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The Act 142 amendments and altered landscape of the Pennsylvania Mechanics' Lien Law for oil and gas construction projects

The Pennsylvania Mechanics' Lien Law, 49 P.S. § 1101 et seq, provides contractors a powerful legal remedy for recovering payment owed for work performed on a construction project; they can impose a lien against the property on which their work was performed, clouding the owner's title. As a result of Act No. 142's amendments to the lien law, effective December 31, 2016, project owners, general contractors, and subcontractors have been evaluating their business practices to ensure compliance with the amended lien law and the subsequent launch of the online State Construction Notices Directory.

Prior to the creation of the directory, there was no streamlined system for owners and general contractors to track subcontractors and suppliers on a project site. This created a lack of certainty with respect to what parties may have lien rights against a property site. The directory (located at www.scnd.pa.gov) helps owners and general contractors track work performed by subcontractors, sub-subcontractors and suppliers.

Required notices under the act

The act creates a more structured notice procedure for owners and contractors on "searchable projects" (projects consisting of the construction, alteration or repair of an improvement costing at least \$1.5 million). Specifically, the act permits four new types of filings within the directory: (1) Notice of Commencement, (2) Notice of Furnishing, (3) Notice of Completion and (4) Notice of Nonpayment.

An owner (or an agent of the owner) is required to file a Notice of Commencement to trigger compliance with the act. A Notice of Commencement should be filed before any labor, work or materials are furnished for the project and must contain: (1) the full name, address and email address of the contractor; (2) the full name and location of the project; (3) the county in which the project is located; (4) a "legal description" of the property, including the tax identification number of each parcel included in the project; (5) the full name, address and email address of the project owner; (6) if applicable, the full name, address and email address of the surety for any performance and payment bonds, and the bond numbers;

and (7) the "unique identifying number" assigned the notice by the directory.

The owner must post this notice on the project site, make reasonable efforts to ensure it remains posted during the project, and ensure the notice is made part of the contract documents provided to all subcontractors. Contractors must include a provision in each of their subcontracts warning their subcontractors that the failure to file a Notice of Furnishing will forfeit the right to file a mechanics' lien.

If an owner files a Notice of Commencement, first- or second-tier subcontractors or suppliers must file a Notice of Furnishing within 45 days after first performing work or first providing materials on the job site, containing: (1) a general description of the labor or materials furnished; (2) the full name and address of the person supplying the services; (3) the full name and address of the person who contracted for the services; and (4) a description sufficient to identify the project. The directory will automatically send a copy of all Notices of Furnishing filed on a project to the project owner. The notices will be sent to the email address provided in the Notice of Commencement. The failure to timely file a Notice of Furnishing will result in a loss of lien rights. Just as important, the filing of a Notice of Furnishing does not absolve a subcontractor of strictly complying with the remaining requirements and deadlines for prosecuting a lien claim, as set forth in the lien law.

The act also permits (but does not require) an owner to file a Notice of Completion within 45 days of the "actual completion" of work on the project, for informational purposes. Additionally, subcontractors are permitted (but not required) to file a Notice of Nonpayment when they have not received payment in full for work or materials provided.

Practical implications of the amended lien law to oil and gas projects

The directory provides obvious benefits to owners and general contractors. Nevertheless, there is still much unknown with respect to how the act will impact energy infrastructure projects. Although the case law is not completely settled, it appears from the text of the lien law—and the body of case law developed from it to date—that many well pad development and pipeline construction projects are

Authors:



David E. White



Esther Soria Mignanelli

likely subject to the lien law. For example, a Pennsylvania appellate court has held that a “well for the production of gas, oil or other volatile or mineral substance” falls within the definition of a “structure or other improvement” governed by the lien law, so long as the well involves “the erection or construction of a permanent improvement.”

Additionally, lien rights can attach to subsequent “substantial additions” to an existing improvement (i.e., a previously constructed well pad or pipeline). Another Pennsylvania court opinion held the addition of plastics-making machinery to a preexisting plant was a “substantial” enough addition for the associated work to be covered by the lien law. This suggests that activities such as the installation of additional surface facilities or the erection of infrastructure necessary to tie a well into a pipeline are subject to the lien law.

For owners of oil and gas projects, the greatest amount of confusion to arise from the act will likely relate to providing a “legal description” of the property in the Notice of Commencement, and complying with the act’s posting requirements. In the directory, many owners have merely provided a single address as the “legal description.” This approach may not be practical or feasible for a pipeline construction project, where numerous parcels, deeds and easement agreements or eminent domain condemnations contribute to the scope of the “legal description” of the property. For these projects, owners might consider drafting a description of the property that includes the start and end points of the pipeline and provide a complete list of counties within which the pipeline will be situated. Additionally, owners should carefully consider how to comply with the act’s requirement to “conspicuously post” a copy of the Notice of Commencement at the project site. Given the transient nature of a given work site on a pipeline construction project, owners may consider posting the Notice of Commencement in their office trailers and any trailers belonging to their contractor.

As for their contracts, owners should contractually require contractors (and their subcontractors) to include a provision in each of their subcontracts, and for any subsequent subcontracts entered, warning their subcontractors that the failure to file a Notice of Furnishing will forfeit the right to file a mechanics’ lien. Contractors should require their subcontractors to include the same warning in their contracts with sub-subcontractors.

Given the current new face of the lien law and some of the uncertainties with respect to the lien law’s application to oil and gas projects, it is impossible to predict with certainty how courts will treat some of the filings submitted in the directory, and the representations made therein. Nevertheless, owners and contractors should take steps to ensure their business practices and construction contracts strictly conform to the act’s new requirements.

For additional information about developments described in this article, contact David E. White at 412-394-5680 or dwhite@babstcalland.com or Esther Soria Mignanelli at 412-394-6422 or emignanelli@babstcalland.com.