

IDAHO CONSTRUCTION PAYMENT REMEDIES
2022 Southwest Business & Construction Credit Virtual Conference

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Idaho Construction Payment Remedies

A. Caveat

These materials contain general information only, and are not a substitute for obtaining legal advice for any given collection issue. These general materials are not meant to be used in lieu of retaining competent and knowledgeable legal counsel. The purpose of these materials is to provide general -- not specific -- information on limited payment issues. Moreover, because the law is constantly changing and evolving, you are encouraged to seek counsel regarding the steps and precautions necessary to ensure that your Idaho Mechanics or Materialman's lien or bond claim(s) may be valid and enforceable. The Idaho laws in this area are complicated and your procedures and follow-through on the preparation of any bid, contract, lien claim or bond claim should be checked by your attorney! Moreover, the history of the construction lien and bond statutes illustrate that they have been amended by the legislature from time to time and are subject to constant interpretation by the courts. As such, the general information contained in these materials may be dated. Again, you should seek the advice of competent legal counsel for specific situations and advice as to the "then existing" status of the law.

B. Administrative Rules Change Often

The Idaho Code ("I.C."), can only be modified by the Idaho Legislature when it meets annually, however, the Idaho Administrative Rules and Regulations ("IDAPA") promulgated by the Idaho Contractors Board ("ICB") and by other Idaho administrative agencies can change more frequently. The IDAPA regulations that may be included here are those which the applicable agency made available at the time of this publication. Changes may well have occurred since that time. Contact the relevant agency to obtain the most current IDAPA provisions.

These materials are written to assist contractors, material suppliers, subcontractors, and rental equipment suppliers to preserve and perfect their payment claims on Idaho construction projects. Dependent upon they type of project, the claimant will need to resort to remedies

controlled by the Idaho Mechanics Lien Statutes (Idaho Code 45-501 et seq. for private works, or the Idaho Public Contracts Bond Act for Idaho State Public Works projects. Lastly, claimants may need to resort to the Federal Miller Act (40 U.S.C. § 3131 et seq.) for Federal Procurements in Idaho. These materials also discuss issues related to Idaho contractor registration requirements, which may prove critical to the ability to obtain payment.

Before you undertake any collection efforts, you should consult competent legal counsel to determine the current state of the law and to receive advice specific to your situation.

C. Speaker Biography

FREDERICK J. HAHN, III Mr. Hahn practices primarily in the areas of commercial and construction litigation in both state and federal litigation at the trial and appellate levels. He is admitted to practice before all state and federal courts of Idaho, and Wyoming, and the United States Circuit Court of appeals for the Ninth Circuit, the United States Court of Federal Claims and the United States Supreme Court. He is a member of the Idaho, Wyoming and American Bar Associations, (member of the ABA Forum on Construction Industry, Litigation and Public Contract Sections).

Mr. Hahn has tried construction and collection related actions in state and federal courts throughout Idaho. Over the course of the last 31 years, Mr. Hahn has represented owners, general contractors, subcontractors, material suppliers, equipment suppliers and design professionals in all phases of litigation and arbitration.

IDAHO CONSTRUCTION PAYMENT REMEDIES

I. IDAHO MECHANICS LIENS

Mechanics lien rights are available on all projects where the project is a private work, meaning the owner is a non-governmental person or entity, with the owner having title to the property or a right to improve the property and the owner has requested the construction work either personally or through a general contractor. However, parties holding less than fee title (ownership) can also subject their interest in the property to a mechanics lien.

A. Right to Lien

The Right to Lien statute is found at Idaho Code 45-501, which states:

Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who grades, fills in, levels, surfaces or otherwise improves any land, or who performs labor in any mine or mining claim, and every professional engineer or licensed surveyor under contract who prepares or furnishes designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on-site observation or supervision, or who renders any other professional service whatsoever for which he is legally authorized to perform in connection with any land or building development or improvement, or to establish boundaries, has a lien upon the same for the work or labor done or professional services or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: provided, that the lessee

or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter.

For purposes of this chapter the term **“furnishing material” shall also include, notwithstanding any other provision of law to the contrary, supplying, renting or leasing equipment, materials or fixtures** as defined in section 28-12-309, Idaho Code.

“Furnishing material” shall also include renting, leasing or otherwise supplying any equipment, materials, fixtures or machinery to any mine or mining claim.

Idaho Code 45-501 (emphasis added).

Idaho Code 45-501 answers the following questions:

- **What is a Mechanic’s Lien?**
 - A claim against the private project or improvement.
- **Who is entitled to assert a Mechanic’s Lien?**
 - A person (contractor, subcontractor, supplier, architect, engineer) performing labor, or furnishing materials, which includes:
 - Supplying, renting or leasing equipment, materials or fixtures;
 - The Labor, materials or equipment were supplied:
 - To the owner; or
 - The owner’s agent (contractors are held to be the owner’s statutory agent);

B. Right to Lien for Improvement of Land.

Idaho Code 45-504 provides for the right to record a Mechanics Lien for improving land and states:

45-504. LIEN FOR IMPROVING LOTS. Any person who, at the request of the owner of any lot in any incorporated city or town, surveys, grades, fills in, or otherwise improves the same, or who rents, leases or otherwise supplies equipment, materials or fixtures as defined in section [28-12-309](#), Idaho Code, to such person for the improvement of any lot, or the street in front of or adjoining the same, has a lien upon such lot for his work done or material furnished or equipment, materials or fixtures as defined in section [28-12-309](#), Idaho Code, rented, leased or otherwise supplied.

1. The Lien Claim:

The contents and procedure for recording a Mechanics Lien are set forth in Idaho Code section 45-507 which states:

(1) Any person claiming a lien pursuant to the provisions of this chapter must file a claim for record with the county recorder for the county in which such property or some part thereof is situated.

(2) The claim shall be filed within ninety (90) days after the completion of the labor or services, or furnishing of materials.

(3) The claim shall contain:

(a) A statement of his demand, after deducting all just credits and offsets;

(b) The name of the owner, or reputed owner, if known;

(c) The name of the person by whom he was employed or to whom he furnished the materials;

(d) A description of the property to be charged with the lien, sufficient for identification; and

(e) For work or materials subject to the provisions of section 45-525, Idaho Code, the required proof of disclosure and acknowledgment of receipt.

(4) Such claim must be verified by the oath of the claimant, his agent, or his attorney to the effect that the affiant believes the same to be just.

(5) A true and correct copy of the claim of lien shall be served on the owner or reputed owner of the property either by an officer authorized by law to serve process delivering a copy thereof to the owner or reputed owner personally or by mailing a copy thereof by certified mail to the owner or reputed owner at his last known address. Such delivery or mailing shall be made no later than five (5) business days following the filing of said claim of lien.

(6) For purposes of this chapter, owner or reputed owner does not include a trustee of a deed of trust as defined and required by chapter 15, title 45, Idaho Code.

(7) In any court proceeding regarding a lien filed pursuant to this section, the prevailing party shall be entitled to recover reasonable attorney's fees and costs.

2. Mechanics Lien Elements Broken Down:

As noted above, the required contents of a claim of lien are set forth in Idaho Code 45-507. The claim of lien must contain the following:

- A Statement of his demand, after deducting all just credits and offsets;
- The name of the owner, or reputed owner, if known;
- The name of the person by whom he was employed or to whom he furnished the materials;
- A description of the property to be charged with the lien, sufficient for identification; and
- For work or materials subject to the provisions of section 45-525, Idaho Code, the required proof of disclosure and acknowledgement of receipt.

(1) Statement of Demand.

Generally, a Mechanics Lien claim will be deemed valid even though the amount due which exceeds the amount the court ultimately determines to be due and owing, ie the Claimant recovers less than claimed. Similarly, a lien will not likely be found invalid if the lien claim states a different amount than the amount alleged due and owing in the foreclosure complaint. Nevertheless, an entire lien claim may be invalidated if the court determines an excessive amount was claimed in the lien based on the Claimant's bad faith or fraudulent intent in making the claim. Blake v. Crystalline Lime Co., 37 Idaho 637, 221 P. 1100 (1923); Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc., 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985). The bad faith standard may be met by knowingly including in the lien claim amounts which are not justified under the lien law. Thus, material suppliers should always credit returned materials in calculating the "demand, after all just credits and offsets." Idaho Code 45-507 does not require any particular description of the labor, materials, rental equipment, or services for which the mechanics lien claim

is being asserted and a mere general description may suffice. Nevertheless, a detailed description of all labor, materials, and rental equipment, and services, and the dates when these were provided, is a good idea and will be helpful in determining the priority of Liens, discussed below.

Claimants should take care to calculate the principal amount of your claim correctly, and apply all just credits, offsets and payments that are appropriate. It may also be helpful, but not necessary to include as an exhibit to the lien a detailed description of all labor, materials, services and rental equipment and the dates when these were provided. Such an exhibit will assist in opposing any claim that the lien is overstated or does not include a proper demand after deducting all just credits and offsets.

Additionally, the Claimant is entitled to charge and collect the applicable Idaho State sales tax to be included in the lien amount. If, at the time you record a lien, you have not been paid the sales tax, you will need to include the sales tax as part of your lien claim. If you have not contracted directly with the property owner, you will still need to charge and collect the sales tax unless you have a proper resale or exemption certificate or another exemption applies.

Claimants are entitled to interest on the lien claim, however, the rate of interest permitted on the lien claim depends on with whom the Claimant contracted. If contracted directly with the property owner, and Claimant is entitled to include interest rate at the rate as agreed to by the parties, even though the rate is higher than the legal rate. Interest accruing at the agreed upon contractual rate is permitted as part of your mechanics lien claim. However, if the Claimant contract with anyone other than the property owner (such as the prime contractor or a subcontractor), the lien claim can only include interest at the legal rate of 12% per annum, even if though the contract provides for an interest rate higher than 12% per annum. The default interest rate in Idaho for money due is 12% per annum under Idaho Code 28-22-104. Thus, if Claimant contracted with the general contractor or a subcontractor and contracted for interest at one and one half percent per month (18% per annum), the Claimant would only be entitled to assert an interest claim on the Mechanics Lien in the amount of 12% per annum.

(2) Name of the Owners or Reputed Owners, if known:

There are several types of parties that can potentially subject a property to a mechanics lien claim. These include full/fee title owners, tenants with a right to improve the property, land sale and contract purchasers. It is important to focus on which property owner requested the construction work.

In the case of a lease, the terms of the lease will determine whether a tenant is an agent of the landlord/property owner such that a mechanics lien can reach the property owner's interest in the property. If the lease requires the tenant to make improvements to the property, the tenant is considered the agent of the property owner and a mechanics lien can reach the interest of the property owner. The interest of the property owner cannot be reached if the lease merely permits or allows the tenant to make the improvements. Many leases prohibit the tenant's ability improve the leased property, which is why it is important for contractors, subcontractors and suppliers to require a copy of a tenant's lease agreement prior to supplying labor, materials or equipment to the improvement of a tenant's property.

The same rules apply in the situation of a land sale contract, i.e. the vendee/purchaser is the agent of the seller only if the land sale contract requires the improvements. Permission is not enough. Also, a licensee (one who has permission from the property owner to enter upon the land for his own purpose) is typically, a not the agent of the property owner when the licensee requests improvements, unless the licensee is required by the owner to improve the property. If the licensee is required by the property owner to improve the property, a mechanics lien can reach the interest of the property owner.

Idaho Code 45-507(3)(c), requires the Mechanics Lien claimant to name the owner(s) or reputed owners of the property owner, if known. Competent and knowledgeable counsel will almost always be able to identify the owners or reputed owners of property sufficient to support a claim of lien and comply with this requirement. However, courts have held that omission of the name of the property owner or reputed owner may not be fatal to the lien claim. See e.g. Gem

State Lumber v. Union Grain, 47 Idaho 747, 278 P. 775 (1929); Layrite Products Co. v. Lux, 86 Idaho 477, 388 P.2d 105 (1964). As is discussed below, lien claimants must also identify the owners or reputed owners of the liened property in order to comply with the service requirements of the Lien statute.

(3) Identification of the Person Employing the Claimant:

Idaho Code 45-507(3)(c) requires that the mechanics lien claim include the name of the person by whom the lien claimant was employed. An Idaho court has invalidated a Lien for failure to include this information. See Riggen v. Perkins, 42 Idaho 391, 246 P. 962 (1926). Claimants generally know who ordered or requested them to provide work, so it should not be difficult to include the full, proper and legal name of Claimant’s customer. To confirm this information, you can research a business entity name by completing a business license search with the Idaho Secretary of State (<https://sosbiz.idaho.gov/search/business>), or if they are a registered contractor with the Idaho Contractors Board (<https://apps.dopl.idaho.gov/DOPLPublic/LPRBrowser.aspx>).

(4) Description of the property to be charged with the lien, sufficient for identification

Idaho Code 45-507(3)(d) requires a description of the property “sufficient to identify” the property charged with the lien. Although a specific legal description may not be required, it is certainly a “best practice” to identify the property both by common identification (432 E. Lansing Street, Boise, Idaho), as well as by a specific legal description. Legal descriptions are often included in general contract documents, or can be obtained through a title company, which typically will provide a copy of the last vesting deed for a property based upon a street address.

However, if the property description in the lien is vague or ambiguous, and/or includes minor errors or is incomplete, the lien may nevertheless be sufficient if it provides a basis for locating the property. Ross v. Olson, 95 Idaho 915, 523 P. 518 (1974). However, if the lien claim identifies the wrong property or is otherwise clearly erroneous, the lien will likely fail based upon an inadequate description of the property.

SUBSCRIBED AND SWORN TO THIS _____ DAY OF _____, 2022

(Notary Signature and Seal)

In First Fed. Sav. Bank of Twin Falls v. Riedesel Eng'g, Inc., 154 Idaho 626, 301 P.2d 626 (2010), the Idaho Supreme Court invalidated a Mechanics Lien, because although the individual verifying the lien stated that he was first duly sworn on oath, the Notary provision did not evidence that the notary had administered the oath upon which the lien was signed. The Court stated:

Claimant argues that this should substantially comply with the requirement that the claim of lien be verified by the oath of the claimant because the statement signed by Mr. Wert began, "I, AARON L. WERT, being first duly sworn, depose and say" That statement is not sufficient because it does not state that Mr. Wert was sworn by a person authorized to administer oaths. Although a notary public is authorized to administer oaths, [I.C. § 9-1401](#), the claim of lien does not state that the notary public did so in this case. The notary did not certify that Mr. Wert was sworn before the notary. The notary only certified that Mr. Wert was the person who signed the claim of lien on behalf of the corporation and that Mr. Wert acknowledged that the corporation executed it. For example, in *ParkWest* the claim of lien stated that it was "[s]igned and sworn to before me [the notary]." *Id.* at 607, 238 P.3d at 207. Likewise, the first lien filed by Claimant stated that it was "SUBSCRIBED AND SWORN to before me [the notary]." Because Claimant's second lien does not state that it was sworn to before someone authorized to administer oaths, the claim of lien does not comply with [Idaho Code section 45-507\(4\)](#), and it is void.

Thus, the Verification requirement is a trap for the unwary, and pre-printed or "off the shelf" mechanics lien forms should be avoided. Idaho lien law is nuanced, and technical. Knowledgeable Idaho counsel should be consulted in order to ensure compliance with the lien statute requirements.

(7) Recording and Serving the Lien

Mechanics Liens must be recorded with the county recorder's office in the county in which the improvement is located. Pursuant to Idaho Code 45-507(2), contractors, subcontractors and suppliers must record their lien **no later than 90 calendar days** after last furnishing a substantial

amount of labor, materials, services and/or rental equipment. As noted above, small or trivial amount of work, or repair or warranty work will not extend the 90 day period, which is strictly construed. Material and rental equipment suppliers must record a mechanics lien within 90 days of last furnishing materials or rental equipment, and this 90 day period may run from furnishing even small or trivial amounts of material or rental equipment. “Best practices” dictate that the Lien should be recorded from the last substantial supply of material or equipment. Franklin Building Supply Co. v. Sumpter, 139 Idaho 846, 87 P.3d 955 (2004).

Small amounts of work (also known as trivial work) will not extend the deadline to record. Mitchell v. Flandro, 95 Idaho 228, 506 P.2d 455 (1973). Additionally, repair of your earlier work or warranty work does not extend the lien deadline. In contrast, material and rental equipment suppliers must record a mechanics lien within 90 days of last furnishing materials or rental equipment, and this 90 day period can run from furnishing even small or trivial amounts of materials or rental equipment. Franklin Building Supply Co. v. Sumpter, 139 Idaho 846, 87 P.3d 955 (2004). Thus, material and equipment suppliers lien rights may expire well before the completion of the construction project. Care must be taken to calendar the 90 day dead with advanced notice, in order to properly prepare and record a Mechanics Lien.

The deadline to record is computed in consecutive calendar days. As such, it includes weekends and holidays. Furthermore, should the 90 day deadline fall on a Saturday, Sunday, or legal holiday, the lien should be recorded no later than the most immediate previous business day. For example, if the deadline falls on Monday, July 4th, the lien should be recorded no later than Friday, July 1st. Waiting until the next business day after the weekend or holiday is arguably too late. A mechanics lien cannot be amended after the 90 day period expires. Chief Industries, Inc. v. Schwendiman, 99 Idaho 682, 587 P.2d 823 (1978). Therefore, the question sometimes arises whether the time to record a lien is extended or renewed by work or materials later provided. The question is whether this later provided work is “trivial”. If so, the time for recording a lien is likely

not extended or renewed. If substantial work is performed subsequent to the original recorded Lien, a subsequent Lien may be recorded.

Mechanics Liens must be served on the owners or reputed owners within 5 business days of recording. Prior to the present language in the statute which requires service within 5 business days, the code required service by delivery or mailing within 24 hours of filing (recording) the Lien. In Ashley Glass Co. v. Hoff, 123 Idaho 544, 850 P.2d 193 (1993), the Idaho Supreme Court held that failure to strictly comply with the service requirement invalidated the Lien. Therefore, all Mechanics Liens must be personally served or served via Certified Mail, Return Receipt, and evidence of the mailing must be retained.

(8) Foreclosure and the Duration of a Mechanics Lien

Pursuant to Idaho Code 45-510 a Mechanics Lien only binds a property for a period of 6 months. Therefore, in order to maintain a secured position in the lien property, a foreclosure action must be filed prior to the expiration of the 6 month period. Counsel should be retained to properly foreclose a mechanics lien, as there are many issues that must be addressed, including the parties to be joined and the proper claims and allegations necessary to properly obtain a foreclosure judgment and sale. There is one infrequently used exception. If during the 6 month period, a partial payment is made on the Lien, then an additional 6 month period of time to foreclose is granted. This is, however, a one-time extension and based upon a single case: Palmer v. Bradford, 86 Idaho 395, 388 P.2d 96 (1965).

(9) Special Issues:

A. Multiple Buildings.

Where there is more than one building or improvement built, the lien claimant should designate the amount due on each or its lien may be inferior to other liens. However, if you have failed to specifically do so, contact legal counsel, as in some cases the courts will hold that a lien claim which generally described the separate improvements is sufficient.

B. Priority of Liens

Idaho Code 45-506 governs the priority of mechanics liens compared to other liens against real property, such as trust deeds and mortgages. Generally, all valid recorded mechanics liens will have the same priority within its class of lien, no matter when recorded, and are preferred to any liens, mortgages or encumbrances which were recorded or attached after the particular claimant commenced performance. Therefore, the determinative date is the date on which the mechanics lien claimant first began furnishing its work on site or delivered materials. For example, a mechanics lien claimant who begins furnishing on site work on December 1, 2010, should have priority over a lender's trust deed recorded on December 2, 2010. The effective date of a mechanics lien relates back to the date the lien claimant first began furnishing on site work (labor, materials, and/or rental equipment).

The Priority of Liens is based upon the date of first work or delivery of material to the project (cite), and based upon the class of the lien in accordance with Idaho Code 45-512, which sets forth the priority as follows:

1. Laborers other than contractors or subcontractors;
2. Material suppliers including equipment rental or leasing;
3. Subcontractors;
4. Original Contractors (general contractors);
5. Professional engineers and licensed surveyors;

C. The “Open Account” Issue for Material Suppliers.

A material or rental equipment suppliers do not have the right to assert a mechanics lien in situations where the supplier relies exclusively on the general credit of the purchaser, and does not look to the land, structure or building as additional security for the material sold or equipment rented on credit. See BMC West Corporation v. Horkley, 174 P.3d 399 (Idaho Supreme Court 2007). In addition, the lien statutes do not apply to a sale without any reference as to what shall

be done with the materials sold. Id. In BMC West Corporation v. Horkley, material supplier BMC furnished materials to prime contractor Davies on an open account. Davies' payments to BMC were applied by a "first in and first out" (FIFO) method. Some of the BMC invoices did not reference the Horkley project, but the vast majority of them referenced the project. In holding the open account defense was not applicable, the BMC West Corporation court reasoned as follows:

The open account defense is inapplicable here, because BMC did not rely exclusively on Davies' general credit. BMC submitted evidence that its general practice was to place a lien on the property built by the contractor when the contractor failed to pay for the purchased materials. Of course, if BMC places a lien on that property, it is not relying exclusively on the general credit of the purchaser. Horkley's only countervailing evidence is that BMC applied Davies' payments on a FIFO basis. That fact, though, serves only to support precisely what BMC admits: that Davies' payments were credited on an open account. But, as established, there exists no genuine issue as to whether the open account defense is inapplicable here, because Horkley has failed to present evidence to support the applicability of the open account defense. Instead, he only presents evidence that an open account exists, and that fact alone does not establish a defense.

A defense would be established if BMC sold the materials without reference to the project for which they were used. BMC cited evidence contradicting this defense though. Glenda Kamachi, the credit manager of BMC, testified that BMC customers must identify their projects on a "ship to" section on BMC's invoices. She further testified that Davies placed the name "Horkley" in this section, and that BMC's purpose in ascertaining this information was to inform BMC as to the particular projects for which the materials were purchased. Nevertheless, Horkley suggests that it can defend on the basis that materials were furnished without referencing a particular project, because "many invoices in the record. . . have no reference to a particular project." But this evidence is enormously insufficient to meet the standard of review for summary judgment. The fact that "many invoices" do not reference the Horkley project provides nowhere near the amount of evidence necessary for a jury to "return a verdict resisting the motion." This evidence serves only as a trivial observation, given that a review of the record demonstrates that the vast majority of the invoices do reference the Horkley project.

Therefore, in order to avoid the “open account” defense, a material or rental equipment supplier’s should always identify the project to which the materials or equipment are supplied. Moreover, delivery documentation to the actual project site should be maintained, rather than delivery to the customer’s shop. If the materials or rental equipment were furnished by the supplier with no reference to where they will be used, the open account defense may be available. The defense will likely not prevail even if the supplier furnishes the materials or rental equipment on the customer’s open account but where most or all of the invoices reference where the materials or rental equipment will be used. Best practices dictates that the location of the project to which materials or equipment are provided should be noted on each invoice and with respect to substantial deliveries, delivery documentation to the project site should be maintained.

D. Attorneys’ Fee Award.

Prior to 2022, the Idaho Mechanics Lien statute provided for a one-way award of attorneys’ fees pursuant to Idaho Code 45-513. Only a Lien claimant was entitled to an award of attorneys’ fees if the claimant recovered on its claim of lien. Effective July 1, 2022, however, the Idaho Legislature modified the Lien Statues (Idaho Code 45-507) to provide for a prevailing party attorneys’ fee award. This is a significant change in Idaho Lien law.

E. Pre-Lien Notice Requirements:

In Idaho, there are no pre-lien notice requirements for subcontractors, material suppliers, or rental equipment suppliers. However, a strong argument can be made for subcontractors and suppliers to send pre-lien notices to owners and particularly residential owners advising of work or supplies which will be provided to the owners’ project. There is no particular form of notice, however, a letter identifying the identity, contact information, type of material or labor to be provided and a likely value should be sufficient.

III. PAYMENT BOND ACTIONS

A. The Miller Act - Federal

Because subcontractors, suppliers and equipment suppliers can not record a lien against the federal government, congress enacted the Miller Act 41 U.S.C. 3131 et seq., which requires payment and performance bonds on contracts relating to the construction, alteration, or repair of any public building or public work” where the federal government is the owner. Miller Act Bonds are required on all such projects in excess of \$100,000 and the bonds must be in the amount of the project, ie a \$2MM project requires a \$2MM payment and \$2MM performance bond.

Performance bonds are for the benefit of the governmental owner to protect the owner in the event the prime contractor defaults, and payment bonds are provided for the benefit of subcontractors and suppliers, to ensure they are provided with a payment remedy (in lieu of lien rights).

1. Payment Bond Limitations.

Miller Act Payment bonds claims are only available for First tier and Second Tier subcontractors and Suppliers. Therefore, third tier contractors and suppliers have no right to recovery under Miller Act payment bonds. If you are a supplier to a material supplier to a second tier, then you have no right of recovery against the payment bond.

2. Notice and Filing Requirements.

First tier subcontractors and suppliers have no notice requirements to pursue a claim against a Miller Act payment bond. However, First Tier subcontractors must file suit on the bond within 1 year of last substantial work or materials, exclusive of warranty or punchlist work.

Second tier subcontractors and suppliers must provide notice of their claims against a Miller Act payment bond within 90 days of the last work or materials (exclusive of warranty or punchlist), and must file suit on the payment bond within 1 year of last substantial work or materials, exclusive of warranty or punchlist work. Compliance with the terms of the bond are also critical to preserve claims. Knowledgeable counsel should be retained to preserve and pursue any bond claim. Suit must be filed in Federal Court in district in which the work was performed. Again, counsel familiar with construction law should be retained.

3. Attorneys' Fees and Costs.

There is no general right to recover attorney fees on a federal Miller Act bond claim. Yet, a claimant under the Miller Act may be able to rely on its contract to entitle it to the recovery of its attorney fees. See e.g. Travelers Indemnity Company v. United States, 362 F. 2d 896, 899 (9th Cir. 1966). Costs are awarded pursuant to the Federal Rules of Civil Procedure.

B. Idaho Public Works Bond Claims.

1. Notice Requirements.

The Idaho Public Works Bond Act is known as the “Little Miller Act” which is found at Idaho Code 54-1926. In essence the same coverage and requirements apply for claims under the Idaho Act. On state and local public works projects, a subcontractor or supplier contracting directly with the prime contractor does not need to serve a bond claim, unless government obligations (i.e. cashier’s or certified check) are posted in lieu of a surety bond. In such a situation, the notice of bond claim should be provided to the public body that let the contract and the prime contractor within the **ninety (90) calendar day period** allowed.

For both state and local projects, a subcontractor or supplier contracting with a first tier subcontractor should serve a bond claim within **ninety (90) calendar days** after last performing a substantial amount of original work. Again, the bond claimant should not run its ninety (90) day period from when it last performed a small (trifling) amount of work (labor, materials, and/or rental equipment) or from any repair or warranty work it performed.

A subcontractor or supplier contracting with a first tier subcontractor must serve its bond claim on the prime contractor by registered mail or certified mail, postage prepaid, in an envelope addressed to the prime contractor at any place he maintains an office, conducts his business, or at his residence. Idaho Code 54-1927. It is also recommended to serve a copy of the bond at same time by registered or certified mail on the surety providing the bond.

2. Foreclosure / Filing Requirements.

On Idaho state and local public works projects, a first-tier subcontractor must commence suit to foreclose its bond claim **no later than one (1) year** from the date on which final payment under the subcontract becomes due. I.C. 54-1927. A material supplier or rental equipment supplier must commence suit to foreclose its bond claim **no later than one (1) year** from the date on which the supplier furnishes the last of its material or equipment. I.C. 54-1927.

Those subcontractors contracting with a first tier subcontractor must commence suit to foreclose their bond claims on state and local public works projects **no later than one (1) year** after they last furnished work. I.C. 54-1927. Those subcontractors should not run their one (1) year from when they last performed a small (trifling) amount of work or from any repair or warranty work they performed.

3. Attorneys' Fees and Costs.

The prevailing party on the bond claim shall recover its reasonable attorney's fees. Idaho Code 54-1929. Costs are awarded to the prevailing party pursuant to the Idaho Rules of Civil Procedure. A bond claimant probably should not, foreclose its own bond claim. Rather, they should hire counsel to foreclose such a claim. We recommend that you consult counsel well in advance of the one (1) year deadline to foreclose regarding commencement of filing suit.

IV. IDAHO CONTRACTOR REGISTRATION ACT

A. License vs. Registration.

Although there are states which require contractors to obtain a "license" to operate a contracting business, Idaho requires only a contractor "registration". Typically, a license involves objective minimum standards that a licensee must obtain, and often requires testing requirements to obtain a license, which is a grant of authority to conduct business. Attorneys, physicians, nurses, accountant, HVAC contractors, architects, electricians and plumbers are examples of licenses granted by the state.

Contractor registration, however, was enacted by the Idaho Legislature to manage and track persons or entities who operate as contractors, and does not require any educational or testing requirements. Rather, a person or firm that holds themselves out as a contractor, must obtain minimum levels of commercial general liability insurance and workman's compensation insurance, and must pay a minimum fee to operate in the state. Thus, contractor registration is much less onerous than the licensing requirements for other professions, however, as is discussed below, the consequences of failing to register may be catastrophic.

B. Registration Requirements.

Idaho Code 54-5204 requires registration and states:

- (1) On and after January 1, 2006, it shall be unlawful for any person to engage in the business of, or hold himself out as, a contractor within this state without being registered as required in this chapter.
- (2) It shall be unlawful for a contractor to engage any other contractor who is required by this chapter to be registered as a contractor unless such other contractor furnishes satisfactory proof to the contractor that he is duly registered under the provisions of this chapter.
- (3) Any person who engages in the business or acts in the capacity of a contractor, whether or not duly registered, has thereby submitted to the jurisdiction of the state of Idaho and to the administrative jurisdiction of the Idaho contractors board, and shall be subject to all penalties and remedies available under Idaho law for any violation of this chapter.

The Definitions relating to the Idaho Contractor Registration Act are found at 54-5203, and in pertinent part state:

As used in this chapter:

- (2) "Construction" means the performance of building, altering, repairing, adding to, subtracting from, improving, reconstructing, moving, excavating, wrecking or demolishing any building, highway, road, bridge, or other structure, project, development or improvement to real property, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith.
- (3) "Contractor" means:

(a) Any person who in any capacity undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to, or does himself or by or through others, perform construction; or

(b) A construction manager who performs construction management services.

(6) “Person” means any individual, firm, partnership, limited liability company, limited liability partnership, corporation, trust, association or other entity or organization capable of conducting business, or any combination thereof acting as a unit.

C. Exemptions from Registration.

The exemptions from Contractor Registration are found at Idaho Code 54-5208, which states:

(1) Nothing in this chapter shall be construed to restrict any person licensed, registered, or otherwise regulated by the state of Idaho from engaging in the profession or practice for which they are licensed, registered or otherwise regulated by the state of Idaho including, but not limited to, persons licensed pursuant to chapters 3, 10, 12, 19, 26, 45 and 50, title 54, Idaho Code, nor shall this chapter require such persons otherwise licensed, registered or regulated to obtain such registration as required by this chapter, so long as such person is not acting with the intent to evade this chapter. No such person exempt hereunder may hold himself out as a registered contractor.

(2) In addition to the exemption set forth in subsection (1) of this section, registration as provided for in this chapter shall not be required for the following, so long as such person is not acting with the intent to evade this chapter and so long as such person does not hold himself out as a registered contractor:

(a) A person who only performs labor or services for wages or a salary as an employee of a contractor, or as an employee of a person otherwise exempt by the provisions set forth in this chapter, or strictly as a volunteer or as part of a bona fide educational curriculum or nonprofit charitable activity for which no wages or salary shall be paid; provided however, that such exemption shall not apply to any subcontractor or other independent contractor who is not otherwise exempt;

(b) An authorized representative of the United States government, the state of Idaho, or any incorporated municipality, county, alternative form of local government, highway district, reclamation district, or other municipal or political corporation or subdivision of this state;

(c) A public utility operating under the regulation of the Idaho public utility commission as set forth in title 61, Idaho Code, in the construction, maintenance, or development work incidental to its own business;

(d) A person who performs repair or operation incidental to the discovery or production of oil, gas or minerals or incidental to the drilling, testing, abandoning, or other operation of an oil or gas well or a surface or underground mine or mineral deposit;

(e) A person who only furnishes materials, supplies or equipment without that person installing or fabricating them into or consuming them in the performance of the work of the construction contractor;

(f) A person performing work on one (1) undertaking or project considered casual, minor, or inconsequential, whether by one (1) or more contracts, the aggregate contract price of which, for labor and materials and all other items, is less than two thousand dollars (\$2,000). The exemptions prescribed in this paragraph (f) shall not apply when the work or construction is part of a larger construction project, whether undertaken by the same or a different construction contractor, or in which a division of the operation is made into contracts of amounts of less than two thousand dollars (\$2,000) for the purpose of evasion of this chapter or otherwise;

(g) A farmer or rancher while engaged in a farming, dairying, agriculture, viticulture, horticulture, or stock or poultry operation;

(h) A person who engages in the construction of an agriculture building which is exempt from the Idaho building code act as set forth in section 39-4116, Idaho Code;

(i) An irrigation district, canal company, reservoir district, ground water district, water district, water measurement district, recharge district, flood control district, drainage district, or other water delivery or water management entity, or an operating agent of irrigation districts whose board consists of directors of its member districts;

(j) An operation related to clearing or other work upon land in rural districts for fire prevention purposes;

(k) An owner who contracts for work to be performed by a registered contractor on his own property, provided however, this exemption shall not apply to an owner who, with the intent to evade this chapter, constructs a building, residence or other improvement on the owner's property with the intention and for the purpose of selling the improved property at any time during the construction or within twelve (12) months of completion of such construction;

(l) An owner performing construction on the owner's personal residential real property, whether or not occupied by the owner, provided however, this exemption shall not apply to an owner who is otherwise regulated by this chapter who constructs a building, residence or other improvement on the owner's property with the intention and for the purpose of promptly selling the improved property, unless the owner has continuously occupied the property as the owner's primary residence for not less than twelve (12) months prior to the sale of such property;

(m) Owners of commercial properties, or lessees of commercial properties with the consent of the owner, who, whether themselves or with their own employees, perform maintenance, repair, alteration or construction work in or upon the properties;

(n) A real estate licensee acting within the scope of his license pursuant to chapter 20, title 54, Idaho Code, who, incident to a regulated real estate transaction, assists his clients in scheduling or performing nominal maintenance and repairs upon such properties being transferred; provided however, nothing in this section shall otherwise authorize a real estate licensee or a property manager to act in the capacity of a contractor unless registered with the board;

(o) A contractor engaged in the logging industry who builds forest access roads for the purpose of harvesting and transporting logs from forest to mill;

(p) A person working on the person's own residence, if the residence is owned by a person other than the resident;

(q) A person who engages in the construction of buildings to be used primarily for industrial chemical process purposes as set forth in section 39-4103, Idaho Code; or

(r) A person who engages in the construction of a modular building as defined in section 39-4301, Idaho Code, that is constructed in the state of Idaho for installation on a building site outside the state.

D. Sanctions.

The sanctions and penalties for failing to properly register under the Idaho Contractor Registration Act are extreme and serious. A contractor subject to the registration requirements, who fails to properly register will be deemed to have waived all lien rights, as well as any right to pursue payment for labor or materials supplied without a registration.

Idaho Code 54-5208 contains the provision, which denies lien rights and states:

A contractor who is not registered as set forth in this chapter, unless otherwise exempt, shall be denied and shall be deemed to have conclusively waived any right to place a lien upon real property as provided for in chapter 5, title 45, Idaho Code. This section shall not operate as a denial of lien rights for any subcontractor or independent contractor who is duly registered in accordance with this chapter and who is performing services at the direction of another contractor, nor shall it operate as a denial of lien rights for any employee of any contractor who is not duly registered, or for any supplier of materials to such unregistered contractor, so long as such subcontractor, independent contractor, employee or supplier did not have actual knowledge that such contractor was not duly registered, or who reasonably believed that such contractor was duly registered.

Idaho Code 54-5217 contains the provision, which denies access to any court to enforce a payment claim and states:

(1) Any person acting in the capacity of a contractor within the meaning of this chapter without a current registration as herein required shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail for a term not to exceed six (6) months, or by both such fine and imprisonment, in the discretion of the court.

(2) No person engaged in the business or acting in the capacity of a contractor, unless otherwise exempt, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which registration is required by this chapter without alleging and proving that he was a duly registered contractor, or that he was otherwise exempt as provided for in this chapter, at all times during the performance of such act or contract.

E. **Takeaways:**

1. If there is any remote potential that your work may come within the requirements of the Idaho Contractor Registration Act, then REGISTER. The registration materials, code and regulations may be accessed at the Idaho Contractors Board website:

<https://apps.dopl.idaho.gov/DOPLPortal/BoardPage.aspx?Bureau=CON>

2. Ensure that any party with whom you are contracted is a duly registered Idaho Contractor. Contractor Registration can be searched online at:

<https://apps.dopl.idaho.gov/DOPLPublic/LPRBrowser.aspx>

3. If you conduct business as a corporation, limited liability company, or general partnership, you must register in the name of the entity. This is the difference between an RCT registration number (issued to individuals) and an RCE registration number (issued to companies).