

## Asserting Mechanic's Lien or Payment Bond Rights: The Devil is in the Details

When it comes to determining the correct path for securing the various lien or bond provisions that ultimately help secure payment on a construction job, public or private, there are typically a few simple steps credit managers can take.

Provided one carries out these actions, like filing a payment bond notice on a public job or a mechanic's lien notice on a private job, and does so at the right time and in the correct manner, the process can seem fairly straight forward, said Chris Ring, of NACM's Secured Transaction Services (STS). STS, for instance, curates these processes in easy-to-follow, three-step formulas as part of its Lien Navigator service. But as a recent court decision in the New York Appellate Division shows, what in some cases appears easy to understand may quickly become complicated, and the pace at which credit managers navigate through the system—in some cases, as the clock to secure payment winds down—can slow to a crawl.

That's part of the reason why STS has included a "Speed Bumps" section in its Lien Navigator, which ferrets out many of the more obscure, yet important details contained within each state's—at times lengthy—mechanic's lien and bonding statutes.

For instance, New York amended its payment bond law in 2011 to extend the time allotted for filing a claim against a public project payment bond to within a year "... from the date on which the public improvement has been completed and accepted by the public owner," said attorney Stan Martin, of Commonsense Construction Law LLC, in Boston, MA, in a recent article. Prior to the change, it had been one year after submitting an invoice for final payment.

In *Clean Earth of N. Jersey, Inc. v Northcoast Maintenance Corp.*, the bond claimant's last invoice was in March 2011, the suit was not filed until June 2012 and the project was declared complete in August 2011, Martin said. The New York court decided the law's amendment does not apply retroactively, thus making the claim late under the older law. Martin said the court also noted that a surety bond is a form of contract, and a "contract generally incorporates the state of the law in existence at the time of its formation."

Such a case illustrates the sort of nuances every construction credit department needs to understand in order to be able to assert their full rights to payment, Ring says. But that's just the beginning. Within New York, STS lists key details that highlight several of the significant speed bumps that need to be known in order to carry on asserting payment bond rights and more, whatever the specific circumstances of the business dealing.

Some of these speed bumps in New York include:

- A payment bond can be waived for public works contracts for less than \$50,000, or where the contract is not subject to the multiple contract award requirements of Section 135 of the State Finance Law, waiving the bonds is in the public interest and the aggregate amount of the contract is less than \$200,000.
- A leasehold interest lien may not attach to a leasehold interest where publicly owned land is leased to a private entity for a private purpose.
- A lien may be filed against a public improvement. Unlike the private improvement lien, the public lien is not against real property. On a public improvement, liens are filed against the

monies of the public entity applicable to the improvement to the extent of the amount due or to become due on such contract.

- On March 31, 2011, as part of the budget bill, New York's governor signed into law a provision that increases the performance and payment bonding threshold on State University of New York (SUNY) construction contracts from \$50,000 to \$250,000. The threshold's sunset date was June 30, 2016.

In situations where a party wants to file a lien on a public improvement project:

- The lienor must file its lien with the head of the department or bureau having charge of the improvement and with the comptroller of the state or with the financial officer of the public entity charged with the custody or disbursement of the funds applicable to the public contract.
- Within five days before or at the same time as the filing of the public improvement lien, the lienor must serve a copy of the lien by certified mail on the contractor, subcontractor, assignee or legal representative for whom it was employed or to whom it furnished materials or, if the lienor is a contractor or subcontractor to the person or entity, with whom the contract was made.
- When a public improvement lien has been filed, the public entity will withhold 1.5 times the stated value of the lien from the entity's payments to the contractor until the lienor (the individual or business that filed the notice of lien) has been paid.
- The filed lien must contain proof of service on the required parties or the lien will be a nullity.

- Nicholas Stern, editorial associate