Bill Patterson (Research)

From: Dave Simpson <Dsimpson@carolinasagc.org>
Sent: Friday, February 28, 2014 12:27 PM
To: Bill Patterson (Research)
Cc: Berry Jenkins
Subject: House Committee on Mechanics Liens and Leashold Improvements

Bill,

Thank you for seeking our input on the legislative proposals the House Committee on Mechanics Liens and Leasehold Improvements is likely to consider at Monday's meeting. We have two major concerns about the changes NCLTA has proposed:

Concerning the proposed changes to N.C. Gen. Stat. s. 44A-11.1(a), we believe it would be problematic and inappropriate to introduce a lien agent into an existing construction project. Late appointment of a lien agent would be particularly prejudicial to early-performing subcontractors and suppliers, who may complete furnishing their labor and/or delivering their materials prior to the lien agent's appointment. Therefore, they would have no way of obtaining information about same. The burden should remain on owners to appoint a lien agent at the beginning of a project only, so that every prime, subcontractor or supplier who subsequently performs work on or delivers materials to the project site have an equal opportunity to know about the lien agent and protect their lien rights by serving a timely Notice to Lien Agent.

Concerning changes to N.C. s. 44A-20(d), the suggested language could seriously undermine the effectiveness of North Carolina's claim of lien upon funds. For example, it's not unusual for prime contractors to begin site work activities in the days immediately before construction financing closes, and in virtually all such cases, the title insurer for the lender will obtain a subordination agreement from the prime as a condition of closing on the loan transaction. NCLTA's proposal would effectively allow owners to ignore every Notice of Claim of Lien Upon Funds it receives from that point forward, as the prime's subordination of its own lien rights would eliminate the rights of its subcontractors to assert "direct liability" liens post-subordination. It also is noteworthy that this proposal represents a significant departure from existing law, which has always observed a sharp distinction between subcontractors' "subrogation" lien rights (i.e., those lien rights derived from the prime contractor's lien rights) and "direct liability" lien rights (i.e., those lien rights derived from an owner's wrongful payment to a prime). North Carolina law has not previously allowed the act of a prime contractor to impair the "direct liability" lien rights of subcontractors. That would change, however, if NCLTA's proposal became law, and would have the effect of weakening the ability of subcontractors and suppliers to secure their payment rights.

CAGC needs additional time to fully consider Brian Schoolman's and Henry Jones' proposal concerning liens on leaseholds, but it certainly appears to represent a solid starting point for the discussion. We look forward to being a part of that discussion going forward. Unfortunately, I will not be able to attend the Monday meeting, as I will be at our AGC Convention.

DS

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