

Notice, Claim & Lawsuit Deadlines

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The constant tug-of-war among owners, contractors and lenders makes the laws governing construction disputes more and more complex. The time limits for various actions are numerous and confusing. The penalty for missing these deadlines can be severe: A contractor's right to withdraw a bid, enforce a subbid, replace a subcontractor, provide an equal, or pursue a lien, stop notice or bond claim can be lost completely. In the last couple of years, the legislature tinkered with these requirements yet again. Here is a checklist of the current critical time deadlines.

DEFINITIONS OF KEY TERMS

Work of improvement: The construction, alteration, repair or demolition of any building or other structure, ditch, well, tunnel, road or landscaping, or the change in the grade of any land (Civil Code § 3106). In other words, a construction project.

Private work: Any work of improvement contracted for by an owner that is not a public entity. In other words, a privately owned construction project, but watch out for the public authorities and public corporations that may look like private owners.

Public work: Any work of improvement contracted for by a public entity (Civil Code § 3100). Public entities are the state, Regents of the University of California, any county, city district, public authority, public agency or other political subdivision or public corporation in the state (Civil Code § 3099).

Completion of a private work: The date (a) when the owner, or its agent, occupies or uses the project and work on the project has stopped; (b) when the owner or its agent

formally accepts the project; or (c) when no work has been done on the project for 60 consecutive days, or 30 consecutive days if the owner records a notice of cessation after the 30th day (Civil Code § 3086).

Completion of a public work: The date (a) when the public entity formally accepts the work or (b), except for state projects, when no work has been done on the project for 30 consecutive days (Civil Code § 3086). Watch out for projects where work stops for more than 30 days, but later starts up again; the time for stop notices and claims against the payment bond may run from the 31st day of the work stoppage, not the later completion and acceptance of the project (*W. F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 CA4th 1101, 20 CR2d 468)

MISTAKE IN BID

A contractor cannot refuse to honor its bid on a public work without risking a claim against the bid bond submitted with the bid. There is an exception to this rule for certain mistakes in a bid (Public Contract Code § 5101). But notice of the mistake must be given under the following procedure:

Notice of Mistake in Bid: Deliver notice to the public entity within 5 **working** days after the bid opening. The notice must specify in detail how the mistake was made (Public Contract Code § 5103).

SUBSTITUTING A LISTED SUBCONTRACTOR

Most bids for public works must include a list of the subcontractors who will perform more than 1/2 of 1% of the work (Public Contract Code § 4100 et seq.; compare Los Angeles Admin. Code section 10.14 which requires listing subcontractors who will do more than 10% or \$5000 worth of the work). Listed subcontractors can only be changed with the permission of the public agency under the following procedures:

Notice of Clerical Error in Bid: Deliver notice to the awarding authority, the

erroneously listed subcontractor, and the subcontractor who should have been listed within 2 **working** days after the bid opening (Public Contract Code § 4107.5).

Objections by the Erroneously Listed Subcontractor: Deliver objections to the awarding authority and the prime contractor within 6 **working** days after bid opening (Public Contract Code § 4107.5).

Notice of Other Request to Substitute a Subcontractor: The awarding authority (or its duly authorized officer) must send notice to the subcontractor who will be substituted out by certified mail; that notice must include the reasons why the substitution is sought (Public Contract Code § 4107).

Objections by the Subcontractor: Deliver objections to the awarding authority within 5 **working** days after the notice of the request for substitution is sent to the subcontractor who will be substituted out. Failure to object amounts to consent to the substitution (Public Contract Code § 4107).

CONFIRMING SUPPLIER'S BID

A subcontractor cannot refuse to honor its bid (a) if the prime contractor relied on that bid in preparing its own bid to the owner and (b) if the prime contractor accepts the subcontractor's bid within a reasonable time (*Drennan v Star Paving Co.* (1958) 51 C2d 409, 413-15, 33 P2d 757). The same rule does not govern supplier's bids. Instead, the following statutory procedures apply:

Oral bid under \$2,500: Does not have to be confirmed by the contractor. Supplier is held to the bid for 90 days, or 10 days after award of the contract, whichever occurs first (Commercial Code § 2205).

Oral bid over \$2,500: Confirm supplier's bid in writing within 48 hours of receipt of the bid (not 48 hours of the bid opening), in order to hold the supplier to that bid for 90

days, or 10 days after award of the contract, whichever occurs first (Commercial Code § 2205).

Written bid: Does not have to be confirmed by the contractor. Supplier is held to the bid for 90 days, or 10 days after award of the contract, whichever occurs first – unless the bid specifies a different expiration date for the bid (Commercial Code § 2205).

"OR-EQUAL" SUBMISSION

Private Work: Acceptance of "equal" items is NOT mandatory on private works. However, prudent owners often include an "or equal" clause in order to get the most economical construction. If there is an "or equal" clause in a private work contract, it will set forth the time limit, if any, for submission of data about the proposed equal.

Sole-sourcing on State or Local Agency Public Work: Sole-sourcing of a material, product, thing or service is allowed for only four reasons, and, then, only if the awarding authority or its designee (*e.g.*, the city engineer) made a finding that one of the four reasons applies and the finding is described in the invitation for bids or the request for proposals. If no such justification appears, the agency must accept equals. The four reasons are: (1) to conduct a field test or experiment of the product, (2) to match existing products in use on the particular public work, (3) to obtain a product that is only available from one source, and (4) to respond to an emergency. Public Contract Code §§ 3400(c) and 10129(b).

State Contract Act (Public Work of the Departments of Boating & Waterways, Corrections, General Services, Transportation, and Water Resources): The contract documents must set forth the period of time prior to or after award of the contract for submission of data substantiating a request for a substitution of an equal item. If no period is specified, the data must be submitted within 35 days after award. Public Contract Code § 10129(a). Subcontractors who will perform work later in the project must be alerted to the need to submit their "or equal" data within the contract time limit.

All Other State or Local Agency Public Work: Exactly the same requirements, pursuant to Public Contract Code § 3400.

Federal Project: The or-equal requirements and sole-sourcing prohibition are contained in the Federal Acquisition Regulations and vary from job to job.

PRELIMINARY NOTICE

Private Work: All subcontractors and suppliers must deliver the notice, or send it by certified mail, to the reputed owner, the reputed construction lender and the prime contractor within 20 days after the **first** labor, services, equipment or materials are furnished to the jobsite. Here "subcontractor" includes any trade contractor that has a direct contract with the owner instead of with a general contractor. If the notice is not given, no stop notices nor mechanics liens are enforceable. Failure to give the notice also bars any claim against a payment bond, unless the alternative procedure described under Payment Bond Claim Notice, below, is followed. If the notice is late, it only covers labor, services, equipment or materials furnished during the 20 days before the notice was given and any furnished after it is given. (Civil Code §§ 3097, 3114, 3160 and 3242)

Public Work: All subcontractors and all suppliers must deliver the notice, or send it by certified mail, to the prime contractor and the public agency within 20 days after the **first** labor, services, equipment or materials are furnished to the jobsite. If the notice is not given by either a subcontractor to another subcontractor or a supplier to a subcontractor, that subcontractor or supplier forfeits its right to pursue a stop notice; failure to give the 20-day notice does not affect the stop notice rights of a subcontractor or supplier whose contract is with the prime contractor. Failure by any subcontractor or supplier to give the 20-day notice bars any claim against the payment bond, unless the alternative procedure described under Payment Bond Claim Notice, below, is followed. If the notice is late, it only covers labor, services, equipment

or materials furnished during the 20 days before the notice was given and any furnished after it is given. (Civil Code §§ 3098, 3183 and 3252).

Federal Project: No Preliminary 20-day Notice is required on federal projects. See Payment Bond Claim Notice, below.

PAYMENT BOND CLAIM NOTICE

Private Work: If a timely Preliminary 20-day Notice is given, no other notice is required. If a Preliminary 20-day Notice is *not* given, then the subcontractor or supplier must deliver to the payment bond surety and principal (usually the prime contractor, but can be the owner), or send by certified mail, a notice describing the labor, services, equipment and material furnished to the job. The notice must be delivered or mailed within 15 days after a Notice of Completion is recorded, and if none is recorded, then within 75 days after completion of the project. (Civil Code §§ 3227 and 3242).

Public Work: If a timely Preliminary 20-day Notice is given, no other notice is required. If a Preliminary 20-day Notice is *not* given, then the subcontractor or supplier must deliver to both the payment bond surety and the prime contractor, or send by certified mail, a notice describing the labor, services, equipment and material furnished to the job, the contractor to whom they were furnished, and the value of what was furnished. The notice must be delivered or mailed within 15 days after a Notice of Completion is recorded, and if none is recorded, then within 75 days after completion of the project. (Civil Code §§ 3227 and 3252).

Federal Project: No payment bond notice is required from subcontractors or suppliers to the prime contractor. However, subcontractors of subcontractors and suppliers of subcontractors must serve upon the prime contractor, or send by registered mail, a notice stating the amount claimed and the subcontractor to whom the labor, services, equipment or materials was provided. The notice must be delivered or mailed within 90 days after the **last** of the labor,

services, equipment or materials were provided by the subcontractor of a subcontractor or supplier. (40 USC § 3133)

MECHANICS LIEN

Effective January 1, 2011: No lien is enforceable unless it includes (1) a new "Notice of Mechanics Lien" and (2) a "proof of service affidavit" showing that both the lien and the new notice were served, by mail (evidenced by a certificate of mailing), on the owner or reputed owner of the property at his/her residence, place of business, address on the building permit or address on the recorded construction trust deed (Civil Code §§ 3084(a)(6) &(7), (c) and (d) and 3097(j)).

Prime Contractor: Record lien within 60 days after a Notice of Completion or Notice of Cessation is recorded. If the owner of a project (other than the owner's personal residence in a building with four or fewer residential units) fails to notify the contractor by mail that a Notice of Completion or Notice of Cessation was recorded, within 10 days after it is recorded, then the time is extended to 90 days after the notice was recorded. If neither a Notice of Completion or Notice of Cessation is recorded, then the lien can be recorded up to 90 days after the project is completed. (Civil Code §§ 3115 and 3259.5).

Subcontractor and Supplier: Record lien within 30 days after the Notice of Completion or Notice of Cessation is recorded. If the owner of a project (other than the owner's personal residence in a building with four or fewer residential units) fails to notify, by mail, a subcontractor or supplier who served a Preliminary 20-day Notice (Private Work) that a Notice of Completion or Notice of Cessation was recorded, within 10 days after it is recorded, then the time is extended to 90 days after the notice was recorded for that subcontractor or supplier. If neither a Notice of Completion or Notice of Cessation is recorded, then the lien can be recorded up to 90 days after the project is completed. (Civil Code §§ 3116 and 3259.5)

State or Local Public Work: None are permitted against public property (Civil Code § 3109; *Mayrhofer v. Board of Education* (1891) 89 Cal 110, 111-14, 26 Pac 646). Payment bonds on public works projects substitute for the property against which a mechanics lien would otherwise be permitted.

Federal Project: No state law mechanics liens are effective on federal projects EXCEPT post offices (*Loeffler v. Frank* (1984) 486 US 549, 100 LEd2d 549, 108 SCt 1965).

STOP NOTICE

Private Work – Prime Contractor: Deliver stop notice to the construction lender within 60 days after a Notice of Completion or Notice of Cessation is recorded. If the owner of a project (other than the owner's personal residence in a building with four or fewer residential units) fails to notify the contractor by mail that a Notice of Completion or Notice of Cessation was recorded, within 10 days after it is recorded, then the time is extended to 90 days after the notice was recorded. If neither a Notice of Completion or Notice of Cessation is recorded, then the stop notice can be delivered up to 90 days after the project is completed. (Civil Code §§ 3115, 3159, 3160 and 3259.5)

Private Work – Subcontractor or Supplier: Deliver stop notice to the owner or construction lender within 30 days after the Notice of Completion or Notice of Cessation is recorded. If the owner of a project (other than the owner's personal residence in a building with four or fewer residential units) fails to notify, by mail, a subcontractor or supplier who served a Preliminary 20-day Notice (Private Work) that a Notice of Completion or Notice of Cessation was recorded, within 10 days after it is recorded, then the time is extended to 90 days after the notice was recorded for that subcontractor or supplier. If neither a Notice of Completion or Notice of Cessation is recorded, then the stop notice can be delivered up to 90 days after the project is completed. (Civil Code §§ 3116, 3158 through 3162 and 3259.5)

Public Work – Subcontractor or Supplier: Deliver stop notice to the public entity within 30 days after the Notice of Completion or Notice of Cessation is recorded. If neither is recorded, then the stop notice can be delivered up to 90 days after the project is completed. (Civil Code § 3184)

Federal Project: No stop notice procedure exists for federal projects.

GOVERNMENT CODE CLAIM

Except on contracts with the state (Public Contract Code § 19100), before a contractor can sue a public entity for breach of contract, the contractor must present the claim prescribed by Government Code § 910 within one year of the last breach of the contract (Government Code § 911.2). As a general rule, this claim is in addition to all of the claims required under the contract. However, if a local agency contract includes a claims resolution procedure (Government Code § 930.2), and the contract fails to clearly state that a Government Code Claim is also required, the contract procedure eliminates the need for a separate Government Code Claim (*Arntz Builders v. City of Berkeley* (2008) 166 CA4th 276, 82 CR3d 605).

LAWSUITS

Warning: An attorney usually needs a few days to get the legal papers together. So, he or she cannot be consulted for the first time on the day before the lawsuit must be filed.

Relief from Forfeiture of a Bid Bond (when the public entity refuses to permit withdrawal of a bid with a mistake in it): File lawsuit within 90 days after the date of the bid opening (Public Contract Code § 5102).

Mechanics Lien: File lawsuit within 90 days after the lien is recorded (Civil Code § 3144). Effective January 1, 2011: Within 20 days of filing the lawsuit, record a notice of

the pendency of the lawsuit (Civil Code § 3146).

Mechanics Lien Release Bond: File lawsuit within 6 months of the mailing, by certified mail, of a notice that the release bond was recorded (Civil Code § 3144.5).

Private Work Stop Notice – by a Prime Contractor: File lawsuit within 150 days after the Notice of Completion or Notice of Cessation is recorded. If neither is recorded, then the lawsuit can be filed up to 180 days after completion of the project. (Civil Code §§ 3115 and 3172)

Any Stop Notice – By a Subcontractor: File lawsuit within 120 days after the Notice of Completion or Notice of Cessation is recorded. If neither is recorded, then the lawsuit can be filed up to 180 days after completion of the project (Civil Code §§ 3116 & 3172 [private work] or 3184 & 3210 [public work]).

Private Work Payment Bond: File lawsuit within 6 months after completion of the project (Civil Code §§ 3239 and 3240).

State or Local Public Work Payment Bond: File lawsuit within 30 days plus 6 months after the Notice of Completion or Notice of Cessation is recorded. The time must be counted in exactly that sequence, because the number of days in the month in which the notice was recorded affects the calculation. Thus, if the notice of completion was recorded on April 15 the limitation is: 30 days to May 15 plus 6 months to November 15 (in other words, 7 months from the recording date). However, if the notice was recorded on May 15 the calculation would be 30 days to June 14 plus 6 months to December 14 (in other words, one day less than 7 months from the recording date). If neither a Notice of Completion or Notice of Cessation is recorded, then the lawsuit must be filed within 90 days plus 6 months after completion of the project. Again, the time must be counted in exactly that sequence. (Civil Code § 3249).

Money Withheld Under a Notice of Civil Wage and Penalty Assessment

(Labor Commissioner) or Notice of Withholding for Violation of Prevailing Wage Laws (agency awarding contract): Request a hearing from the office of the Labor Commissioner that appears on the notice within 60 days after service of the notice. The hearing is an administrative proceeding, which can be reviewed by the courts. (Labor Code § 1742)

Federal Project Payment Bond: File lawsuit within one year after the **last** of the labor, services, equipment or materials were provided by the subcontractor or supplier. (40 USC § 3133).