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NEWS

ABOUT THE AUTHOR



Byron Saintsing leads a practice group focused on matters involving [construction law](#), commercial and business litigation, representation of [equipment lessors](#), charter schools, and education law, and commercial creditor bankruptcy. Byron has written and lectured on many topics pertaining to construction and equipment leasing, including editing materials on North Carolina's adoption of Article 2A of the Uniform Commercial Code.

Statutory Changes to the Provisions of N.C.G.S. 44A Regarding Liens and Payment Bonds

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In March 2011, the Construction Law Section of the North Carolina Bar Association proposed revisions to the North Carolina General Statutes that would mark the first substantial changes to the state's lien laws since 1969. The initial revisions addressed the "hidden lien" issue, overruled recent judicial decisions by statute, and provided notice to general contractors and owners of the presence of certain lower-tier suppliers on the project to ensure the payment of all tiers prior to using liens and lawsuits to resolve disputes. Some of the more controversial provisions to House Bill 1052, which included the hidden lien provision (formerly H864 and H489), were abandoned earlier this year, prompting the Land Title Association to introduce Senate Bill 42 on May 22, 2012. In spite of numerous changes to the bills in recent weeks, both were ratified and signed into law on July 12, 2012. The full texts of SB42 and HB1052 can be found on the General Assembly website (<http://www.ncleg.net/>). What follow are some of the key changes to the statutory scheme:

Changes to Bonding Provisions

In an effort to mitigate "double payment" liability for general contractors and sureties involved in North Carolina owned public projects, HB 1052 adds new requirements for subcontractors and suppliers under the bonding statutes found in Article 3 of N.C.G.S. § 44A.

General contractors on public bonded work must now provide to each first-tier subcontractor a "Project Statement" which includes: the name of the project; the physical address of the project; the name of the contracting body; the name of the contractor; the name, phone number, and mailing address of an agent authorized by the contractor to accept service of the requests for a copy of the payment bond; the notice of public subcontract; the notice of claim on payment bond; and the name and address of the principal place of business of the surety issuing the payment bond for the construction contract. If a first-tier subcontractor hires another contractor for a public bonded project, the first-tier subcontractor must provide a copy of the "Project Statement" to the second-tier contractor. Lower-tier subcontractors must supply a copy of the Project

statement to lower-tier subcontractors and suppliers as well. A contractor who fails to provide a Project Statement to a lower-tier party is barred from enforcing a contract against the lower-tier party until the Project Statement has been served.

The new provisions also require that subcontractors and suppliers working on public bonded projects deliver a "Notice of Public Subcontract" to the project general contractor in order to maintain the right to later make a payment bond claim, if needed. The Notice of Public Subcontract, which details work to be done on the project, should be provided to the contractor by subcontractors and suppliers upon receipt of a Project Statement. The form for a Notice of Public Subcontract is provided in HB 1052 is as follows:

NOTICE OF PUBLIC SUBCONTRACT

(1) Name and address of the subcontractor giving notice of public subcontract:

(2) General description of the real property on which the labor was or is to be performed or the material was or is to be furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

(3) General description of the subcontractor's contract, including the names and addresses of the parties thereto:

(4) General description of the labor and material performed and furnished thereunder:

Dated: _____
Subcontractor

The obligation to provide a notice of public subcontract only applies to the portion of claims that are greater than \$20,000, and does not apply to claims less than \$20,000.

If a supplier or subcontractor does not serve the Notice of Public Subcontract within 75 days of the subcontractor's or supplier's first date of furnishing labor or materials, any claim will be limited to the greater of the value of the labor or materials provided within 75 days of the date of the claim, or \$20,000.00.

HB 1052 also requires contractors to furnish any claimant with a copy of the payment bond within seven days of the claimant's written request under N.C.G.S. § 44A-11.2. Both the "Notice of Public Subcontract" and request for a copy of the payment bond must be addressed to the contractor at its office or to the contractor's agent identified in the contractor's project statement. They must be served by one of the following methods: certified mail with return receipt requested; signature confirmation as provided by the United States Postal Service; physical delivery and obtaining a delivery receipt from the lien agent; telephone facsimile with a facsimile confirmation; deposit with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2); or electronic mail with a delivery receipt.

The above provisions of HB 1052 go into effect on January 1, 2013.

Addition of a Lien Agent

In conjunction with House Bill 1052, Senate Bill 42 offers its own significant changes to lien provisions under N.C.G.S. 44A. The Senate bill includes new sections that define a "lien agent" as a designated title insurance company or agency chosen by the owner from a list of registered lien agents maintained by the North Carolina Department of Insurance. With the exception of a building currently used as a single family residence, any other construction project with original permitted work in excess of \$30,000 requires that the owner designate a lien agent by the time the owner first contracts with another to improve the property.

Once an agent has been designated, contact information (including the name, physical and mailing address, telephone number, facsimile number, and e-mail address) for the lien agent must be posted on the construction site beside the building permit. If the permit is not posted on the job site, the owner must provide all potential claimants with lien agent information within seven days of receiving a written request. Additionally, a contractor or subcontractor must provide lower-tier subcontractors, who will not to furnish labor on-site, with a written notice of the lien agent within three business days of contracting. If any contractor or subcontractor who has notice of the lien agent's contact information fails to provide this information to lower-tier subcontractors, it may be held liable to the lower-tier subcontractor for damages incurred as a result of the contractor's failure to give notice.

When a lien agent is identified in a contract between an owner and a contractor for improvements to a single-family residence, or when a lien agent is not identified in a contract between an owner and a design professional, the contractor and/or design professional will be deemed to have met the notice requirements on the date of the lien agent's receipt of the owner's notice of designation. In these situations, the lien agent should include the contractor and/or design professional in its response to any requests for information relating to persons who have given notice to the lien agent.

A lien on real property may be enforced if any of the three conditions listed in N.C.G.S. §44A-11.2 are met. First, a claimant may serve formal notice upon a lien agent using the statutory form called "Notice to Lien Agent" within 15 days after the first furnishing by the claimant. Second, the claimant may serve the lien agent with the "Notice to Lien Agent" form before the property is sold to a bona fide purchaser. The form as listed in the statute is below:

NOTICE TO LIEN AGENT

(1) Potential lien claimant's name, mailing address, telephone number, fax number (if available), and electronic mailing address (if available): _____

(2) Name of the party with whom the potential lien claimant has contracted to improve the real property described below:

(3) A description of the real property sufficient to identify the real property, such as the name of the project, if applicable, the physical address as shown on the building permit or notice received from the owner:

(4) I give notice of my right subsequently to pursue a claim of lien for improvements to the real property described in this notice.

Dated: _____

Potential Lien Claimant

The final option for enforcement of a lien by a potential claimant is to file a Claim of Lien on Real Property under N.C.G.S. 44A-12 before the property is sold to a bona fide purchaser for value.

To the extent that written notice is required by the statutes, the Notice to Lien Agent must be addressed to the person required to be provided with the notice and should be delivered by: certified mail with a return receipt requested; signature confirmation as provided by the U.S. Postal Service; physical delivery and obtaining a delivery receipt from the Lien Agent; facsimile with a facsimile confirmation; e-mail with delivery receipt; or by a designated delivery service (DHL Express, FedEx or UPS).

If a potential claimant does not follow these notice requirements, the claimant's lien rights are terminated if the property has been sold or subordinated to the new lender when a new Deed of Trust or mortgage has been recorded.

These provisions relating to notice and lien agents become effective on April 1, 2013.

The Legal Effect of the Contractor's Execution of a Final Lien Waiver

HB 1052 also makes changes to the impact of lien waivers. Under current law, a subcontractor's right to enforce the contractor's lien on real property is waived if a final lien waiver is signed by the contractor any time prior to the filing of the lien claimant's lawsuit to enforce its lien. The new lien waiver provisions state that once a subcontractor or supplier has given notice to the lien agent, properly served a Claim of Lien on Real Property upon the owner, and delivered a copy of the Claim of Lien on Real Property to the lien agent, no action of the contractor may prejudice the rights of a subcontractor.

The new law sets out a standardized form for lien waivers in an effort to eliminate the current use of varying forms. Use of other lien waiver forms may be ruled insufficient to cut off lien rights. The standardized form provided by statute is as follows:

CLAIM OF LIEN ON REAL PROPERTY

- (1) Name and address of the person claiming the claim of lien on real property:
- (2) Name and address of the record owner of the real property claimed to be subjected to the claim of lien on real property at the time the claim of lien on real property is filed and, if the claim of lien on real property is being asserted pursuant to G.S. 44A-23, the name of the contractor through which subrogation is being asserted:
- (3) Description of the real property upon which the claim of lien on real property is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)
- (4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
- (5) Date upon which labor or materials were first furnished upon said property by the claimant:
- (5a) Date upon which labor or materials were last furnished upon said property by the claimant:
- (6) General description of the labor performed or materials furnished and the amount claimed therefore:

I hereby certify that I have served the parties listed in (2) above in accordance with the requirements of G.S. 44A-11.

Lien Claimant

Filed this ____ day of ____, ____

Clerk of Superior Court

This statutory form specifically includes a certification of proper service, a requirement for a Claim of Lien on Real Property under the revised laws. If the Claim of Lien on Real Property is being asserted by subrogation, the subcontractor or supplier's claim must also name the contractor through which the claim is asserted.

Revisions to section § 44A-18 serve to clarify or resolve a statutory conflict arising within the Eastern District Bankruptcy Courts [that a lien upon funds arises, attaches, and is

effective upon the first furnishing of labor or materials on the job site]. This provision clarifies confusion created by conflicting bankruptcy rulings In re *Shearin Family Investments*, In re *Mammoth Grading*, In re *Harrelson Utilities*, and In re *Construction Supervision Services, Inc.*, and allows subcontractors and suppliers to serve a Notice of Claim of Lien Upon Funds or a Claim of Lien on Real Property after another party in the contractual chain files bankruptcy. Until a lien claimant gives notice of a claim of lien upon funds, a contractor, owner or subcontractor against whose interest the lien is claimed may make, receive, use, or collect payments thereon and may use the proceeds in the ordinary course of its business.

Efforts to make fraud in the execution of lien waivers a felony and an Unfair and Deceptive Trade Practice under Chapter 75 of the General Statutes were unsuccessful. However, the possibility of conviction for a Class 1 misdemeanor remains in effect, along with the added threat of discipline by licensing boards, such as revocation, suspension, or restriction of a license or the ability to act as a qualifying party for a license.

These new provisions take effect January 1, 2013.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, North Carolina 27609

Phone: 919.250.2000
Fax: 919.250.2100

COLUMBIA OFFICE

1720 Main St.,
Suite 104
Columbia, SC 29201

Phone: 864.751.5523
Fax: 888.784.2250