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THE CONTRACTING PROFESSIONAL

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Welcome to TCP

The Law Offices of Nash & Wecker, LLC is pleased to announce the publication of its new quarterly newsletter, The Contracting Professional ("TCP"). The goal of TCP is to provide practical and useful information to construction industry professionals, General Contractors, Subcontractors, and Material Suppliers working in the New England area.

For those of you not familiar with Nash & Wecker, LLC, we are a full service law firm specializing in construction law and the legal issues that affect construction business owners. Our firm has a

wealth of experience in the construction industry because our attorneys worked in the construction industry prior to creation of the firm. Nash & Wecker is currently licensed



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to handle cases in Federal Courts throughout New England and in the State Courts of Massachusetts and Vermont. While the firm's specialty is litigating construction dis-

putes, our goal is resolve problems before they reach the Court system so as to obtain the best result for the client.

With that goal in mind, we hope that you will find this newsletter helpful and informative in resolving the problems that are faced by contracting professionals. Enjoy the newsletter and please do not hesitate to supplement the information provided herein by contacting a construction lawyer of your choosing.

Concerning Developments in the Massachusetts Lien Law

Massachusetts subcontractors and material suppliers have, for at least 60 years, had the ability to protect their right to receive payment for their work by claiming a Mechanic's Lien under Massachusetts law. The Massachusetts "Mechanic's Lien" law has undergone several major revisions throughout the course of history and it continues to be shaped through the interpretation of the Mas-

sachusetts Courts. While the actual letter of the Mechanic's Lien law has changed very little in the last several years, Court interpretations have made significant changes to the practical effects of filing a Mechanic's Lien. The purpose of this article is to alert the reader to developments which have seriously limited the protection formerly provided by the Mechanic's Lien statute. It is only with an

Concerning Developments (Cont.)



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“An Owner has to pay for the work performed on his project, right?”

Contracting with the Commonwealth



accurate understanding of the current state of the law that subcontractors and material suppliers can make informed credit decisions and take appropriate legal action.

The Massachusetts Mechanic’s Lien law is quite complex, and for that reason, this article shall be limited in scope to the single issue that is affecting the protection provided by liens the most. This issue can be simply labeled as the “due or to become due” issue. “Due or to become due” refers to the amount of money “due or to become

due” to the General Contractor from the Owner when a Mechanic’s Lien is filed. It is probably easiest to think of a Mechanic’s Lien as cup placed under a faucet of running water. The Mechanic’s Lien is the cup and the amount of money “due or to become due” between the Owner and the General Contractor is the flow of water. Thus, if there is no money “due or to become due” between the Owner and the General Contractor there is nothing for the Mechanic’s Lien to catch. Under this scenario one would assume that if work has been performed at

a construction project then there must be money “due or to become due” from the Owner to the General Contractor. An Owner has to pay for the work performed on his project right? Unfortunately, a growing line of Massachusetts Court decisions have found that under a number of circumstances (none of which are in the control of the Subcontractor or Material Supplier) the Owner does not have to pay for previously performed work.

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The Certified Payroll Requirement

With American Recovery and Reinvestment Act funding for shovel ready projects theoretically hitting the construction market, it is important for contractors and subcontractors to be aware of the legal requirements associated with performing public construction projects. One such requirement that all contractors and subcontractors need to be aware of is the filling of certified payrolls on public projects. Massachusetts General Laws Ch. 149 § 27B requires

every contractor or subcontractor working on a public works project to keep certified payrolls for all applicable employees working on the project. The purpose of this requirement is to make sure that contractors and subcontractors are paying their employees in accordance with prevailing wage laws and not gaining a competitive advantage at the expense of their workforce.

While the certified payroll requirement is generally administered by the awarding authority through its general contractor, it is important to

recognize that the Massachusetts Attorney General’s Office is ultimately charged with the enforcement of this law. Pursuant to that charge, the Attorney General’s Office has a number of tools at its disposal to ensure compliance with these requirements. By way of example, the Attorney General’s Office can require any contractor, subcontractor, or awarding authority to produce copies of certified payrolls for a project up to three years after the work on that project was performed. If the contractor or subcontractors cannot produce those certified payrolls,

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Vermont Indemnification



A recent Vermont Supreme Court decision has held that an independent contractor may be indemnified by a customer/ employer for its own negligence in injuring an employee. Under the facts of the case, an inde-

pendent Contractor installed certain safety measures at a job-site pursuant to a written contract with the Owner of the job-site. The written contract had a provision in it that required the Owner to indemnify the Contractor for any injury arising out of the Contractor’s work. The contract also had a choice of law provision which applied Connecticut law to the contract. After the Contractor completed its work, one of the Owner’s employees was injured when a safety measure failed. The em-

ployee sued the Contractor and obtained a judgment against the Contractor. The Contractor and the employee then brought a claim against the Owner for indemnification.

The Owner argued, among other things, that it could not be required to indemnify the Contractor for its own negligence. Interestingly, the Owner made certain analogies to Massachusetts law which does not allow one party to indemnify another for its sole negligence. How-

“You could be held responsible for the actions of others even when you have done nothing wrong”

Concerning Developments (Cont.)

The first, and perhaps most significant, of these cases dealt with a General Contractor that abandoned a project in the middle of construction. Two subcontractors had performed work on the project before the General Contractor abandoned the job and they were never paid for their work. After the General Contractor walked off of the project, the Subcontractors filed Mechanic’s Liens for the work they performed. In deciding that the subcontractors’ Mechanic’s Liens were worthless, the Massachusetts Courts said that the General Contractor breached his contract with the Owner when he abandoned the project and from that moment forward there was no money “due or to become due”. Thus, because the Subcontractors filed liens after the General Contractor walked off of the project, there was no flow of money between the Owner and the General Contrac-

tor for the liens to catch and the subcontractor liens were worthless.

A more recent Massachusetts Court decision has expanded the logic in this earlier case and produced a result that is, quite frankly, absurd. In this more recent case, a General Contractor was paid a large sum of money by the Owner for its second requisition. The majority of that money was to be paid to Subcontractors and Material Suppliers for work performed in the previous month. The General Contractor never distributed that money to the Subcontractors and Suppliers, but continued to perform work at the project for at least another month. The General Contractor submitted its third requisition, but could not provide proof of payment to the Subcontractors as required by the General Contract. Obviously the reason he

could not provide this proof is because the General Contractor had not paid them! Several Subcontractors then filed Mechanic’s Liens and within days of those filings the Owner terminated the General Contractor. In determining that the Subcontractors’ liens were again worthless, the Court said the General Contractor’s failure to provide proofs of payment prior to the third requisition was a breach of the General Contract that stopped the flow of money between the General Contractor and the Owner. Thus, because the General Contractor had not paid the Subcontractors, he was not entitled to any more money, and the Subcontractor’s liens were worthless.

This latest decision puts Subcontractors in a lose-lose situation. Subcontractors



Concerning Developments (Cont.)

“Make informed decisions based on an understanding of the law”

typically do not file Mechanic’s Liens until their payment is past due. However, this case says that late payments by the General Contractor excuses the Owner from all further payments. The very fact that a Subcontractor has gone unpaid stops the flow of money and causes any Mechanic’s Lien filed after the late payment to be worthless. As if this scenario were not bad enough, an added difficulty is the fact that the Subcontractor typically has no information or control over what is going on between the Owner and the General Contractor. How many times has a General Contractor been heard to say payment is late because the Owner has not paid him? Is that information true or is it a stall tactic that effectively destroys a lower tiered contractor’s lien rights? There is no way for Subcontractors and Material Suppliers to know if they can file a valid Mechanic’s Lien under these circumstances.

Given that this is the current state of the Massachusetts Lien law you might ask what, if anything, can Subcontractors do to protect their lien rights? The short and simple answer is to file a Notice of Contract as soon as there is a written contract. Obviously this practice might ruffle some feathers on the project, but it is time for General Contractors and Owners

to recognize a Notice of Contract for what it is; a NOTICE! It is not a declaration of war. There are three steps to perfecting a Mechanic’s Lien under Massachusetts law and the filing of a Notice of Contract is merely the first step. The Notice of Contract simply tells the Owner that a particular Subcontractor is working on the project, that he is protecting his lien rights, and that the Owner better make sure that Subcontractor gets paid. Such a notice simply serves to facilitate the very purpose of lien waivers and proofs of payment.

While filing a Notice of Contract is the only way a lower tiered contractor can be sure of protecting its lien rights, we are not suggesting you have to record a Notice of Contract on every project. The decision is one that should be made by each contractor’s Credit Manager. If there is a long standing relationship with the General Contractor and/or a solid reputation, there is probably no need to file the Notice of Contract. However, if there is a question as to the funding of the project or the General Contractor’s ability to make payment it would be wise to file a Notice of Contract at the beginning of the project when there is definitely money “due or to become due”. The ultimate decision is up to each lower tiered contractor, but the key is to make informed decisions

“Contractors working on public projects are required to keep certified payrolls for all employees”

Vermont Indemnification (Cont.)

ever, in deciding an important issue of Vermont law, the Supreme Court of Vermont stated that “an indemnification clause [can] cover the sole negligence of the indemnitee [sic] where it clearly expresses that intent”. Thus, the Court held that the Owner could be held responsible for the Contractor’s negligence

even if the Owner did nothing wrong.

While this decision may seem like it is of limited applicability, it has some important ramifications for all Vermont contractors. The decision makes it very clear that contractors at any level must review their contracts for indemnification language in detail. If your contract

contains an indemnification clause it will be extremely important to analyze what that language actually means. It could mean the difference between being held responsible only for your own actions or being held responsible for the actions of your Subcontractors and/or customers.



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Certified Payroll (Cont.)

or if the Attorney General finds that those payrolls do not conform to the work actually performed, the Attorney General can award back pay to workers, assess fines, and even institute criminal proceedings.

In one recent case, an asbestos abatement company was required to pay nearly \$326,000.00 in restitution and fines for failing to comply with the certified payroll requirement. This amount was comprised of roughly \$276,000.00 in back pay to workers that were not being paid the appropriate prevailing wage. It also included approximately \$50,000.00 in fines, including a \$15,000.00 fine for failing to pay the prevailing wage and another \$35,000.00 in fines for failing to submit true and accurate payrolls records for inspection upon the request of the Attorney General. Clearly certified payroll requirements and the prevailing wage law are not something to be taken lightly.

In light of the foregoing, you might ask what you should be doing to ensure compliance with these laws. The first

step is to recognize that the majority of the information you will need to comply with these laws is available to the public. As an initial matter, it should be noted that prevailing wage sheets must be included in all project specifications. Thus, the first step is a thorough review of the specifications relating to your work. If you don't see anything about prevailing wages in your specifications, you can also go to the Office of Labor and Workforce Development. The Division of Occupational Safety within that office is equipped to respond to specific questions about the law and to help contractors and workers understand their rights and obligations under the prevailing wage law. Recently the Office of Labor and Workforce Development has also launched a web-based application which can provide prevailing wage rate schedules for public construction projects and help contractors with filing requirements. This website can be found at www.mass.gov/dos. While these tools may ultimately address your concerns, you should also feel free to contact your preferred construction attorney for further guidance.