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Contractors and others involved in the construction industry should be aware of several new laws enacted this past year, and one enacted the year before, that take effect in 2012 and later. The new laws, which are intended to provide relief to the state's hard hit construction industry, provide for speedier progress payments, place caps on public works retention, establish new requirements for the filing of payment bond claims and limit the types of indemnity that can be required of downstream contractors and subcontractors:

Progress Payments

Beginning January 1, 2012, prime contractors on both public and private projects must pay progress payments to subcontractors no later than 7 days after receipt from the owner. Previously, progress payments were required to be made no later than 10 days after receipt. Prime contractors who fail to make progress payments within 7 days are subject to penalties of 2% per month, disciplinary action and attorneys' fees.

Public Works Retention

Beginning January 1, 2012, for public works contracts entered on or after January 1, 2012 and through January 1, 2016, public owners, original contractors and subcontractors may not withhold more than 5% retention with two exceptions: (1) where an original contractor requires performance and payment bonds in their request for bids and a subcontractor is unable or refuses to furnish performance and payment bonds, the original contractor may withhold retention from that subcontractor in excess of 5% or (2) where the director of the department contracting for the public works makes a finding, prior to bidding the project, that the project is substantially complex and requires the withholding of more than 5% retention. The new law does not change existing law, which permits public owners to withhold up to 150% of any disputed work.

Payment Bonds

Beginning January 1, 2012, for construction contracts entered into on or after January 1, 2012, payment bond claimants who do not have a direct contractual relationship with the original contractor and who did not serve a 20-day preliminary notice may still pursue such claims by giving written notice to the payment bond surety and bond principal. Notice must be given within 15 days after recordation of a notice of completion or, if no notice of completion is recorded, within 75 days after project completion. The new law, which applies to both public and private projects, does not apply to:

1. Laborers;
2. Claimants who supplied labor and/or materials to a subcontractor who has a direct contractual relationship with an original contractor who has been paid all progress payments except amounts disputed in good faith; or
3. Claimants who supplied labor and/or materials to a subcontractor who had a direct contractual relationship with an original contractor who has been terminated but who has been paid all progress payments except amounts disputed in good faith.

These three types of claimants must serve a 20-day preliminary notice in order to make a claim against an original contractor's payment bond.

The new law is intended to protect original contractors who may not know the identity of second-tier and lower subcontractors and materialmen who provided labor and/or materials on a project and who did not serve a 20-day preliminary notice, but who could nonetheless make a claim on the original contractor's payment bond.

Indemnity

Beginning January 1, 2013, for commercial construction contracts and public works contracts and amendments entered into on or after January 1, 2013, in which a downstream contractor or subcontractor is required to indemnify and/or defend an owner or upstream contractor against liability caused by the owner or upstream contractor's "active negligence or willful misconduct," for design defects, or for claims that do not arise out of the scope of work performed by the downstream contractor or subcontractor – are void and unenforceable. The new law will apply irrespective of choice-of-law provisions purporting to apply the law of another state and irrespective of any provision in the contract purporting to waive the new law. However, the new law does not apply to residential construction contracts (in which Type I indemnity provisions are already prohibited), contracts with design professionals, owner-controlled insurance programs (OCIPs) and contracts with owner-builders.

It may seem early to begin thinking about 2013 changes, but owners, contractors and subcontractors should carefully review the indemnity provisions in their form contracts this year. If they include Type I indemnity provisions subject to the new law, these provisions will become void and unenforceable beginning January 1, 2013, which may have the effect of leaving them with no indemnity provisions at all.

Construction Payment Remedies

Beginning July 1, 2012, as part of legislation enacted in 2010, the construction payment remedy provisions found at Civil Code section 3082 et seq. will be re-codified at Civil Code sections 8000 et seq. The legislation, sponsored by the California Law Review Commission, is intended to simplify and clarify existing law and includes the following changes:

- **Preliminary notices and waivers and releases:** The statutorily required language for preliminary notices and conditional and unconditional waiver and releases will change. Preliminary notices on private projects will be required to be served on construction lenders whose identity will be required to be disclosed in construction contracts. If a construction loan is obtained after commencement of a project, the identity of the construction lender will be required to be given to those serving preliminary notices.
- **Definition of "completion" and notices of completion:** The definition of "completion" – which is important because it starts the time to record a mechanic's lien, file a stop notice and make a bond claim – will no longer include acceptance by the owner. Owners will be able to record separate notices of completion where there are multiple prime contractors. The deadline to record notices of completion will be extended from 10 days to 15 days following project completion.
- **Design professional liens and landscape contractors:** There will no longer be a separate design professional lien. Design professionals will be able to record mechanic's liens, which they had also been able to do under previous law-. Licensed landscape architects will be included within the definition of "design professional" and will be able to record mechanic's liens.

In addition, clarifying legislation enacted in 2011, provides a 30 day grace period for design professionals to convert design professional liens to mechanic's liens, and clarifies that the proof of service affidavit which must accompany mechanic's liens beginning January 1, 2011 must now not only include the name of the property owner but also the title or capacity of the person or entity served with the mechanic's lien.

- **Petitions to expunge and lien release bonds:** Parties prevailing on a petition to expunge a mechanic's lien will be able to recover the full amount of their reasonable attorney's fees rather than the previous maximum of \$2,000. The statutory amount of lien release bonds will be reduced from 150% to 125% of the amount set forth in mechanic's liens.

- **Terminology:** Many of the terms used under the previous law will change. The term “original contractor” will be replaced with “direct contractor,” “materialman” will be replaced with “material supplier,” “stop notice” will be replaced with “stop payment notice” and “20-day preliminary notice” will be replaced with “preliminary notice.”

The 2012 changes to the state’s construction laws range from technical to sweeping, but are collectively some of the most wide-ranging changes we have seen in the state’s construction laws in recent years. Owners, contractors, subcontractors and others involved in the construction industry should ensure that they review their form contracts, check their statutory deadlines, and make sure that they are following proper procedures when enforcing their payment remedies.