

Construction Law Updates

What's Keeping the Construction Industry Up at Night – and How to Get Some Sleep!

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Legislative Changes Payment Requirements and Contractual Provisions



Pay-if-Paid now prohibited, with a few exceptions.



Statutory requirements governing timing of payment.



Statutory requirements regarding notice of nonpayment.



Exceptions to statutory requirements.



Legislative Changes Payment Requirements and Contractual Provisions



- A “**pay-if-paid**” clause typically makes the owner’s payment of the general contractor a condition precedent to any obligation for the general contractor to pay its subcontractors.
- In contrast, a “**pay-when-paid**” provision typically allows an unpaid general contractor to delay payment to subcontractors for a reasonable time—payment by the owner is not a condition precedent under a “pay-when-paid” provision.



Legislative Changes Payment Requirements and Contractual Provisions



- **April 2022: Governor Youngkin signs Senate Bill 500**
 - **Banned use of pay-if-paid clauses** on public and private construction projects in Virginia.
 - Required GCs to take on an **express obligation** to pay their subcontractors **and** established fixed deadlines to do so.
- “**Workgroup**” Established
 - Changes went into effect July 1, 2023



Legislative Changes Payment Requirements and Contractual Provisions



- **Prompt Payment Act – Virginia Public Procurement Act, Article 4**

Code of Virginia

[Table of Contents](#) » [Title 2.2. Administration of Government](#) » [Subtitle II. Administration of State Government](#) » [Part B. Transaction of Public Business](#) » [Chapter 43. Virginia Public Procurement Act](#) » [Article 4. Prompt Payment](#) » [§ 2.2-4354. Payment clauses to be included in contracts](#)

- **Title 11. Contracts (Private Projects)**

Code of Virginia

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Legislative Changes Payment Requirements and Contractual Provisions



- **Pay-if-Paid provisions prohibited and unenforceable in all public and private construction contracts.**
- **Exceptions:**
 - **Private Projects – Payment by owner “shall not be a condition precedent to payment to any subcontractor . . . unless the [owner/contracting party] is *insolvent* or a *debtor in bankruptcy*.” (emphasis added)**
 - **Public Projects – Nothing in Va. Code § 2.2-4354 applies to contracts awarded solely for professional services from an *architectural or engineering* firm.**



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Legislative Changes Payment Requirements and Contractual Provisions



- **Payment Obligations**
 - **Public & Private Projects - GC must pay subcontractor within the *earlier* of:**
 - **60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the subcontractor has invoiced, or**
 - **7 days after receipt of amounts paid by owner to GC for that work.**
 - **Private Projects - *Owner* must pay GC within 60 days of receiving an invoice**



Legislative Changes Payment Requirements and Contractual Provisions



- **Notice Requirements for Nonpayment / Withholding**
 - **Public & Private Projects**
 - **If contractor withholds payment, must notify subcontractor in writing within 50 days of receiving an invoice of intent to withhold payment *and* reason for nonpayment.**
 - **Notice must include: (1) the contractual noncompliance, (2) dollar amount being withheld, and (3) the lower-tier subcontractor responsible for the contractual noncompliance.**
 - **Private Projects - Owner must notify contractor within 45 days of receiving invoice of intent to withhold all or part of invoice, “specially identifying the contractual noncompliance and the dollar amount being withheld.**



Legislative Changes Payment Requirements and Contractual Provisions



- **Interest**
 - Penalties on public and private projects are the same.
 - Failure of owner/GC/subcontractors to “make timely payment as provided” “shall result in interest penalties consistent with § 2.2-4355.”



Legislative Changes Payment Requirements and Contractual Provisions



- **Exceptions to statutory requirements:**
 - Retainage
 - Single-family residential construction projects
 - Aggregate value of the project is less than \$500,000





Legislative Changes

Payment Requirements and Contractual Provisions



- **Conclusions**
 - Do the changes matter?
 - Pay Attention to Obligations
 - Contract Drafting

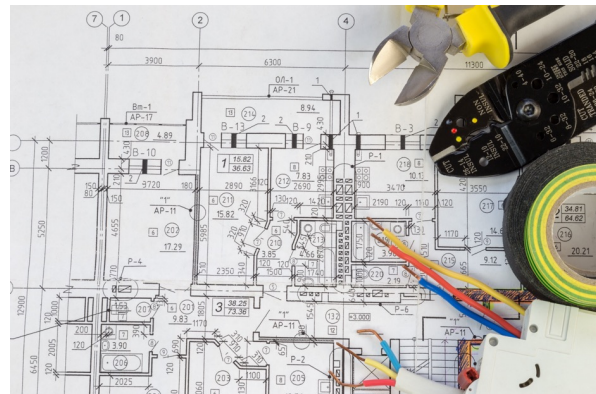


Mechanic's Liens

A Primer on Timing



- **90-Day Rule**
- **150-Day Rule**
- **Mechanic's Lien Agents and Notice to the Agent**
- **Requirements strictly enforced**





Mechanic's Liens A Primer on Timing



- **Code of Virginia: Title 43, Chapter 1**

[Code of Virginia](#)

[Table of Contents](#) » [Title 43. Mechanics' and Certain Other Liens](#) » [Chapter 1. Mechanics' and Materialmen's Liens](#)

- **§ 43-3. Lien for work done and materials furnished; waiver of right to file or enforce lien.**
 - ML available to anyone supplying labor or furnishing materials worth \$150 or more for the “construction, removal, repair or improvement of any building or structure permanently annexed to the freehold...”
 - May not waive or diminish lien rights in a contract in advance of furnishing labor, service, or materials.
 - Must have a valid license or certification issued by Board of Contractors.



Mechanic's Liens A Primer on Timing



- **Step 1: Memorandum of Mechanic's Lien**
 - Must be filed in clerk's office in county/city where property is located. (Va. Code § 43-4)
 - Must include name & address of owner, GC, claimant; amount being claimed; description of property on which lien is claimed. (Va. Code § 43-4)
 - Safe harbor for substantial compliance (Va. Code § 43-15)



Mechanic's Liens A Primer on Timing



- **Step 2: Timing Requirements**
 - **90-Day Rule (Va. Code § 43-4)**
 - **150-Day Rule (Va. Code § 43-4)**
 - **Does *not* apply to:**
 - Sums withheld as retainage up to 10% of the contract price, or
 - Sums not yet due because of nonpayment to the party with whom the lien claimant contracted.
 - **Strict Compliance**
 - **Practical Considerations**
 - **Notice Trap for Residential Contractors**



Mechanic's Liens A Primer on Timing



- **Step 3: Enforcement of Lien**
 - **File enforcement action within 6 months of filing ML or within 60 days of project completion/termination (whichever is later). (Va. Code §§ 42-17, 42-22)**
 - **Owner Defenses (Va. Code § 43-7)**
 - **Joinder of Contractual Claims**
 - **Challenging Lien Validity (Va. Code § 43-17.1)**



Mechanic's Liens A Primer on Timing



- **Challenging / Removing the Lien**
 - **Challenging Lien Validity (Va. Code § 43-17.1)**
 - **Bonding off the Lien (Va. Code § 43-70, 43-71)**
 - **Release of mechanic's lien upon payment or satisfaction (Va. Code § 43-67)**



Notice Requirements



- **Contractual notice compliance vs. actual notice**
 - **Virginia case law protects the ability to impose strict notice requirements, and the parties must carefully comply with such contractual notice requirements.**
 - **Actual notice that does not satisfy the contract is insufficient.**
 - ***Commonwealth v. AMEC Civil LLC*, 280 Va. 396, 699 S.E.2d 499 (2010)**
 - **Though AMEC Civil provided actual written notice, the Supreme Court of Virginia held that this was insufficient to satisfy the contractual requirements and the strictly construed statutory requirements on which the contract was based.**



Notice Requirements



- **Public vs. private projects**
 - Notice requirements 100% strictly enforced on public projects
 - 98%+ likely to be enforced on private projects as well
- ***SNC-Lavalin Am. Inc. v. Alliant Techsystems, Inc.*, 2011 U.S. Dist. LEXIS 118312 (W.D. Va. 2011)**
 - Dispute between a contractor and subcontractor
 - The Terms and Conditions stated that the “failure to provide notice within the prescribed time period will serve as an absolute bar and complete waiver of Contractor’s right to recover for any increases in the Contract Price or Contract Time resulting from the change.”
 - Court: Actual notice is not sufficient.
 - The contractual notice requirements must be strictly met and followed - even when the subcontractor claims that the changes were directed by the general contractor.



Notice Requirements



- **The Notice**
 - Form
 - Contents
 - Timing
- ***Coleman-Adams Construction, Inc. v. Mills Heating & Air Conditioning, Inc.*, 93 Va. Cir. 442 (2016)**
 - The Court applied *AMEC Civil* and *Alliant*, enforcing the contractual notice requirements.
 - Upstream notice requirements were flowed down to Mills and were binding.
 - A written claim document “must clearly give notice of the contractor’s intent to file its claim.”
 - Mills offered communications that were given within the contractually specified time period but failed to clearly give such notice
 - Other communications provided actual notice but fell outside the prescribed window.
 - Because none of the communications offered by Mills complied with the contract’s notice requirements, the court granted Coleman-Adams’s plea in bar and dismissed the complaint.



Indemnification Provisions



- **Va. Code § 11-4.1**
 - **Prohibits any provision contained in any construction contract by which the contractor purports to indemnify another party against liability** “caused by or resulting solely from the negligence of such other party or his agents or employees.”



Indemnification Provisions



- ***Uniwest Construction, Inc. v. Amtech Elevator Services, Inc.*, 280 Va. 428, 699 S.E.2d 223 (2010)**
 - **Virginia’s anti-indemnity statute actually prohibits indemnification for the indemnitee’s own negligence in *all* circumstances—not just where the indemnitee is *solely* negligent.**
- **After *Uniwest*, construction contracts in Virginia cannot include an indemnity provision which covers any portion of the indemnitee’s own negligence, even if the resulting damages are also caused by another party’s negligence.**



Indemnification Provisions



- **Enforceable Indemnity:**
 - **Include Savings Provisions:**
 - “To the fullest extent permitted by law”...
 - **Include specific language which ties the indemnity obligations to the proportional amount of fault of the parties:**
 - “Contractor shall indemnify the Owner in an amount proportional to the amount of Contractor’s own negligence or fault (and the negligence or fault of its subcontractors), compared to the proportional amount of fault, if any, attributable to the parties indemnified hereunder.”



Indemnification Provisions



- **Subsequent caselaw narrowing impact of *Uniwest*:**
- § 11-4.1 **only applies to “contracts relating to . . . construction.”**
 - **Material sales and equipment rentals are not construction contracts.**
 - **The purchase from an architect of plans for a building to be constructed without the architect’s participation, while related to construction in the abstract, would not be a “contract related to construction.”**
- **Contracts that merely procure designs, materials, or equipment for construction projects, without creating ongoing obligations during the actual building phase, may not be subject to the same anti-indemnity provisions as broader agreements.**



Indemnification Provisions



- **Va. Code § 11-4.4: Prohibition of “duty to defend” obligations in contracts with design professionals:**
 - **Any provision contained in any contract relating to the planning or design of a building, structure, or appurtenance thereto, including moving, demolition, or excavation connected therewith, or any provision contained in any contract relating to the planning or design of construction projects by which any party purports to impose a duty to defend on any other party to the contract, is against public policy and is void and unenforceable.**
- **The effect of this change is that the inclusion of a duty to defend obligation renders the entire provision void and unenforceable.**
- **This change applies to any provision in a qualifying contract, not only a provision titled as an “indemnification” provision.**



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QUESTIONS?



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