



LEGAL CORNER

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Things You Should Know Before Venturing South Of The Massachusetts Border

Editor's Note: With the fiscal restraints that beset municipalities and awarding authorities in most New England states, contractors have, obviously, found it difficult to secure adequate levels of work from their traditional sources. Accordingly, as contractors have to expand their geographic reach in the quest to obtain new work, they may encounter procedures and a regulatory environment which may be different than that which they are familiar with. Accordingly, this month's article will be an overview of what a contractor or other entity should be aware of with respect to doing business in the State of Connecticut. Next month's column will feature a similar analysis as to doing business in New Hampshire. While not exhaustive, these will provide some guidance should you seek to expand or continue operations within these jurisdictions.

I would like to acknowledge the assistance of my partner, Jared Cohane, who prepared this month's article. Jared is a Partner in Hinckley, Allen & Snyder's Construction and Public Contracts Group in Hartford, CT.

In dire economic times cross-border mobility can mean survival. With limited new projects, and fierce competition, it only seems natural for Massachusetts contractors to look for work outside of the Commonwealth.

According to the Associated General Contractors of America, 313 out of 337 metropolitan areas lost construction jobs between January 2009 and January 2010, with only nine metro areas adding jobs.¹ Other than the Haverhill-North-Andover-Amesbury metropolitan area, the only other metropolitan area in New England to add construction jobs during that period was Waterbury, Connecticut, which lies just 35 miles to the south of the Massachusetts border.²

Beyond the positive news out of Waterbury, other areas of Connecticut present the promise of potential opportunities. Indeed, while only

111.57 miles of the 1,925 miles of Interstate 95 run through Connecticut, it remains one of the heaviest-traveled stretches of highway in the Northeast, and is in a perpetual state of improvement, maintenance and repair. Connecticut also boasts a number of major universities, including Yale University and the University of Connecticut, and countless smaller universities, colleges and community colleges, many of which are taking advantage of lower construction costs to accelerate campus expansion, upgrades and improvement projects. In short, despite the difficult economic climate, there are construction opportunities in Connecticut.

Thinking of heading south of the Commonwealth border? Well, welcome to the Nutmeg State. Here is a general overview of some construction law nuances in Connecticut.

¹ <http://newsletters.agc.org/datadigest/2010/03/18/metropolitan-area-construction-employment-january/>

² Id. Waterbury added 100 new construction jobs between January 2009 and January 2010. The other seven metropolitan areas experiencing an increase in new construction jobs was Eau Claire, Wisconsin; Ithaca, New York; Michigan City, Indiana; Grand Forks, North Dakota and Minnesota; El Paso, Texas; Syracuse, New York; and Lafayette, Louisiana.

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License and Registration Please...

For contractors venturing into Connecticut for the first time, it is essential to confirm the type of licensing, registration and certifications needed. There are a variety of licensing and registration requirements depending upon the size and type of the project and the nature of the trade.

- **Similar to Massachusetts, registration is required for major contractors conducting business in Connecticut. A “major contractor” is defined as an individual, firm, company, partnership, corporation or joint venture who performs or offers to perform “any work that impacts upon the structural integrity of the structure or addition, including repair, alteration, dismantling or demolition of a structure or addition that exceeds certain threshold limits.”** Those limits apply to any structure or addition to a structure
 1. having four stories,
 2. sixty feet in height,
 3. with a clear span of one hundred fifty feet in width,
 4. containing one hundred fifty thousand square feet of total gross floor area, or
 5. with an occupancy of one thousand persons.

Major contractors are licensed and regulated by the Department of Consumer Protection.

- **Interior system trades (electrical, plumbing and piping, HVAC, elevator, solar work and fire protection) have separate examination boards and licensing requirements, all under the jurisdiction of the Department of Consumer Protection.**
- **Demolition contractors are subject to Connecticut’s demolition code with two possible classes of certificates of registration based upon the height of the structure being demolished (Class A for structures greater than two and one-half stories or 35-feet, Class B for structures below that threshold). The Department of Public Safety oversees demolition registration.**
- **Lead and asbestos abatement contractors, consultants, supervisors and workers must be licensed through the Department of Public Health.** Generally speaking, abatement contractors, consultants, supervisors and workers (both lead and asbestos) must pass a training course. However, those who are licensed in states with standards equal to or better than Connecticut’s can obtain licen-

sure without having to take the course. Massachusetts and Connecticut have reciprocity in this regard.

- **Home improvement contractors and new home constructors require a certificate of registration from the Department of Consumer Protection.** Sales staff for any home improvement contractor must also be registered. In addition to the registration requirements, the Home Improvement Act sets forth certain contract requirements, including a start and completion date and notice of the owner’s cancellation rights. Strict compliance with the Home Improvement Act registration and contract requirements is crucial, otherwise the contract will be unenforceable and the contractor cannot recover under any quasi-contractual or equitable theory. In addition, failure to comply with the Home Improvement Act has been held as *per se* violation of the Connecticut Unfair Trade Practices Act, Connecticut’s analog to Chapter 93A in Massachusetts.

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Prequalification Requirements For Bidding On Public Projects

The Department of Administrative Services requires all contractors to prequalify before they can bid on a contract or perform work pursuant to a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work by the state or a municipality (not including heavy highway work), estimated to cost more than \$500,000 and which is funded in whole or in part with state funds. This also includes subcontractors whose contract exceeds \$500,000. Suppliers of material or products who do not do installation or construction work are not subject to the prequalification requirement.

The five criteria for prequalification are the applicant's integrity, work experience (focusing on skill and ability in both public and private work), the experience and qualifications of the applicant's supervisory personnel, the applicant's financial condition, and safety record. Prequalification must be renewed annually. Currently, the Department of Administrative Services sends out a reminder e-mail approximately 90-days before prequalification lapses.

Heavy highway contractors have different prequalification requirements, which are administered by the Department of Transportation. The Contractor's Prequalification Statement (the "CON-16") is available at the Connecticut Department of Transportation website. Prequalification with the Connecticut Department of Transportation is valid for 16 months.

Bonding Requirements

Connecticut mandates the posting of a bid bond on state public works projects greater than \$50,000 in value. The bid bond for public works projects must be at least ten percent of the bid. On transportation projects, however, the bid bond must equal one-third of the bid.

Like the Commonwealth, there is no requirement in Connecticut for the provision of bonds on a private project. On public projects over a certain dollar value, payment bonds are required.

Connecticut's Little Miller Act, modeled on the Federal Miller Act, sets forth the payment bond requirements and process. For public jobs greater than \$50,000, a prime contractor must provide a payment bond equal to the contract price. The government can also require a subcontractor to post a payment bond where the subcontract price is greater than \$50,000.

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Recovery under a payment bond is limited to first and second tier subcontractors. In order to make a bond claim, the claimant must comply with the notice provisions of the statute. If a claimant does not receive payment within 60 days of the applicable payment date or within 60 days after the date materials were supplied or work was performed, then he or she can provide written notice to the surety and the bond principal. Although a claim becomes ripe for demand against the surety after the 60-day period runs, the notice *must* be served not later than 180 days from the last date of work performed or material supplied. The notice must identify the amount of the claim as accurately as can be ascertained, the parties to whom or for whom labor or materials were supplied and a brief description of the project in question.

The surety who receives a bond claim has up to 90 days from the service of the notice of claim to either pay the claim or deny the claim. Upon denial of the claim, or expiration of the 90-day period without a denial, the claimant can commence a lawsuit to recover under the bond. Bond claimants should be prepared to cooperate with the surety, providing the necessary documentation of their claim to best position the claimant for payment. Similarly, the principal should also cooperate with the surety so as to avoid placing the surety in precarious position with respect to payment and potentially open-

ing up the principal to greater financial risk.

The timing for bringing legal action on a payment bond is within one year after the last date that materials were supplied or work was performed. In the case of a claim for payment of retainage, however, the action must be brought within one year that the retainage payment was due.

Performance bonds are not mandatory on public projects. The state can require a general contractor to post a performance bond on projects with value greater than \$25,000. Subcontractors can be required to provide performance bonds where the sub-contract value exceeds \$50,000.

Connecticut Mechanic's Lien Basics

Generally, the right to assert a mechanic's lien only extends to private property. There are rare circumstances in which publically-owned property not being used for a governmental purpose can be liened, but otherwise, public property is not subject to the statutory mechanic's lien.

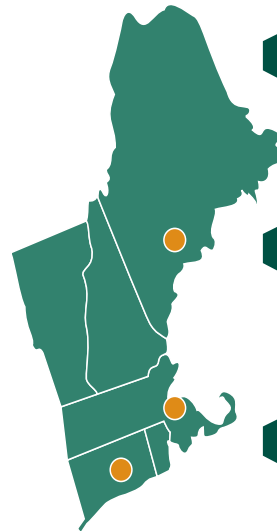
Connecticut mechanic's lien procedure differs significantly from Massachusetts. In Connecticut, any person has the right to file a lien "for materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its

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appurtenances or in the improvement of any lot or in the site development or subdivision of any plot of land” in excess of ten dollars. Unlike in Massachusetts, there is no express statutory requirement for a written contract in order to have lien rights in Connecticut, although a written contract is typically best practice and a necessity for home improvement contractors in order to comply with the Home Improvement Contractor Act and the New Home Construction Act.

Although the mechanic’s lien statute is generally construed in a broad, remedial sense to provide security to a lien claimant, its timing and notice requirements are viewed more strictly. A prospective lien claimant has 90 days from the last day of work to record his lien and provide notice to the owner. Warranty work will not extend the lien period.

The lien certificate itself must be recorded within ninety days of the last day of work with the town clerk of the town in which the building, lot or plot of land is situated. The certificate must state the basis for the claim, whether the lien is the result of an agreement with the owner or if the work was done with the owner’s consent, the first day of work, the last day of work (or a statement that the lien is recorded within 90 days of the last work performed on the project), the amount claimed, and that the amount is justly due as near as can be ascertained. A description of the property liened must also be included in the lien certificate. Finally, the certificate must be subscribed and sworn to by the claimant.

The amount of lien need not be supported by the filing of a statement of account as is required in Massachusetts. There is little case law in Connecticut articulating what costs fall within the statutory scope of the lien. As a rule of thumb, if it is a cost for “materials furnished” or “services rendered” that is incorporated into a project, it should be included. This can include delay damages incurred on a project. Interest, both statutory and contractual, should also be included as lienable costs.

Once recorded on the land records, the lienor has 30 days to have the certificate served upon the owner of the property subjected to the lien. Proper service (by a marshal or indifferent person as set forth in the statute) is critical. Failure to adhere to the service requirements can invalidate the lien. If you have a direct contract with the owner of the property in question, a lienor need not serve a notice of intent to lien upon the owner, only the lien certificate. However, for subcontractors and suppliers further down the contractual chain, it is necessary to serve a notice of intent to lien, as well as the lien certificate, upon the owner and the general contractor. Again, it is best practice to serve the requisite notice on the owner and general contractor so that there is no argument that there was a lack of timely notice by the owner or the general contractor.

The claimant has one year from the date of recording to commence an action to foreclose the lien, otherwise the lien expires. A notice of *lis pendens* (Latin for “suit pending”) must be recorded on the land records prior to the expiration of the one-year time limitation. The *lis pendens* provides notice on the land records that the property is subject to a lien foreclosure action. Liens are foreclosed in the manner of any mortgage on a property, allowing for the recovery of reasonable attorney’s fees.

Conclusion

Construction contracting can be a complicated and risky endeavor, even working in your own backyard. Venturing outside of your comfort zone can be fraught with peril for the uninformed, so familiarizing yourself with the legal requirements for construction contracting in another state is a necessity in order to manage some of the risks. Despite its size, Connecticut is a regionally-diverse state, with many construction opportunities in both the public and private sector. If you plan on expanding operations into Connecticut, careful preparation is the key to compliance with the nuances of Connecticut construction law. ■

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