several lots.

6. Payment. Vendor understands and agrees that it is an express condition precedent to payment that Contractor receive payment from ___________ for the goods or materials supplied by, or the labor or services performed by, Vendor. Upon satisfaction of said express condition precedent, Contractor shall make payment to Vendor within 30 days of Contractor's receipt of payment. Without waiving the foregoing express condition precedent and notwithstanding thereof, Contractor acknowledges that the schedule for receipt of payments from ___________ is.

7. Additional and Extra Work. All requests for additional or for extra work must be submitted in writing to, and approved in writing by, Contractor. Any additional or extra work performed by Vendor without prior written approval from Contractor shall be at Vendor's sole risk.

8. Penalty. Unless otherwise specifically excluded by this Purchase Order, Vendor shall be responsible to assure and pay for all permits, government fees, licenses, or inspections, that are necessary for proper execution and completion of Vendor's work.

9. Time of Execution. Vendor understands and agrees that the time for performance of this Purchase Order is of the essence.

10. Incorporation. Contractor has entered into an agreement with ___________ ("Primary Agreement"). The terms and conditions of the Primary Agreement are incorporated herein as though more fully set forth. Provided, however, that where a conflict or antipathy exists between the Primary Agreement and this Purchase Order, the terms and conditions of this Purchase Order shall govern.

11. Vendor Indemnity. In the event Contractor determines, in its sole discretion, that Vendor is insolvent, or has failed to make timely payment to its contractors, sub-contractors, or suppliers of labor, equipment, goods, or materials, Vendor agrees to execute all necessary documents to the extent and in such form as may be designated by Contractor, including, but not limited to, Joint Pay Agreement, to withstand liability for judgment against the Contractor.

12. Indemnification. This Purchase Order cannot be modified, supplemented, altered or changed without the express written consent of Contractor and Vendor.

13. Warranties. In addition to any and all express warranties, Vendor warrants that the goods and materials are in new condition, free from all faults and defects, are unconditionally fit, and fit for their particular purpose. Vendor warrants that a holds valid, nonconstrained title to the goods and materials supplied, and that the goods and materials are not subject to any security interests, taxes, encumbrances, or claims of third persons by any of prior assignments, transfers, or dispositions.

14. Consummational Damages. Vendor shall be liable for all consummational, indirect, incidental, and special damages.

15. Indemnifications. Vendor shall purchase and maintain insurance that protects Contractor from all losses, demands, and actions, legal or equitable, that may result or arise in connection with Contractor's performance of work and services, and supply of goods and materials, including, and not limited to, workers' compensation, liability, and other similar employer benefits acts, bodily injury, occupational illness or disease, or death, injury or destruction of tangible property, including loss of
user, and bodily injury, death, or property damage arising out of ownership, maintenance or use of a motor vehicle or equipment. Vendor shall provide Certificate of Insurance evidencing said coverage.

16. **Lien Waiver.** In consideration of payment, Vendor agrees that no mechanic’s lien or claim, or materialman’s lien, or other lien or claim of any kind whatsoever will be filed, enforced, or maintained with respect to goods supplied, or services performed, pursuant to this Purchase Order, against the property for which they are supplied or performed, or against the land, building, or other improvements of which the property is a part, or any part or parts thereof or the improvements thereof by Vendor, its successors and assigns, or by all subcontractors, suppliers, materialmen, and other parties acting through or under it or them. Vendor agrees to provide actual notice of this Lien Waiver to its successors, assigns, subcontractors’ suppliers, materialmen, and all other parties acting through or under it or them, before any lien is performed or materials are supplied.

17. **Releases and Waivers of Lien.** Vendor agrees that it will execute all necessary documents that evidence and secure payment for all labor, services, equipment, goods, and materials in connection with the provisions of work or supply of materials under this Purchase Order, including, but not limited to, Releases and Waivers of Lien, in consideration of each and every payment, whether partial or final.

18. **Hold Harmless and Indemnification.** Vendor agrees to indemnify, defend, and hold Contractor harmless for all claims, demands, and actions, legal or otherwise, including, but not limited to, all costs, expenses, fees, and attorneys’ fees, that arise out of or are asserted to Vendor’s performance of work or services, or supply of goods or materials, or any other acts or omissions to act, including, but not limited to, claims, demands, and actions, legal or otherwise, concerning or related to title, security interests, lien, mechanics’, or claims of third persons by any of them infringement, trademark infringement, or the like.

19. **Termination for Convenience.** Contractor may, without cause, terminate, suspend, delay, or, upon notice to Vendor, supply of goods or services, in whole or in part, by written notice to Vendor. In the event of suspension, delay, or termination, Vendor shall be entitled to and, specifically, waives all rights to, damages for delay, but shall only be entitled to an equitable adjustment in the time for completing its performance. In the event of termination, Vendor shall be compensated for the price of goods that have been delivered to and accepted by Contractor at the time of the termination, and the completed services that were requested by Contractor and performed by Vendor in a good and workmanlike manner.

20. **Force Majeure.** Any controversy or claim arising out of or related to this Purchase Order, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association (“AAA”) under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Provided, however, that where the amount of the controversy or claim, together with all costs, interest, and attorneys’ fees, that arise out of or are asserted to Vendor’s performance of work or services, or supply of goods or materials, or any other acts or omissions to act, including, but not limited to, claims, demands, and actions, legal or otherwise, concerning or related to title, security interests, lien, mechanics’, or claims of third persons by any of them infringement, trademark infringement, or the like.

21. **Notice of Arbitration.** A party desiring to invoke arbitration shall file a Notice of Arbitration with the American Arbitration Association (AAA) and a copy with the other party. The Notice of Arbitration shall set forth the nature of the dispute and the relief sought.

22. **Arbitration.** All disputes shall be submitted to the American Arbitration Association (AAA) for arbitration in accordance with the AAA’s Commercial Arbitration Rules and the Supplementary Rules for Construction Disputes.

23. **Award.** In the event of arbitration, the arbitrator shall award the prevailing party costs, including reasonable attorney’s fees and disbursements.

24. **Enforceability.** This Purchase Order constitutes the entire agreement between Contractor and Vendor, and supersedes all other communications and prior offers, quotes, agreements, understandings, representations, and communications, whether oral or written.

25. **Severability.** If any provision of this Purchase Order or any part thereof, is determined to be invalid, it shall be severed and the remaining provisions of this Purchase Order shall remain in full force and effect.

John Doe, Inc. Vendor Company Name

By: Printed Name of Company Officer By: Printed Name of Company Officer
Surety Claims

Bond Claims

The Golden Rule: RGDB

- Timing
- Who may make a claim
- Requirements for claims
- Filing suit
Public Bond Law
Basic Rules

• Rules are usually set out in statute
• Must follow the rules to a tee
• Notice or no notice?
• How notice is sent?
• Who must receive notice?
• When must a lawsuit be filed?

Bonds on Private Projects

• Find out if there is a bond
• Don’t assume that there is no bond
• Are there rules for bonds on private projects?
• They are not governed by statute as to contents
• RGDB!!!
When Should Bond Claims be Made?

• Don’t have to wait until the end
• Are you having problem with the Contractor?
• Delays in payment
• Not being paid

Prompt Payment Acts

• Statutory so differs from State to State
• Some apply to both public and private projects
• General idea: Have to pay down the stream timely unless you have an expressed reason not to pay
  – Deficiency notice
Penalties

- High Interest
- Penalties
  - Bad faith?
- Attorneys fees
  - Substantially prevailing party

Claims

- There are basically two types of claims that get submitted in a construction context: delay claims and inefficiency claims.
- Delay claims are the easiest to understand because they reference a period of extension beyond which the parties had contractually agreed.
- Inefficiency claims come in many shapes and sizes, including:
  - Acceleration
  - Compression
  - Labor inefficiency
Claims

1. Unfortunately, it is the rare construction contract that does not involve issues that ultimately lead to a claim, whether it be for more money, a time extension or both.

2. Recovery is dependent on the Contractor being able to substantiate and support the claim.

3. In order to substantiate and support a claim
   a. Create, locate and maintain all pertinent documents, records, correspondence, photos, etc.

4. Claims are often important not only to recover money, but also to negotiate offsets against claims asserted by another party.

5. When deciding whether or not to pursue a claim
   a. The decision should be made by senior management
   b. Look to economic and/or political reasons

6. Recognize potential claims early in order to take necessary steps to preserve and support the claim.
Acceleration Claims – Causes of Acceleration

a. Decision by Contractor

b. Directive by Owner or A/E to finish entire project early

c. Directive by Owner or A/E to finish part of the project early

d. Delay or stop by Owner with no extension to finish date

e. Failure by Owner or A/E to grant valid time extension

f. Directive by Owner to man project at certain levels.

Types of Acceleration

a. Directed – when confirmed by written change order

b. Constructive – implied when
   (1) Excusable delays are incurred
   (2) Contractor specifically requests time extension
   (3) Owner fails to grant time extension
   (4) Owner expressly orders completion within original performance time; or
   (5) Contractor gives notice to Owner that its actions constitute constructive acceleration
Costs of Acceleration

a. Overtime
b. Inefficiencies of overall operations
c. Costs of expedited Subcontractor delivery
d. Additional supervision and overhead
e. Reduction of equipment rental costs and acceleration.

Acceleration Claims

• How do you preserve a Constructive Acceleration claim?
  ▪ Must ask for time extension.

• What should you do if Owner denies request for extension of time?
Effects of Delay and Acceleration: Loss of Efficiency

Example of Lost Efficiency

• A certain activity (e.g., excavate for u/g conduit to cooling tower) is estimated to take 8 hours to complete
• According to the original schedule, this activity was supposed to take place in the fall
• Because of delays the activity is forced to be performed in winter
• As a result of the frozen ground and weather, the activity now takes 16 hours
• 8 hours have been lost – a 100% loss of productivity!
Main Causes of Inefficiency

• Adverse or unusually severe weather
• Out-of-Sequence Work
• Stacking of trades
• Overtime
• Restrictions on access to the work
• Acceleration
• Combined effect of change orders, RFIs or design changes

QUIZ QUESTIONS
Quiz

Should you sign a contract provided by a general contractor or construction manager without reviewing or negotiating its terms?

No

If your work on a Project is being delayed or otherwise impacted, should you withhold providing notice of impact to the general contractor or construction manager to maintain friendly relations on the jobsite?

No

If your work on a project is being delayed, or otherwise impacted, should you execute monthly partial releases of liens without adding exculpatory language?

No

If you have received or generated a change order request, should you always request an extension of the contract time, and a reservation of rights to seek monies for delays, disruption and inefficiencies?

No
If you have provided the correct notice letters and did not waive your rights by signing monthly partial releases of lien or change orders, will you automatically be paid for the claim you are owed?

No

Roy S. Cohen
Cohen Seglias Pallas Greenhall & Furman PC
30 S. 17\textsuperscript{th} Street, 19\textsuperscript{th} Floor
Philadelphia, PA 19103
Phone: 215.564.1700

rcohen@cohenseglias.com
www.cohenseglias.com