

Scribbles Squibs¹ # 77 (April 5, 2022)

“MASSACHUSETTS STATUTES TO HELP GET YOU PAID”

By Massachusetts Construction Attorney and Construction Mediator Jonathan Sauer

I. Introduction

This Squib is a short summary of Massachusetts statutory law concerning the filing of mechanic liens, the filing of payment bond claims (public and private) and the filing of (and responding to) demands for direct payment.

2. Massachusetts Mechanic Liens

This law is statutory in nature and is complex. It is contained within a number of sections of Massachusetts General Laws (MGL), Chapter 254. For an amount in question of any significant size to a potential claimant (a ‘lienor’), one is encouraged to consult with counsel. There are numerous appellate court decisions stating that this statute is to be fairly strictly construed, meaning that it is not intended as being a statute forgiving of errors made by lienors. While the following covers the basic steps in filing a mechanic’s lien, secondary steps and concepts such as service requirements and notices of substantial completion and termination are not set forth due to space limitations and liens by design professionals and for personal labor are simplified.

Basically, the statute calls for the taking of three steps for first tier and second tier subcontractors and general contractors to file a mechanic’s lien, the first two steps making filings at the applicable registry of deeds with the third step occurring in court: 1. The filing of a notice of contract; 2. The filing of a statement of account; 3. The filing of a court case to have a court finally establish the lien. For subcontractors and general contractors, a lien may be claimed at any time after which one has a written contract. It is not even necessary that one has even commenced construction or is owed any money. A mechanic’s lien is in effect at such time as one has filed a notice of contract and continues in effect until a lienor fails to comply with an applicable time periods or fails to take the next required step. Design professionals have lien rights in accordance with MGL C. 254, s. 2C and subcontractors to design professionals have lien rights in accordance with MGL C. 254, s. 2D.

Who May Claim:

(a) *General Contractor*. A person entering into a written contract with the owner of land, or with any person acting for, on behalf of, or with the consent of such owner for the whole or any part of the erection, alteration,

¹ ¹ A *squib* is defined as ‘a short humorous or satiric writing or speech’. Wiktionary defines *squib* as “a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses.”

repair or removal of a building or structure upon land or other improvement to real property,, or for furnishing material or rental equipment, appliances or tools thereof, shall have a lien upon said building or structure and upon the interest of the owner in said lot of land as appears of record at the date when notice of said contract is filed or recorded in the registry of deeds for the county or district where such land lies, to secure the payment of all labor and materials which shall be furnished by virtue of said contract.

(b) *First Tier Subcontractor*. A person who subsequent to the date of the general contract enters into a written contract with the general contractor for the whole or any part of the erection, alteration, repair or removal of a building or structure upon land or other improvement to real property or furnishes labor or material, or both labor and material or equipment, or performs labor or furnishes, rental equipment, appliances or tools shall have a lien to secure the payment of all labor and material and equipment which s/he is to furnish or has furnished upon the building or structure and upon the interest of the owner, as appears of record at the time of such filing in the lot of land on which said building or structure is situated upon the filing a notice of contract and giving actual notice to the owner of such filing. Such lien shall in no event exceed the amount due or to become due under the general contract when notice of the filing of the subcontract is given by the subcontractor to the owner. For this reason, earlier liens are more successful than later liens because there is a greater amount of money to fund the lien.

(c) *Personal Labor*. A person to whom a debt is due for personal labor performed in the erection, alteration, repair or removal of a building or structure upon land or an improvement or alteration to real property, by virtue of an agreement with, or by consent of, the owner of such building or structure, or of a person having authority from or rightfully acting for such owner in procuring or furnishing such labor, shall have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which it is situated, for not more than 30 days of work actually performed during the 90 days next prior to his/her filing of a statement of account. A person shall include an assignee, agent, authorized representative or third-party beneficiary to whom amounts are due or for whose benefit amounts are computed or due for.

(d) *Design Professional*. Architects, landscape architects, professional engineers, licensed site professionals and land surveyors who are licensed or registered in Massachusetts may claim a lien for the value of the professional services rendered to the owner or to any person acting for or on behalf of or with the consent of an owner.

How Claimed:

(a) *General Contractor*. The contractor must sign and file in the registry of deeds for the county or district where the land lies a notice of contract in substantially the following form:

“Notice is hereby given that by virtue of a written contract, dated _____, between _____, owner, and _____, contractor, said contractor is to furnish or has furnished labor and material or rental equipment, appliances or tools for the erection, alteration, repair or removal of a building structure or other improvement on a lot of land or other interest in real property described as follows: (insert description).”

(b) *First tier Subcontractor*. The subcontractor must sign (before a notary) and record in the registry of deeds for the county or district where the land lies a notice of his contract substantially in the following form:

“Notice is hereby given that by virtue of a written contract dated _____, between _____, contractor, (or subcontractor), and _____ said _____ is to furnish or has furnished labor or material, or both labor and material, or is to furnish or has furnished rental equipment, appliances or tools in the erection, alteration, repair or removal of a building, structure or other improvement of real property by _____ contractor, or _____, owner on a lot of land or other interest in real property described as follows: (insert description)

As of the date of this notice, an account of said contract is as follows:

- 1. Contract price \$ _____
- 2. Agreed change orders \$ _____
(indicate whether addition or subtraction)
- 3. Pending change orders \$ _____
(indicate whether addition or subtraction)
- 4. Disputed claims \$ _____
(indicate whether addition or subtraction)
- 5. Payments received \$ _____

The regular mailing address of the party recording or filing this notice is as follows: _____.”

A first tier subcontractor’s lien will not exceed the amount owed by the owner to the general contractor at such time as the lien is filed. As such, earlier liens can be more productive than later liens, as the funding mechanism for the lien should be greater.

(c) *Second Tier Subcontractor.* A lien by a second tier subcontractor shall not exceed the amount due or to become due under the subcontract between the original contractor and the subcontractor whose work includes the work of the person claiming the lien as of the date such person files his notice of contract, unless the person claiming the lien has, within 30 days of commencement of his performance, given written notice of identification by certified mail, return receipt requested, to the general contractor in substantially the following form:

NOTICE OF IDENTIFICATION

“Notice is hereby given to _____, as contractor, that _____, as subcontractor/vendor, has entered into a written contract with _____ to furnish labor or materials, or labor and materials, or rental equipment, appliances or tools to a certain construction project located at (Street Address), (Town or City), Massachusetts. The amount or estimated amount of said contract is \$ _____. (No amount need be stated for contracts for the rental of equipment, appliances or tools.)”

Note that a notice of identification is *not* a mechanic’s lien, although the author’s experience has been that many general contractors treat it as such.

(d) *Design Professional.* Design professionals must follow the same steps as listed above to perfect a lien. There are special requirements for second tier design professionals working for first tier design professionals, including owner written approval of the design professional’s subcontractor. There is a different statutory form for the Notice of Contract (Mass. General Laws Chapter 254, Section 2C or 2D) to be filed by the design professional or subcontractor to the design professional.

Where Recorded:

The required notices and documents must be recorded with the registry of deeds for the county and district where the land is located. If registered land governs the real estate – where all deed and encumbrances are listed on a ‘certificate of title’ and where title to the real estate was previously established in a land court action - then

lien documents must be filed with the registered land division of the registry of deeds. When title to the real estate is recorded land – where deed references are to a book and page number – then lien documents must be filed at the recorded division at the registry of deeds. If both registered land and recorded land are involved with the lien, then filings have to be made with each division.

When Notice Must Be Recorded:

Applicable to Both Contractors and Subcontractors. At any time after execution of a written contract whether or not the date for performance stated in such written contract has passed and whether or not the work under such contract has been performed, but not later than the earliest of: (i) 60 days after filing or recording the notice of substantial completion under section two A; or (ii) 90 days after filing or recording of the notice of termination under section two B; or (iii) 90 days after such person or any person by, through or under him last performed or furnished labor or materials or both labor and materials.

Applicable to Design Professionals. Design professionals must file or record the M.G.L. Section 254, Section 2C (design professionals) and Section 2D (subcontractors to design professionals) notice of contract no later than the earliest of 60 days after filing or recording the notice of substantial completion or 90 days after the first tier design professional or anyone performing professional services under them last performed such services.

Statement of Account:

(a) *Contractor, Subcontractor and Design Professional.* Liens under sections two (general contractors) and four (subcontractors) shall be dissolved unless the contractor, subcontractor, or some person claiming by, through or under them, shall, not later than the *earliest* of: (i) 90 days after the filing or recording of the notice of substantial completion under section two A; (ii) 120 days after the filing or recording of the notice of termination under section two B; or (iii) 120 days after the last day a person, entitled to enforce a lien under section two or anyone claiming by, through or under him, performed or furnished labor or material or both labor and materials or furnished rental equipment, appliances or tools, file or record in the registry of deeds in the county or district where the land lies a statement, giving a just and true account of the amount due or to become due him, with all just credits, a brief description of the property, and the names of the owners set forth in the notice of contract. Design professionals must file or record a statement of account within 30 days after the last day that a notice of contract may be filed or recorded.

Enforcement Action; Errors: The lien shall be dissolved unless a civil action to enforce it is commenced within 90 days after the filing of the statement of account. *See “Cases of Note”* below as to a recent interpretation of enforcement actions as they apply to lien dissolution bonds. The validity of the lien shall not be affected by an inaccuracy in the description of the property to which it attaches if the description is sufficient to identify the property, or by an inaccuracy in stating the amount due for labor or material unless it is shown that the person filing the statement has willfully and knowingly claimed more than is due him.

Extent of Lien: Liens are limited to the amount owed by the owner to the contractor, subcontractor and design professional as of the time those parties record their notice of contract. The lien extends to the building or structure and upon the interest of the owner in said lot of land as appears of record at the date when notice of said contract is filed or recorded. If the person for whom the labor has been performed or with whom the original contract has been entered into for the whole or any part of the erection, alteration, repair or removal of a building or structure upon land, or for furnishing material therefor, has an estate less than a fee simple (complete ownership) in the land or if the property is subject to a mortgage or other encumbrance, the lien shall bind such person’s whole estate and interest in the property.

Priority of Lien:

(a) *Mortgages*. No lien for personal labor shall avail against such a mortgage unless the work or labor performed is in the erection, alteration, repair or removal of a building or structure which erection, alteration, repair or removal was actually begun prior to the recording of the mortgage. No liens filed by subcontractors or contractors shall avail as against a mortgage actually existing and duly registered or recorded to the extent of the amount actually advanced or unconditionally committed prior to the filing or recording in the registry of deeds of the notice of contract. No liens filed by subcontractors or contractors shall avail as against a purchaser other than the owner who entered into the written contract on which the lien is based, whose deed was duly registered or recorded prior to the filing of such notice of contract.

(b) *Attachments*. The rights of an attaching creditor shall not prevail as against a lien for personal labor nor against the claim of a subcontractor or contractor where notice or notices of contract have been filed or recorded in the registry of deeds prior to the recording of the attachment. An attachment recorded prior to the filing or recording of the notice of contract shall prevail against a lien, other than for personal labor, to the extent of the value of the buildings and land as they were at the time when the labor was commenced or the material furnished for which the lien is claimed.

Public Property: No lien shall attach to any land, building or structure thereon owned by the Commonwealth or by a county, city, town, water or fire district.

Void Agreements: A covenant, promise, agreement of understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance or other improvement to real property, including moving, demolition and excavating connected therewith, purporting to bar the filing of a notice of contract or the taking of any steps to enforce a lien as set forth in this chapter is against public policy and is void and unenforceable. Partial lien waivers by contractors are permitted if the form provided in the statute is followed.

Cases of Special Note: *Bloom South Flooring Corp. v. Boys and Girls Club of Taunton Inc.*, 440 Mass. 618 (2003), is of special note in that before this case, the M.G.L. c. 254, §4 language “amount due or to become due” was typically taken to mean the contract balance at the time the notice of contract was filed, notwithstanding the value of claims/backcharges the owner had against the general contractor at that time. *Bloomsouth* indicates that now a strong argument can be made (in defense of owners) that the remaining contract balance is only significant to the extent that any of that amount is actually due or will become due to the general contractor, taking into account claims the owner has against the general contractor. In *Golden v. General Builders Supply, LLC*, 441 Mass. 652 (2004), the Massachusetts Supreme Judicial court answered two questions: a mechanic’s lien can be properly perfected by the filing of a counterclaim and that counterclaim must be filed and recorded within the deadline set by M.G.L. c. 254. In 2013, in *NES Rentals v. Maine Drilling & Blasting, Inc.*, 465 Mass. 856 (2013), the Massachusetts Supreme Judicial Court liberally interpreted M.G.L. 254, § 14 by holding that the relation back provisions of Massachusetts Rules of Civil Procedure Rule 15(c) apply to M.G.L. c. 254, § 14 bond enforcement actions and that a claimant may amend a complaint to add a claim to enforce a lien dissolution bond against the bond holder after the 90-day period set forth in §14. On June 11, 2018, in *Atlas Contracting, Inc. v. Saleh*, 35 Mass.L.Rptr. 101, the Massachusetts Superior Court further refined the definition of “written contract” to include the concept of the actual contract. If the plaintiff comes up with another contract, in a different amount, the lien will be invalidated.

3. Massachusetts General Contractor Payment Bonds – Public

This is contained within Massachusetts General Laws Chapter 149, section 29, which is Massachusetts ‘Little Miller Act’. Unlike the Miller Act, claimants under this statute who prevail with their claims are entitled to an award of a reasonable attorneys’ fee. Unlike claims under Massachusetts mechanic lien statutes, claims under this statute have a great number of cases stating that where this statute is remedial in nature, it should be liberally construed on behalf of claimants. The statute has broad coverage including the payment of certain union benefits. Bond coverage extends to deliveries of materials off-site provided the facts clearly demonstrate that the materials were required for the bonded project.

Amount of Bond: A bond in the amount of not less than one-half of the total contract price shall be obtained.

Labor and Material Covered: All subcontractors and materialmen.

Notice Required: A claimant having a contractual relationship with a subcontractor, but not with the general contractor, must give notice of a claim in writing to the general contractor within 65 days after the day on which the claimant last performed labor or furnished labor, materials, equipment, appliances or transportation, stating with substantial accuracy the amount claimed, the name of the party for whom such labor was performed or to whom such labor, materials, equipment, appliances or transportation was furnished.

To make a claim covering specially fabricated material the claimant must give the contractor principal written notice of the placement of the order and the amount thereof not later than 20 days after receiving the final approval in writing for the use of the material. The notices shall be served by mailing by registered or certified mail postage prepaid in an envelope addressed to the contractor principal at any place at which the contractor principal maintains an office or conducts his business, or at the contractor principal’s residence, or in any manner in which civil process may be served.

Otherwise, there are no notice requirements for first tier subcontractors and material suppliers.

Time for Suit: Within one year after the day such claimant last performed the labor or furnished the labor, materials, equipment, appliances or transportation included in his claim, and by prosecuting the claim thereunder by trial in the superior court to final adjudication.

Penalty for Failure to Take Bond: No special statutory provision.

Of Special Note for Second Tier Material Suppliers and Subcontractors. Always be mindful of the fact that for public work, in particular, there is a chance that the first tier subcontractor – your customer – will also have a payment bond, which would be in addition to the payment bond the general contractor is required to have for public work or, simply, does have as to private work. It is not an infrequent occurrence that a second tier material supplier or subcontractor has lost the ability to pursue the general contractor’s payment bond for public work due to not providing the 65 day notice to the general contractor that the statute requires. And, since the general contractor can be potentially on the hook for paying for the same thing *twice*,² fundamental fairness suggests that the general contractor be notified as to the various material suppliers and subcontractors that his/her

² It is not a legal defense to the general contractor as to claims from second tier material suppliers and subcontractors that s/he has fully and properly paid the first tier subcontractor, who then didn’t pay his/her material suppliers and subcontractors. So, a general contractor might be forced to pay for the same thing *twice*: initially, to the first tier subcontractor for monies due under the subcontract, and, then, secondarily, to that first tier subcontractor’s material suppliers and subcontractors who have claims against the general contractor’s payment bond due to the first tier subcontractor’s lack of payment.

first tier subcontractor might have, some of whom s/he won't know about. Since a first tier subcontractor doesn't need to receive notice from his/her downstream material suppliers and subcontractors as to their existence and potential claims – after all, s/he has a subcontract with each and knows how much they claim that they are owed – quite often, there is no notice requirement in the subcontractor's bond for the second tier material supplier and subcontractor to have to meet. So, while unintentionally having given up potential rights against the general contractor's payment bond, the second tier material supplier and subcontractor might still have rights against the first tier subcontractor's payment bond.

Note that for all Construction-Manager-At-Risk public projects, which projects are becoming more numerous each year, *all* subcontractors (called 'trade contractors' in this context) *have* to supply payment bonds.

4. Massachusetts Payment Bonds – Private

The law applicable to such bonds is contained within Massachusetts General Laws Chapter 149, section 29A.

There is no statutory content to such bonds. The key aspect of this statute is that one wishing to file suit on such a bond must do so "in accordance with its provisions". As such, there is no way to know what rights one might have under such a bond without first having the actual bond to review for potential payment bond coverage.

The statute was passed, in large measure, due to an intention that a claimant not be subject to the defense of Massachusetts law in effect at the time which limited the rights of third party beneficiaries to recover under contracts as to which they might otherwise have rights. As such, this statute is less a statute addressing surety legal principles and more one addressing contract law principles.

5. Massachusetts Demands For Direct Payment – Public

This is a procedure provided for by Massachusetts General Laws Chapter 30, section 39F.

This is a procedure which allows, under certain circumstances, for a subcontractor to make a demand upon a public agency for payment for monies claimed due from the general contractor.

A written demand for direct payment directly to the awarding authority is a way for a "subcontractor" to be paid by the awarding authority for both progress payments and for final payments on certain kinds of public work. For the purposes of this remedy, a "subcontractor" is defined as being three things: (1) a person who files a sub-bid and receives a subcontract as a result of that filed sub-bid or who is approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor; (2) for either public buildings or public works, an entity approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor; and (3) for contracts with the Commonwealth (only) and not awarded under the competitive bid statute for buildings, a person contracting with the general contractor to supply materials used in a public works project for a price in excess of \$5,000.

A general contractor has ten days to respond to a demand for direct payment.³ That is not a large amount of time when considering the various statutory requirements of what must be in the general contractor's response. And, a general contractor receiving such a demand might not know that it only has ten days to respond to the

³ This is something that I have found that even some large general contractors are not aware of.

demand. Additionally, the general contractor may feel that it is unnecessary to respond to the demand because it is clear that the subcontractor is not entitled to payment.⁴

However, if that ten day period goes by without the general contractor's response, then the owner is under a statutory obligation to pay the demand, the amount of money necessary to do so being charged against the general contractor's account. That is another way of saying that after the ten day period goes by, the general contractor loses the opportunity/ability to respond to the demand for direct payment.

For one of my general contractor clients, for a certain job, a subcontractor filed three different, successive demands for direct payment. The general contractor objected to each of the three different demands for direct payment and the subcontractor did not get paid by the owner. There were some issues with the subcontractor's performance which, in my mind, suggested that the subcontractor was not entitled to be paid as to any of the three demands for direct payment. I drew the inference that the subcontractor filed *three* demands for direct payment because it hoped the general contractor would miss the ten day period in responding to at least *one* of the demands, which might have gotten the subcontractor paid by the owner, whether it was entitled to payment or not. The subcontractor in making the three demands was swinging for the fences. And, every now and again, one of them makes it over the fences and leaves the ball park.

A homerun.

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⁴ On occasion, it can be a serious mistake to confuse common sense with the law!

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