

*A SYSTEM FOR PAYMENT AND
COLLECTION UNDER MICHIGAN
CONSTRUCTION LIENS AND
PAYMENT BONDS*

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Presented by:



and



SECTION A:

SETTING UP THE SYSTEM...

SETTING UP THE SYSTEM

- A. Recognition of four system benchmarks guides system setup.*
- a. **RESPONSIBILITY:** One individual is assigned responsibility for implementing and completing System Procedures.
 - b. **CONSISTENCY:** Company policy must require adherence to System Procedures on every project.
 - c. **COMMUNICATION:** Company policy must require that supervisory personnel communicate key events to System Manager.
 - d. **SYSTEM IS EVENT DRIVE:** Action upon a relatively limited number of key events assures consistent System Performance regardless of the type of project and regardless of whether your company is involved as the prime contractor or a subcontractor or supplier on any given project.

SETTING UP THE SYSTEM

B. Specific events drive action...

1. Contract Formation
2. First Furnishing Labor or Materials
3. Last Furnishing Labor or Materials
4. Non-Payment
5. Progress or Final Payment

SECTION B:

PRIVATE WORK

GOVERNED BY THE MICHIGAN CONSTRUCTION LIEN ACT

The purpose of Michigan Construction Lien Act...

“[T]o establish, protect, and enforce by lien the rights of persons performing labor or providing material or equipment for the improvement of real property; to provide for certain defenses with respect thereto...”

EVENT: CONTRACT FORMATION

ACTIONS:

- 1) Provide System Manager with copy (or relevant excerpt) of the contract.
- 2) If Prime Contractor: Obtain clean and recorded copy of Notice of Commencement and blank Notice of Furnishing from Project Owner and enter it in System File. If not provided at the time of signing the contract or at the time of verbal request, send written request via certified mail to Project Owner.
- 3) If Subcontractor or Supplier: Submit written request for Notice of Commencement and blank Notice of Furnishing to Prime Contractor via certified mail. Enter copy of request and certified mail receipt into System File. Upon receipt of Notice of Commencement and blank Notice of Furnishing, enter these documents into System File.

Comments on Relevant Provisions of Construction Lien Act

- 1) Contract Requirements:
 - a) Non-Residential Work: Contract may be written or oral.
 - b) Residential Work: Prime Contract (and all amendments) must be in writing or contractor is barred from recording Claim of Lien.
- 2) Licensing Requirements:
 - a) Residential Work: Contractor must be licensed.
 - b) “Residential Work” is broadly defined under MI law.
 - c) No license is required for non-residential contracting except for specific trades:
 - Electrical, Plumbing, and Mechanical.
- 3) Failure of Owner or Lessee to record Notice of Commencement or to provide Notice of Commencement upon proper request:
 - a) Sanctions Available
 - b) Extension of Time for Notice of Furnishing
 - c) Self Help
- 4) Failure of General Contractor (or higher-tier subcontractor) to provide Notice of Commencement upon proper request:
 - a) Sanctions Available
 - b) Self Help
- 5) Effect of Errors in Notice of Commencement

EVENT: FIRST FURNISHING

ACTIONS:

- 1) Project Superintendent notifies System Manager of the first furnishing date and, after verifying that the project is correctly identified, provides copy of Foreman's Daily Report or pertinent load ticket to System Manager.
- 2) IF YOU ARE A SUBCONTRACTOR OR SUPPLIER, System Manager prepares Notice of Furnishing and serves it via Certified Mail Return Receipt Requested upon Designee **and** General Contractor named in Notice of Commencement. Notice of Furnishing must be served within twenty (20) days of the date of first furnishing.
- 3) System Manager prepares Proof of Service of Notice of Furnishing and places original Proof of Service, together with a copy of Notice of Furnishing and Daily Report or load ticket, in System File.
- 4) Upon receipt, System Manager attaches Certified Mail Return Receipt (Green Card) to Proof of Service of Notice of Furnishing in System File.

EVENT: LAST FURNISHING

ACTIONS:

- 1) Project Superintendent notifies System Manager of last furnishing date and, after verifying that the project is correctly identified, provides a copy of Foreman's Daily Report or applicable load ticket to System Manager.
- 2) System Manager saves Daily Report or Load Ticket in System File and records two (2) calendar entries:
 - a) A ten (10) day warning entry - eighty (80) days from last date of furnishing.
 - b) A lien recording deadline - ninety (90) days from last date of furnishing.

Practical Considerations and Comments on Relevant Provisions of Construction Lien Act

- 1) “Last Furnishing” Activity Type
- 2) “Safety Net” Work Items
- 3) Phased or Suspended Construction

EVENT: NON-PAYMENT

ACTIONS:

- 1) System Manager verifies contract balance due including undisputed extras and retention and inserts final account balance statement into System File.
- 2) If your company is the prime contractor, System Manager prepares a Claim of Lien in recordable form.
- 3) If your company is a subcontractor or supplier, System Manager must attach a copy of Notice of Furnishing and Proof of Service of Notice of Furnishing to Claim of Lien for recording.
- 4) System Manager serves recorded Claim of Lien, along with all required attachments, upon Designee named in Notice of Commencement via Certified Mail Return Receipt requested within fifteen (15) days of recording the Claim of Lien.
- 5) System Manager prepares Proof of Service of Claim of Lien and inserts Proof of Service, together with a complete copy of Claim of Lien and service letter, into System File.
- 6) System Manager makes two (2) calendar entries:
 - a) A thirty (30) day warning entry - eleven (11) months after the date of recording the Claim of Lien, and;
 - b) A lien expiration date - one (1) year after the date of recording the Claim of Lien.

RESULT

- A perfected Claim of Lien.
- Payment security provided under the Michigan Construction Lien Act.
- Statutorily authorized recovery of fees and costs, including attorney fees and costs, in the foreclosure / collection action.
- Reduction in the cost of commencing foreclosure action.
- Improvement in the company's overall profitability.
- Fewer sleepless nights.

Practical Considerations and Comments on Relevant Provisions of Construction Lien Act

- 1) Determining contract balance due for Claim of Lien:
 - a) “Contract Dollars” versus “Claim Dollars”
 - b) The difference between interest or finance charges and time-price differential charges
 - c) The contract retainage conundrum
 - d) Effect of “pay when paid” and “pay if paid” contract provisions
 - e) Statutory sanctions for “inflated” liens
 - f) Effect of owner/lessee breach or early termination of contract
- 2) Effect of Owner’s failure to record or provide Notice of Commencement:
 - a) NO extension of ninety (90) day period to record lien
 - b) Self help
- 3) Claim of Lien shall not exceed amount of claimant’s contract less payments made:
 - a) If lien willfully overstated - lien invalidated (unlikely)
 - b) If lien negligently overstated - lien reduced (likely)

Practical Considerations and Comments on Relevant Provisions of Construction Lien Act (Continued)

- 4) Protecting lien rights when construction is “phased” across seasons or suspended for extended periods:
 - a) The Interim Claim of Lien
 - b) The Amended Claim of Lien
- 5) Recording Requirements: Document format specifications.
- 6) Effect of project property crossing county lines:
 - a) Record claim of lien in **both** counties
 - b) A “fielder’s choice” for venue of foreclosure action
- 7) Potential Umbrella Effect of Claim of Lien:
 - a) Multiplicity of liens not prohibited
- 8) Effect of failure to either name a designee in the Notice of Commencement or the death of the designee:
 - a) Service upon named owner or lessee
- 9) Special Rules for Laborers
- 10) Special limitation concerning condominium projects.
- 11) Priorities
 - All liens relate back to date of first physical improvement
 - All liens subordinate to recorded instruments that predate first physical improvement

EVENT: PROGRESS PAYMENT

ACTIONS:

- 1) Project Manager contacts System Manager to advise of Sworn Statement and Partial Waiver requirement.
- 2) System Manager verifies outstanding subcontractor and supplier accounts and prepares Sworn Statement.
- 3) System Manager either prepares or reviews Partial Conditional Waiver of Lien or Partial Unconditional Waiver of Lien.
- 4) System Manager or Project Manager transmit Sworn Statement and Partial Waiver to process payment.
- 5) System Manager files a copy of Sworn Statement and Partial Waiver in System File.

Practical Considerations and Comments on Relevant Provisions of Construction Lien Act

- 1) Conditional Waivers versus Unconditional Waivers
 - a) When each should be used
 - b) The typical “stand off”
 - c) Simultaneous written notice of lack of consideration for unconditional waivers
 - d) The “one draw” lag
 - e) Prompt subsequent written notice of failure of consideration
 - f) Excluding retention from partial waiver calculation
- 2) Lower Tier Partial Waivers and Sworn Statements.

EVENT: FINAL PAYMENT

ACTIONS:

- 1) System Manager verifies outstanding contract balance including approved extras.
- 2) System Manager verifies outstanding amounts of disputed unresolved claim items.
- 3) Project Manager seeks a negotiated resolution of outstanding unresolved claim items to be included in Final Payment.
- 4) If all outstanding items are resolved and included in Final Payment, System Manager prepares and transmits Full Conditional Waiver of Lien to facilitate the payment process, or System Manager prepares and exchanges Full Unconditional Waiver for Final Payment.
- 5) If Claim of Lien has been recorded prior to receipt of Final Payment, System Manager either reviews and executes Release of Lien provided by Owner or prepares Release of Lien to be exchanged for Final Payment in certified funds.
- 6) If outstanding disputed claim items remain unresolved at the time of Final Payment, Full Conditional Waiver or Full Unconditional Waiver must expressly except such claims from Waiver.

SECTION C:

Non-MDOT Public Works Projects

**Governed by the Act Requiring
Contractor Bonds on Public Buildings
and Public Works Contracts**

EVENT: CONTRACT FORMATION

ACTIONS:

- 1) Project Manager (or Estimating or Sales) notifies System Manager of new contract. A copy of the contract (or relevant contract excerpts identifying principal contractor and governmental owner of the project) are provided to System Manager and maintained in System File.
- 2) System Manager prepares and submits written request to governmental owner requesting copy of Payment Bond furnished for Project. Upon receipt, System Manager saves Payment Bond in System File.

Comments on Relevant Provisions of “Public Works Bond Act”

- 1) The Act provides payment protection to subcontractors and suppliers of all tiers. The principal contractor is forced to rely upon the governmental unit for payment upon the principal contract.
- 2) The Act does not require the governmental unit to provide certified copies of the bond in advance of work being performed.
- 3) The statute does not require 100% payment bonds.
- 4) The statute does not prescribe the form of bond to be furnished and the procedural content of payment bonds may vary from project to project.
- 5) The bonds may provide more, but not less, protection than prescribed in the statute.

EVENT: FIRST FURNISHING

ACTIONS:

- 1) Project Superintendent notifies System Manager of first furnishing date and, after verifying that project is correctly identified, provides copy of Foreman's Daily Report or pertinent load ticket to System Manager.
- 2) IF YOU ARE A SUBCONTRACTOR OR SUPPLIER who does not have a contract with the principal contractor, System Manager prepares Notice of Furnishing and serves it via Certified Mail Return Receipt Requested upon the principal contractor. Notice of Furnishing must be served within thirty (30) days of date of first furnishing.
- 3) System Manager prepares Proof of Service of Notice of Furnishing and places original Proof of Service, together with a copy of Notice of Furnishing and Daily Report or load ticket, in System File.
- 4) Upon receipt, System Manager attaches Certified Mail Return Receipt (Green Card) to proof of Service of Notice of Furnishing in System File.

Comments on Relevant Provisions of “Public Works Bond Act”

- 1) Effect of failure to timely serve Notice of Furnishing
- 2) Bond may expressly or by omission extend or waive thirty (30) day requirement for serving Notice of Furnishing

EVENT: LAST FURNISHING

ACTIONS:

- 1) Project Superintendent notifies System Manager of last furnishing date and, after verifying that project is correctly identified, provides copy of Foreman's Daily Report or applicable load ticket to System Manager.
- 2) System Manager saves Daily Report or Load Ticket in System File and records two (2) calendar entries:
 - a) A ten (10) day warning entry - eighty (80) days from last date of furnishing.
 - b) A bond claim submittal deadline - ninety (90) days from last date of furnishing.

EVENT: NON-PAYMENT

ACTIONS:

- 1) System Manager verifies outstanding contract account balance (inclusive of contractually specified interest, finance or time-price differential charges, and unresolved additional compensation claims) and inserts a detailed outstanding account statement into System File.
- 2) System Manager prepares Notice of Intent to Rely Upon the Payment Bond for payment. The Notice must be served upon Principal Contractor and Governmental Owner via Certified Mail Return Receipt Requested before expiration of ninety (90) days following date of last furnishing.
- 3) System Manager prepares Proof of Service of Notice of Intent to Rely Upon the Payment Bond and saves it in System File with a copy of the Notice.
- 4) System Manager monitors status of final payment to Principal Contractor by Governmental Owner on a monthly basis and documents the date of final payment to Principal Contractor in System File.
- 5) System Manager then makes two (2) calendar entries:
 - a) A thirty (30) day warning at eleven (11) months following date of final payment to Principal Contractor.
 - b) An expiration/limitation period warning for commencing action upon payment bond at one (1) year following the date of final payment to Principal Contractor.

Practical Considerations and Comments on Relevant Provisions of “Public Works Bond Act”

- 1) Determining the amount claimed under the payment bond
- 2) Effect of failure to timely and properly serve the Notice of Intent to Rely Upon Payment Bond
- 3) Determining the date of final payment to the Principal Contractor
- 4) Responding to proof of claim requests (i.e., procedural requests) from the Payment Bond Surety
- 5) Potential for penalty interest assessments against the Payment Bond Surety under the Michigan Insurance Code
- 6) Early involvement of your attorney in the Payment Bond Claim Process

EVENT: COMPANY DECISION TO COMMENCE COLLECTION ACTION

ACTIONS:

- 1) System Clerk verifies that the one (1) year expiration/limitation period has not expired.
- 2) System Manager verifies current status of contract account and amount outstanding (inclusive of retention, interest, finance or time-price differential charges authorized by contract) and unresolved claim items.
- 3) System Manager copies and sends System File to company attorney with instructions to commence action upon payment bond.

SECTION D:

Michigan Department of Transportation (MDOT Projects)

EVENT: CONTRACT FORMATION

ACTIONS:

- 1) Project Manager notifies System Manager of new contract and provides copy of contract or relevant contract excerpt which identifies Principal Contractor and any higher tier subcontractor with whom your company has contracted.
- 2) System Manager saves contract or contract excerpt in System File.

*Comment on Relevant Provisions of
“MDOT Bond Act”*

- 1) No Notices of Furnishing required regardless of subcontract tier.

EVENT: LAST FURNISHING

ACTIONS:

- 1) Project Manager notifies System Manager of last furnishing date and provides copy of Foreman's Daily Report or Load Ticket for last date of furnishing.
- 2) System Manager submits written request for copy of Payment Bond to MDOT - Contracts Section.
- 3) Upon receipt of Payment Bond, System Manager confirms whether Payment Bond contains typical "MDOT Endorsement".
- 4) If: (a) typical "MDOT Endorsement" is part of Payment Bond and (b) you are a supplier or second tier or lower subcontractor, System Manager makes two (2) calendar entries:
 - a) A thirty (30) day warning for filing of "Notice of Lien Claim" at ninety (90) days after last furnishing date.
 - b) A warning for filing "Notice of Lien Claim" at one hundred twenty (120) days after last furnishing date.

EVENT: LAST FURNISHING (Continued)

ACTIONS:

- 5) If you are a first tier subcontractor and have a subcontract directly with Principal Contractor and typical “MDOT Endorsement” is part of payment bond, System Manager monitors the MDOT pay estimates on a monthly basis to determine:
 - A) The date of project completion and acceptance and
 - B) The date of issuance of Final Estimate. Upon determining both dates, System Manager makes four (4) calendar entries:
 - 1) A thirty (30) day warning of “Notice of Lien” filing deadline at thirty (30) days after Notice of Issuance of the Final Estimate;
 - 2) A warning for filing a “Notice of Lien” at sixty (60) days after Notice of Issuance of the Final Estimate;
 - 3) A thirty (30) day warning for commencing an action on payment bond at eleven (11) months after the date of completion and acceptance of the Project; and
 - 4) An expiration/limitation period warning for commencing an action upon the payment bond at one (1) year after the date of completion and acceptance of the Project.

EVENT: LAST FURNISHING (Continued)

Don't fall into the "timing trap"...

SCENARIO:

Project is completed and accepted on January 1, 2023.

MDOT fails to issue Final Estimate until December 1, 2023.



Even though deadline for Notice of Claim of Lien is not until January 30, 2024, lawsuit on payment bond **MUST BE COMMENCED** before January 1, 2024.

EVENT: LAST FURNISHING (Continued)

ACTIONS:

6) If typical “MDOT Endorsement” is not part of payment bond, System Manager shall make two (2) calendar entries regardless of your subcontractor or supplier status:

a) A ten (10) day warning at fifty (50) days after last date of furnishing of the need to file a “Notice of Lien”

b) A warning for filing a “Notice of Lien” at sixty (60) days after last date of furnishing

The limitation period for commencing an action upon the payment bond remains at one (1) year following the date of completion and acceptance of the Project.

EVENT: NON-PAYMENT

ACTIONS:

- 1) System Manager verifies outstanding account balance (inclusive of accrued interest, finance or time-price differential charges authorized by contract) and unresolved claim items.
- 2) System Manager, within the time periods previously calendared, prepares and issues “Notice of Lien” upon MDOT Financial Services Division via Certified Mail Return Receipt Requested.
- 3) System Manager prepares Proof of Service of Notice of Lien and saves it in System File with a copy of Notice of Lien and transmittal letter.
- 4) Responding to proof of claim requests from the payment bond surety.
 - a) Pluses verses Minuses
 - b) Tracing Requirements
- 5) Potential for penalty interest assessments against the payment bond surety under the Michigan Insurance Code.
- 6) Early involvement of your attorney in the Payment Bond Claim Process.

EVENT: COMPANY DECISION TO COMMENCE COLLECTION ACTION

ACTIONS:

1. System Manager verifies outstanding contract account balance.
2. System Manager, within time period for commencing an action upon payment bond, copies and transmits System File to company attorney with instructions to commence action upon payment bond.

QUESTIONS?

We truly appreciate the opportunity to present this seminar and you attending it. This seminar was designed to provide you with the knowledge and tools necessary to set up a systems in your office that consistently maximizes your ability to: (1) collect full payment on projects reduce collection costs when collection action is required. This seminar and any information or documentation provided in connection with it are not intended to be legal advice and should not be regarded as legal advice, especially since it is not possible or prudent to offer legal advice without a prior and thorough analysis of the facts involved in any specific situation. The construction attorneys at Butzel Long, of course, welcome the opportunity and privilege of meeting your needs for legal consultation, advice, and representation if necessary. Therefore, if you ever require any legal consultation, advice, and representation, please do not hesitate to contact:

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