



Virginia Mechanic's Lien Update

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Contractors and property owners undertaking construction projects in Virginia should take note that the Virginia Legislature has amended the Virginia Mechanic's Lien Statute, effective July 1, 2013.

In sum, the Legislature has added a new Section 43-3 (D) that requires anyone performing labor without a valid contractor's license or certificate, or without the proper class of license for the value of work performed, when such a license or certificate is required by law for the labor performed shall not be entitled to a mechanic's lien. (In a sense this codifies prior rulings from state courts that an unlicensed contractor cannot assert a mechanic's lien.) The Legislature also amended the statutory memorandum of lien forms for contractors, subcontractors and sub-subcontractors to now include lines for the lien claimant to provide its license or certificate number, the date of issuance of the license or certificate and the date of expiration. The Legislature also provided in the statutory amendments that any inaccuracy in the memorandum of lien as to the lien claimant's license or certificate number or the date of issuance or expiration will not bar a person from perfecting a lien if the claimant can otherwise be reasonably identified in the records of the Virginia Board for Contractors. Such terms may prove to be of limited use to salvage a lien because the lien statute calls for a memorandum of lien to comply "substantially in form and effect" to the statutory forms. With the newly amended forms now including lines for the contractor license information, will the omission of license information mean that the memorandum of lien does not comply "substantially in form"? This appears to be a contradiction within the statute that the courts will have to address or that the Legislature will have to address at the next session.

Another amendment appears in Code Section 43-4.01 to require that a contractor's notice to a mechanic's lien agent must include the contractor's license or certificate number as well as the dates of issuance and expiration.

On the judicial side, the Circuit Court of Fairfax County issued a decision in January, 2013 on the necessary parties to a lawsuit to enforce a mechanic's lien claim when the lien has been "bonded-off". In *Johnson Controls v. Norair Engineering Corp*, Johnson Controls was a second tier subcontractor to Norair, a first tier subcontractor. Johnson filed a mechanic's lien to which Norair filed a substitute bond, i.e. Norair "bonded-off" the mechanic's lien. Under Virginia law, when suing to enforce a mechanic's lien that has been bonded-off, the claimant must still prove all the elements of a cause of action to enforce the lien. When Johnson sued to enforce its lien claim, Johnson included multiple counts in the lawsuit, one count being a claim against the bond and naming the bond surety. Johnson, however, did not name Norair in the count against the bond. Johnson did name Norair as a defendant in other counts of the lawsuit, so Norair was on notice of the lawsuit. Responding to Norair's motion to dismiss the bond count, the court ruled that Norair was a "necessary" party to the count against the bond, and Johnson's failure to name Norair in the bond count resulted in dismissal of that count. The court reasoned that, because

the count against the bond did not name Norair, then Norair would not have an opportunity to challenge Johnson's lien, or to present defenses to the bond claim generally. Further, because the six month statute of limitations on suing to enforce a mechanic's lien had expired, Johnson Controls was out of time to amend the count against the bond to include Norair.

Virginia mechanic's liens are prickly with procedural and substantive traps for the unwary. Be sure that you are up-to-date with the latest nuances to protect your interests.

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