

Preserving Claims Under Section 137(3) of the State Finance Law, author Andrew Richards, Esq., STA Legal Log, January 2022

Sub Contractors Trade Association (STA), Legal Log

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State Finance Law section 137 generally requires prime contractors to obtain a payment bond for public projects to protect subcontractors, sub-subcontractors and materialmen from non-payment by the prime contractor. Notwithstanding the fact that this law provides payment security for many subcontractors and materialmen, there are condition precedents that a claimant must follow to maintain a claim. First, the claimant must wait 90 days after the last day labor or materials were provided to the project to file a lawsuit. Second, the claimant must commence an action on the bond no later than one year after the public improvement was completed and accepted by the owner.

Third, and commonly overlooked by claimants, is the requirement that a sub-subcontractor or a materialman of a subcontractor must provide written notice of its claim to the prime contractor within 120 days from the last day material or labor was provided to the project. The notice must state with substantial accuracy the amount claimed and the name of the party to whom the material or labor was finished. Many parties who do not have a contract with the prime contractor fail to serve this notice because they either do not know of the requirement, or they are told by the subcontractor that they will get paid or that the subcontractor has not yet been paid. Failure to make payment by the prime contractor to the subcontractor does not extend the time to serve the notice. In addition, the notice must be served personally or by registered mail upon the prime contractor. However, if the prime contractor receives actual notice by another means the condition precedent will be deemed fulfilled.

It is important for the sub-subcontractor or materialman to be vigilant and serve the notice no matter what promises of payment are made by the subcontractor. Also, a good practice is to obtain the payment bond from the owner at the beginning of the project so that it is available when the notice or claim is made. As a claimant, you do not want to run up against the limitations period for the notice or the claim while waiting for a copy of the bond.