



LEGAL CORNER

Charles E. Schaub, Jr. Esq., Hinckley Allen Snyder LLP

Doing Business North Of The Border



(Editor's Note: As previously noted in last month's column, this month we are featuring a similar analysis as to doing business in the State of New Hampshire.

I would like to acknowledge the assistance of my Partners, Ron Ciotti and Daniel Deschenes, who prepared this month's article. Ron and Dan are Partners in Hinckley, Allen & Snyder's Construction and Public Contracts Group, in Concord, NH.)

The economy's impact on the construction industry has caused companies to evaluate if geographic expansion is an option to offset a slow building environment. When making such an evaluation, one must first decide how significant the geographic expansion should be both via miles and effort. Sitting at the northern border, New Hampshire, like all states, has been significantly impacted by our nation's economic backslide.

However, between March 2009 and March 2010, New Hampshire was New England's front-runner for construction employment. New Hampshire had the lowest percentage of jobs losses in the industry as compared to the other New England states. Its (-3.4%) twelve-month change was approximately 5% below Connecticut's (-8%) and some 10.3% below Massachusetts' (-13.7%). However, when evaluating a geographic expansion

into New Hampshire, it is critical to understand what is required when performing your services in the Granite State. This article is intended to assist you in understanding some of the distinct differences of doing business in New Hampshire versus Massachusetts.

Getting Started

First, foreign business entities doing business in New Hampshire must register with the New Hampshire Secretary of State's Office. For a foreign corporation, the required documentation includes an Application for Certificate of Authority form¹, an original certificate of existence or certificate of good standing from the corporation's "home state", a Form SRA (statement of compliance with securities laws), and the filing fee. The corporation must also designate a registered agent within this state, upon whom legal process can be served.

To remain in "good standing," your business will need to file an annual report and filing fee by April 1st of each year following the year of registration.

Statute of Limitations and Repose

One significant difference between New Hampshire and Massachusetts construction law involves how long a contractor or design professional is exposed to liability for claims arising out of their work. By statute, RSA 508:4, New Hampshire has a **three-year** limitations period for contract and/or tort (negligence)

¹ This form can be found at the Secretary of State's website, at www.sos.nh.gov/business/corp_serv/pdf/20_170.pdf

continued on page 27

claims, meaning that any claims must be brought within three years after the breach of duty. Like most states, however, the New Hampshire statute of limitations is subject to what is commonly referred to as the "discovery rule." The discovery rule provides that the three-year limitation period for bringing a lawsuit sounding in contract or tort does not start running until the time a party **discovers** (or should have discovered) its injury or damages.

Obviously, strict application of the discovery rule could lead to a contractor facing "perpetual liability" for undiscovered defects. In direct response to this concern, the New Hampshire Legislature enacted a statute, RSA 508:4-b, designed to limit the exposure for contractors. RSA 508:4-b provides that:

...all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter.

RSA 508:4-b is commonly referred to as a "statute of repose." The practical effect of the statute is that a contract or tort claim must be brought within eight years from the **substantial completion** of a project. Once eight years from date of substantial completion passes, no lawsuit can be filed, **regardless of when a defect is discovered.**²

Note that the three year statute of limitations still provides protection for contractors as, if a defect is discovered in year two after substantial completion,

suit must be brought in year five (three years) to be timely. But even if the defect is discovered in year six or seven after substantial completion, no lawsuit can be filed after eight years has elapsed. This eight year "limit of liability" differs from Massachusetts' statute of repose, M.G.L. Ch. 260, § 2B, which establishes a **six year limitation period** for negligence claims following completion of construction of the project.

One issue that remains unsettled in New Hampshire is whether a contractor effectively loses the "protection" of the eight year limitation of the statute of repose where it has contractually agreed to indemnify the owner against third party claims alleging defective construction. At least one trial court has held that since the owner's claim arises from a contract, not the underlying alleged defect, it is, thus, not limited by the statute of repose. Accordingly, it may be possible for a contractor to face an indemnity claim from the owner regarding, for example, a personal injury claim that related to a construction defect, ten or fifteen years after substantial completion. Based on the above, we regularly recommend that contractors insist on limiting their indemnity obligations to a maximum of eight years, so that any contractual obligations expire before, or the same time, that any direct negligence claims become time barred.

We also recommend that contractors retain their records on New Hampshire projects for at least eight years so that they can effectively defend and/or bring counterclaims in any litigation. The destruction of crucial case documents can be costly as it can be considered "spoliation" of evidence by the court. In that instance, the court can create an "adverse inference" against the contractor (e.g., instruct the jury that it may infer that the destroyed evidence would be helpful to the other party's case).

continued on page 29

² Note however, that RSA 508:4-b includes an express exception to the 8-year period for cases involving either fraudulent misrepresentations or fraudulent concealment of material facts. In such instances, actions must be brought within 8 years after the date on which all relevant facts are, or with due care ought to be, discovered by the person bringing the action.

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Mechanic's Liens

1. Who Can Secure a Lien

Another area where New Hampshire has distinct differences from Massachusetts relates to mechanic's liens. New Hampshire mechanic's lien law is set forth by statute in RSA Chapter 447. To be entitled to a lien, a person must perform labor or furnish materials in the amount of \$15 pursuant to a direct contractual relationship with: (1) the owner; (2) the general contractor; or (3) a first-tier subcontractor of the general contractor.³

While generally the amount of a mechanic's lien is the amount of labor or materials provided to the project, for subcontractors, the amount of the lien also may depend on **when**, and at what stage of the project, they provide notice to the owner of the property.⁴ New Hampshire law requires first and second-tier subcontractors and material suppliers to first-tier subcontractors to provide the owner or the person having charge of the property with written notice of their lien either before or after performing labor or furnishing materials.⁵ The consequences associated with waiting to provide notice until after performing labor or furnishing materials can be severe. If notice is provided to the owner before providing labor or furnishing materials, the full amount of the lien is protected, but it cannot exceed the amount that the owner owes the general contractor under the contract.⁶ If notice is provided after performing labor or furnishing materials, the lien may be limited further to the amount that the general contractor or first-tier subcontractor is due and owing at the time of the notice of the lien, or that which later becomes due to the general contractor or the first-tier subcontractor after the notice is served on the owner.⁷ In practice,

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few subcontractors and suppliers comply with the notice requirement before providing labor or furnishing materials because they do not want to get off on the "wrong foot" with the owner and the general contractor by stating an intention to lien the property.

2. Perfecting a Lien

A mechanic's lien is "created" as soon as a contractor performs work.⁸ The lien, however, has no legal effect, and thus cannot be enforced, until it is **perfected**⁹ and later **secured** (or enforced) by filing a petition and *lawsuit* with the Court within **120 days** after the last date that the contractor performed labor or furnished materials to the property.¹⁰ Once approved by a judge, the lien must then be filed at the Registry of Deeds in the county where the property is located. Case law is clear that 120-day deadline is **not** extended by performing work that is merely inconsequential or ancillary ("punch list work") or to remedy defects (*i.e.*, repair work).¹¹ Note that this procedure is radically different from Massachusetts, as summarized in the chart on the following page.

continued on page 47

³ *Lyle Signs, Inc. v. Evroks Corp.*, 132 N.H. 156, 159 (1989).

⁴ *Duke/Fluor Daniel v. Hawkeye Funding, Ltd. P'Ship*, 150 N.H. 581, 583 (2004). Furthermore, a general contractor is not required to provide written notice to the owner because the owner has a direct contract with that general contractor. *James Drywall v. Europa Dev. Corp.*, 116 N.H. 619, 622 (1976). Because subcontractors and material suppliers do not have that direct contractual relationship with an owner, New Hampshire law requires written notice in order to protect the owner from unknown liability.

⁵ RSA 447:5; RSA 447:6.

⁶ See *Russell v. Woodbury*, 135 N.H. 432, 434 (1992) ("A subcontractor's mechanic's lien is limited by the amount the owner owes the principal contractor").

⁷ See 447:6 ("Such notice may be given after the labor is performed or the material is furnished, and said lien shall be valid to the extent of the amount then due or that may thereafter become due to the . . . subcontractor of the owner"); see also *Westinghouse Elec. Supply Co. v. Electromech, Inc.*, 119 N.H. 833, 836 (1979) (reading RSA 447:5 and 447:6 together and concluding that a second-tier subcontractor or material supplier to a first-tier subcontractor has an enforceable lien up to the amount due that first-tier subcontractor).

⁸ A general contractor also creates a mechanic's lien once it performs work. But as explained above, a general contractor does not need to provide written notice to the owner. That said a general contractor must secure its lien by filing suit.

⁹ *Pine Gravel, Inc. v. Cianchette*, 128 N.H. 460, 464 (1986).

¹⁰ RSA 447:10.

¹¹ See *Peabody v. Weitzell*, 123 N.H. 416, 419 (1983) (concluding lien untimely because work performed was not part of parties' contract); *Bader Co. v. Concord Elec. Co.*, 109 N.H. 487, 488-89 (1969) (refusing to extend deadline where contractor returned at request of owner to correct defects and make other repairs); *Tolles-Bickford Lumber Co. v. Tilton Sch.*, 98 N.H. 55, 57 (1953) ("[A] subsequent gratuitous furnishing of material in the nature of a substitution or replacement to remedy a defect in the material originally delivered will not operate to extend the time within which to claim a mechanic's lien.") (citation omitted).

3. Other Important NH Distinctions

Unlike most other states, in New Hampshire an owner or a general contractor **cannot** compel the lienholder to accept a bond or any other form of collateral so as to dissolve its mechanic's lien. In fact, in our experience, lienholders are well aware of this fact and will commonly try to exert more leverage on the owner/general contractor by refusing to remove their lien. This situation often creates great turmoil between the general contractor and the owner, as the prime contract commonly requires the contractor to immediately remove any liens that are placed on the property.

There is, however, a way to avoid liens entirely. In New Hampshire, parties can waive their rights to a mechanic's lien by contract. Thus, many owners (and general contractors) expressly include such waiver clauses directly into the contracts and all contracts should be carefully reviewed to ensure you do not unwillingly waive your rights. Note that in Massachusetts, a contractual waiver of lien is against public policy and unenforceable.

Public Projects

By statute, mechanic's liens cannot be filed on public property. Those contracting on behalf of public bodies, however, must obtain a bond on all projects

that involve expenditures of \$35,000 or more. Just like a mechanic's lien, the bond ensures that first- and second-tier subcontractors and material suppliers to first-tier subcontractors receive payment for labor performed and materials furnished to a project.¹²

In order to make a claim on the bond, a party must file a statement of its claim with the appropriate State of New Hampshire office within ninety (90) days after the completion and acceptance of the project by the contracting party.¹³ A bond claim is not barred, however, if the statement of claim is filed *before* the project is completed and accepted.¹⁴ The statement of claim must also be sent by mail to the principal and the surety.¹⁵ Meeting these requirements is crucial—the failure to strictly comply with these statutory provisions **waives** any claim on the bond.¹⁶

To enforce its bond claim, a party that has complied with the above notice requirement must, within one year after filing its claim, file a petition in the superior court for the county in which the contract was principally performed, or intervene in a petition already filed.¹⁷ Also, within one-year after filing its claim, a party must provide a copy of its petition to the principal and the surety.¹⁸ To avoid the risk of waiving its claim on the bond, the party should **not** wait for the court to issue formal orders of notice before serving the principal and the surety with a copy of the petition.¹⁹

continued on page 49

State	Written Notice of Lien	Where To Send/File/Record Notice	Bringing Suit	Lien Rights Waivable by Contract?	Can Compel Removal of Lien by Posting a Bond?
New Hampshire	Subcontractor must file "intent to lien" before providing work to guarantee secure lien in full amount and in all events, before perfecting lien. General contractors do not need to send notice prior to seeking lien.	With Owner	Must file lawsuit and lien with the Court within 120 days of last date work performed.	Yes	No
Massachusetts	File Notice of Contract earliest of: (1) 60 days after recording of Notice of Substantial Completion; (2) 90 days after owner recorded Notice of Termination; or (3) in the event neither Notice recorded, 90 days after general contractor last performed work.	Registry of Deeds	Within 90 days after recording Statement of Account in Registry of Deeds	No	Yes

¹² The statute specifically requires payment: for all labor performed or furnished, for all equipment hired, including trucks, for all material used and for fuels, lubricants, power, tools, hardware and supplies purchased by said principal and used in carrying out said contract, and for labor and parts furnished upon the order of said contractor for the repair of equipment used in carrying out said contract. RSA 447:16.

¹³ RSA 447:17. The statute directs where to send the statement of claim depending on which political subdivision is the contracting party.

¹⁴ *Gen. Elec. Co. v. Dole Co.*, 105 N.H. 477, 488–89 (1964).

¹⁵ *Id.*

¹⁶ *Fastrack Crushing Servs. v. Abatement Int'l/Advatex Assocs., Inc.*, 149 N.H. 661, 666 (2003).

¹⁷ RSA 447:18. The statute sets forth the contents to include in the petition.

¹⁸ *Id.*

¹⁹ *See Gen Insulation Co. v. Eckman Constr.*, Nos. 2009-102, 2009-103, slip. op. at 7–8 (N.H. Sup. Ct. Jan. 28, 2010) (concluding supplier waived claim on statutory bond because although it filed a petition with the superior court within one year of filing a statement of claim, the supplier did not provide the principal and surety with a copy of the petition until the supplier received orders of notice from the court, which did not occur until after the one-year period had expired).

Prequalification Requirements for DOT Projects

The New Hampshire Department of Transportation (“DOT”) requires all contractors to prequalify before they can bid on a contract or perform work for the department. The DOT Rules require the submission of a prequalification application that includes, among other requirements, statements relating to the following:²⁰

- Selection of the types of projects the applicant wishes to be prequalified for (e.g. Road Construction, Site Work, Electrical work, all of the above) by the DOT;
- A statement as to the construction industry experience of each principal individual in the organization;
- A list of key employees of the applicant involved in the submission of the bids and/or the supervision of projects
- Listing of all on-going projects, public and private, as either a prime or subcontractor at date of filing;
- Information related to the organization and capitalization of the applicant’s company;
- Any failed projects undertaken by the applicant or their affiliates, if applicable;
- A list of references for the applicant’s work;
- A list of projects completed by the applicant in the past three (3) years;

- Balance sheet information (financial statement);²¹
- Information related to significant notes payable and notes receivable.

Upon completion of the statement, the application is submitted for review with the DOT. The DOT then reviews the submissions, obtains verification of the submitted information and, occasionally, will hold a personal interview. As a result, we advise our clients to maintain copies of any submitted application, and more importantly, to be conversant with all information referenced on their applications.

If, after review of the application, the DOT is satisfied with the statement, the applicant is prequalified for a period of one (1) year and three (3) months from the date of their submitted financial statement. Applicants **must** reapply for prequalified status annually.

Once prequalified, a bidder must submit a letter from its bonding company indicating both single and aggregate bonding limits. All Public Works projects, regardless of the bid amount, require a 100% contract bond.

Conclusion

This concludes our series on introducing contractors to requirements for doing work in Connecticut, New Hampshire, and Rhode Island. Remember, that this is meant only as a cursory overview. If you decide to venture into one of these jurisdictions, proceed cautiously and seek competent advice for your specific needs. ■

²⁰ The complete “Prequalification Package” can be found at <http://www.nh.gov/dot/business/contractors.htm>. In addition to the application, this site contains information related to current projects out for bid, bid results, and other information useful to parties seeking to contract with New Hampshire DOT.

²¹ Any contractor proposing to bid on projects advertised by the New Hampshire DOT must furnish a financial statement meeting the following standards:

- (1) The financial information shall be as of the end of the contractor’s last completed fiscal year, provided that a 3-month period following the close of a fiscal year shall be allowed for the preparation of updated financial statements;
- (2) All information other than financial information contained in the statement shall be current as of the date of filing; and
- (3) Any adverse change in the financial condition of the contractor since the date of the financial statement shall be indicated, and a written explanation given for the change.

Financial statements shall be accompanied by a report of financial condition meeting the following standards:

- (1) A contractor may elect to self certify as to financial condition by providing financial information on balance sheet forms provided by the department within the prequalification statement if the contractor seeks prequalification to bid upon projects with a value of less than \$500,000;
- (2) In all cases other than (1) above, the report shall be prepared by an independent certified public accountant certified to practice in New Hampshire, including the text of any footnotes to the financial statements as prepared by the certified public accountant;
- (3) The report shall be accompanied by a letter expressing the unqualified opinion of the certified public accountant that the report fairly and accurately expresses the financial condition of the contractor as presented by management on the date of the report; and
- (4) The report shall be based upon the following levels of service by the certified public accountant:
 - For projects with an estimated cost of \$4,000,000 or more, the report shall be based upon an audit of the firm’s financial condition;
 - For projects with an estimated cost between \$500,000 and \$4,000,000, the report shall be based upon a review of the firm’s financial condition; and
 - For projects with an estimated cost of less than \$500,000, the report shall be based upon a compiled financial statement.