

Notice, Claim & Lawsuit Deadlines

by Bernard S. Kamine

Definitions of Key Terms.....	2
Mistake in Bid	3
Substituting a Listed Subcontractor.....	4
Confirming a Supplier's Bid	4
"Or-equal" Submission	5
Preliminary Notice	6
Payment Bond Claim Notice	8
Mechanics Lien.....	9
Stop Payment Notice	11
Government Code Claim	12
Lawsuit	13

Construction activity is so important to California's economy that the state constitution assures payment to contractors and suppliers for their contributions to real property (Cal. Const. Art XIV, § 30). However, the details are left to the legislature. That has resulted in a continual tug-of-war among owners, contractors, subcontractors, suppliers and lenders that keeps twisting the mechanics lien laws. Those statutes continually become more and more complex. Today, they have numerous and confusing time limits for various actions required of contractors. The penalty for missing one of those deadlines could be severe: A contractor's right to pursue a mechanics lien, stop payment notice or bond claim could be completely lost.

Effective July 1, 2012, a wholesale rewrite of the mechanics lien laws went into effect. In addition to other changes, the revision altered the sequence and numbering of statutory provisions. It also substituted new terminology for words and phrases that had been employed for years.

Here is a checklist of the critical time deadlines – with the new terminology and the new statutory references. Also included are deadlines in laws governing withdrawing bids, replacing subcontractors, confirming supplier bids, submitting an equal, and enforcing those

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rights.

DEFINITIONS OF KEY TERMS

Work of Improvement: Construction, alteration, repair or demolition of, or on, any building or other structure, ditch, well, tunnel, road or landscaping, or the change in the grade of any land (Civ. Code § 8050). In other words, a construction project.

Direct Contractor or Prime Contractor: A contractor who has a direct contractual relationship with an owner (Civ. Code § 8018).

Private Work: Any work of improvement contracted for by an owner who is not a public agency. In other words, a privately-owned construction project. Watch out for confusion caused by public authorities and public corporations that look like private owners, and privately owned public utilities that look like public agencies. What they are governs, not how they appear.

Public Work: Unlike the old statute, the new one does not specifically define "public work" (previous Civ. Code § 3100). Instead it defines "public works contract" as one for "the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind" (Civ. Code § 8038 and Pub. Cont. Code §1101). The new statute does not identify the range of possible public parties to such contracts. Civil Code § 8036 defines "public entity" as "the state, Regents of the University of California, a county, city, district, public authority, public agency and any other political subdivision or public corporation in the state." But other public agencies, and sometimes private entities, can enter into the kind of public works contract the statute defines (see Pub. Cont. Code §§ 1100 and 1100.7 and Labor Code § 1720 et seq.).

Completion of a Private Work: Completion is generally the date when the **first** of these events occurs (Civ. Code § 8180(a)):

-2-

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- (a) The work of improvement is actually completed;
- (b) The work of improvement is occupied and used by the owner and there is a cessation of labor;
- (c) There has been a cessation of labor for 60 continuous days; **or**
- (d) A notice of cessation of labor is recorded, but only if there had been a cessation of labor for 30 continuous days before it was recorded.

However, if the private work must be "accepted" by a public entity (Civ. Code § 8036), *e.g.*, a storm drain in a new subdivision that is being installed by the developer, but which must be "accepted" by the public agency that will take over its operation, then the work is not complete until the acceptance by the public agency (Civ. Code § 8180(b)). These changes in the definition of completion impact deadlines for private works mechanics liens, stop notices and bond claims

Completion of a Public Work: Completion of a public work is the earlier of the date

- (a) When the public entity formally accepts the work; **or**
- (b) When, except for state projects, no work has been done on the project for 60 consecutive days (Civ. Code § 9200).

Watch out for projects where work stops for more than 60 days, but later starts up again. The time for stop payment notices and claims against the payment bond may run from the 61st day of the work stoppage, not the later completion and acceptance of the project (*W. F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 CA4th 1101, 20 CR2d 468). Again, these definitional changes impact deadlines for public works stop notices and bond claims.

MISTAKE IN BID

A contractor cannot refuse to honor its bid on a public work without risking a claim against the bid bond submitted with the bid. There is an exception to this rule for certain mistakes in a bid (Pub. Cont. Code § 5101). But notice of the mistake must be given under the following procedure:

Notice of Mistake in Bid: Deliver notice to the public entity within 5 **working**

-3-

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days, excluding Saturdays, Sundays and state holidays, after the bid opening. The notice must specify in detail how the mistake was made (Pub. Cont. Code § 5103).

SUBSTITUTING A LISTED SUBCONTRACTOR

Most bids for public works must include a list of the subcontractors who will perform more than 1/2 of 1% of the work (Pub. Cont. Code § 4100 et seq.; compare City of Los Angeles Admin. Code § 10.14 which requires listing subcontractors who will do more than 1/2 of 1% or \$10,000 worth of the work, whichever is greater). Listed subcontractors can only be changed with the permission of the public agency under the following procedures:

Notice of Clerical Error in Bid: Deliver notice to the awarding authority, the erroneously listed subcontractor, and the subcontractor who should have been listed within 2 **working** days after the bid opening (Pub. Cont. Code § 4107.5).

Objections by the Erroneously Listed Subcontractor: Deliver objections to the awarding authority and the prime contractor within 6 **working** days after bid opening (Pub. Cont. Code § 4107.5).

Notice of Other Request to Substitute a Subcontractor: No time limit for prime contractor request, but awarding authority (or its duly authorized officer) must send notice by certified mail, stating the reasons why the substitution is sought, to the subcontractor who will be substituted out (Pub. Cont. Code § 4107).

Objections to the Substitution by the Subcontractor: Deliver written objections to the awarding authority within 5 **working** days after the notice of request for substitution is sent. Failure to object amounts to consent to the substitution (Pub. Cont. Code § 4107).

CONFIRMING A SUPPLIER'S BID

A subcontractor must honor its bid (a) if the prime contractor relied on that bid in

-4-

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preparing its own bid to the owner and (b) if the prime contractor accepts the subcontractor's bid within a reasonable time (*Drennan v Star Paving Co.* (1958) 51 C2d 409, 413-15, 33 P2d 757). The same rule does not govern supplier's bids. Instead, the following statutory procedures apply:

Oral bid under \$2,500: Does not have to be confirmed by the contractor. Supplier is held to the bid for 90 days, or 10 days after award of the contract, whichever occurs first (Com. Code § 2205).

Oral bid over \$2,500: Confirm supplier's bid in writing within 48 hours of receipt of the bid (not 48 hours of the bid opening), in order to hold the supplier to that bid for 90 days, or 10 days after award of the contract, whichever occurs first (Com. Code § 2205).

Written bid: Does not have to be confirmed by the contractor. Supplier is held to the bid for 90 days, or 10 days after award of the contract, whichever occurs first – unless the bid specifies a different expiration date for the bid (Commercial Code § 2205).

"OR-EQUAL" SUBMISSION

Private Work: Acceptance of "equal" items is **not** mandatory on private works. However, prudent owners often include an "or equal" clause to get the most economical construction. If there is an "or equal" clause in a private work contract, it will set forth the time limit, if any, for submission of data about the proposed equal.

Sole-sourcing on State or Local Agency Public Work: Sole-sourcing of a material, product, thing or service is allowed for only four reasons, and, then, only if the awarding authority or its designee (*e.g.*, the city engineer) made a finding that one of the four reasons applies, **and** that finding is described in the invitation for bids or the request for proposals. If no such justification appears, the agency must accept equals. The four reasons are: (1) to conduct a field test or experiment of the product, (2) to match existing products in use on the particular public work, (3) to obtain a product that is only available from one source, and (4)

-5-

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to respond to an emergency. Public Contract Code §§ 3400(c) and 10129(b).

Time to Submit Or-equal Proposal: The contract documents can set forth the period of time prior to or after award of the contract for submission of data substantiating a request for a substitution of an equal item; if no period is specified, the data must be submitted within 35 days after award (Pub. Cont. Code § 3400 for all public agencies except those governed by Pub. Cont. Code § 10129(a) in the State Contract Act, which governs projects of state Departments of Boating & Waterways, Corrections, General Services, Transportation, and Water Resources). Subcontractors who will perform work later in the project must be alerted to the need to submit their "or equal" data within the contract time limit.

Federal Project: The or-equal requirements and sole-sourcing prohibition are contained in the Federal Acquisition Regulations and vary from job to job.

PRELIMINARY NOTICE

Private Work Preliminary Notice (Civ. Code § 8034(a)): All subcontractors (Civ. Code § 8046), material suppliers (Civ. Code § 8028), design professionals (Civ. Code §§ 8014 and 8300), and providers of services or equipment (Civ. Code §§ 8004, 8022, 8048, 8400, 8520), but not laborers (Civ. Code § 8200(e)(1)), must deliver a preliminary notice, or send it by certified mail, express mail, or overnight delivery by an express service carrier (Civ. Code §§ 8106 and 8110), to the reputed direct (prime) contractor, the reputed owner and the reputed construction lender. Trade contractors who have direct contracts with the owner are no longer considered to be subcontractors under the preliminary notice requirements (Civ. Code §§ 8018, 8046 and 8200(e)(2)). However, **all direct contractors now must give a preliminary notice to the reputed construction lender** to preserve their mechanics lien and bond claim rights (Civ. Code §§ 8200(c),(d) and (e)(2) 8410 and 8612(a)).

Except for design professionals, the notice is to be given within 20 days after the

-6-

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first labor, services, equipment or materials are furnished to the jobsite. If the notice is late, it only covers labor, services, equipment or materials furnished during the 20 days before the notice was given and any furnished after it was given (Civ. Code § 8204(a)). Design professionals must give the notice within 20 days after commencement of work (Civ. Code §8204(b)). A notice that contains an accurate general description of the labor, services, equipment and materials provided through the date of the notice will cover everything provided after the notice, even if everything fails to fall within the general description in the notice (Civ. Code § 8206(b)).

If the notice is not given, no stop payment notices nor mechanics liens are enforceable (Civ. Code §§ 8410 and 8508(a)). Failure to give the notice also bars any claim against a payment bond, unless the alternative procedure described under Payment Bond Claim Notice, below, is followed (Civ. Code § 8612(a)).

Public Work Preliminary Notice (Civ. Code § 8034(b)): Neither laborers, nor anyone who has a direct contractual relationship with the direct (prime) contractor (*i.e.*, 1st tier subcontractor or supplier), has to give the notice (Civ. Code § 9300(b)(2)). Anyone else who provided labor, service, equipment or materials for the work (Civ. Code §§ 8022, 8048 and 9100), under authority from a direct contractor (Civ. Code § 8018), subcontractor (Civ. Code § 8046), architect, project manager, or other person having charge of any part of the work, must give the notice. It must be delivered, or sent by certified mail, express mail, or overnight delivery by an express service carrier (Civ. Code §§ 8106 and 8110), to the public entity and the direct contractor (Civ. Code §§ 9300 and 9302). If the work is for the California Department of Public Works or Department of General Services, it must go to the disbursing officer of the department constructing the work (Civ. Code § 9302).

The notice only covers labor, services, equipment or materials furnished during

-7-

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the 20 days before the notice was given and any furnished after it was given (Civ. Code § 9304).

If the notice is not given, no stop payment notice is enforceable (Civ. Code § 9500(a)). Failure to give the notice also bars any claim against a payment bond, unless the alternative procedure described under Payment Bond Claim Notice, below, is followed (Civ. Code § 9560(b)).

Federal Project: No Preliminary Notice is required on federal projects. See Payment Bond Claim Notice, below.

PAYMENT BOND CLAIM NOTICE

Private Work: If a timely Preliminary Notice is given, no other notice is required. If a Preliminary Notice is **not** given, then the subcontractor or supplier must deliver a payment bond claim notice, or send it by certified mail, express mail, or overnight delivery by an express service carrier (Civ. Code §§ 8106, 8110 and 8614), to the payment bond surety and principal (usually the prime contractor, but can be the owner) within 15 days after a Notice of Completion was recorded, and if none was recorded, then within 75 days after completion of the project (Civ. Code § 8612(b)). An attempt has been made to prevent a subcontractor or supplier to a subcontractor (*i.e.*, 2d tier subcontractor or supplier) from using the 15/75 day notice to preserve its payment bond claim when the 1st tier subcontractor received all of the progress payments to which it was entitled (Civ. Code. § 8612(c) and (d)). The language in the statute is hopelessly ambiguous and confusing. However, 2d tier subcontractors and suppliers should give preliminary notices to avoid losing their right to pursue a payment bond claim.

Public Work: If a timely Preliminary Notice is given, no other notice is required (Civ. Code § 9560(a)). If a Preliminary Notice is **not** given, then the subcontractor or supplier must deliver a payment bond claim notice, or send it by certified mail, express mail, or overnight

-8-

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delivery by an express service carrier (Civ. Code §§ 8106, 8110 and 9562), to the payment bond surety and principal, usually the direct (prime) contractor, within 15 days after a Notice of Completion was recorded, and if none was recorded, then within 75 days after completion of the project (Civ. Code § 9560(b)). An attempt has been made to prevent a subcontractor or supplier to a subcontractor (*i.e.*, 2d tier subcontractor or supplier) from using the 15/75 day notice to preserve its payment bond claim when the 1st tier subcontractor received all of the progress payments to which it was entitled (Civ. Code. § 9560(c) and (d)). The language in the statute is hopelessly ambiguous and confusing. However, 2d tier subcontractors and suppliers should give preliminary notices to avoid losing their right to pursue a payment bond claim.

Federal Project: No payment bond notice is required from subcontractors or suppliers to the prime contractor. However, subcontractors of subcontractors and suppliers of subcontractors must give notice to the prime contractor, within 90 days after the **last** of the labor, services, equipment or materials were provided, stating the amount claimed and the subcontractor to whom the labor, services, equipment or materials were provided. The notice must be delivered by any means that provides written, third-party verification of delivery or in any manner in which a summons can be served (40 USC § 3133).

MECHANICS LIEN

A mechanics lien must be recorded within a specified window of time (*Howard S. Wright Construction v. BBIC Investors, LLC* (2006) 136 CA4th 228, 38 CR3d 769). A lien recorded **before** the claimant has ceased furnishing labor, services, equipment or materials to the project is likely to be found to be premature.

Notice and Proof of Service: No lien is enforceable unless it includes (1) the statutory "Notice of Mechanics Lien" and (2) a "proof of service affidavit" showing that both the

-9-

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lien and the new notice were served on the reputed owner by certified mail, or first-class mail (evidenced by a certificate of mailing), postage prepaid, addressed to the reputed owner of the property at his/her residence, place of business, address on the building permit or address on the recorded construction trust deed (Civ. Code § 8416).

Direct (Prime) Contractor: Record lien "**after** the contractor completes the direct contract" and either (1) **before** 60 days after a Notice of Completion or Notice of Cessation was recorded or (2) **before** 90 days after Completion of the Private Work (Civ. Code § 8412). If the owner of a project (other than the owner's personal residence in a building with four or fewer residential units) fails to deliver a copy of the Notice of Completion or Notice of Cessation, or send it by certified mail, express mail, or overnight delivery by an express service carrier, to the direct contractor within 10 days after it is recorded, then the time is extended to **before** 90 days after the notice was recorded (Civ. Code §§ 8106, 8110 and 8190).

Subcontractor and Supplier: Record lien "**after** the claimant ceases to provide work" and either (1) **before** 30 days after the Notice of Completion or Notice of Cessation is recorded or (2) **before** 90 days after Completion of the Private Work (Civ. Code § 8414). If the subcontractor/supplier gave the owner a Preliminary Notice, **and** the project is not the owner's personal residence in a building with four or fewer residential units, **and** the owner fails to deliver a copy of the Notice of Completion or Notice of Cessation, or send it by certified mail, express mail, or overnight delivery by an express service carrier, to the subcontractor/supplier within 10 days after it is recorded, then the time is extended to **before** 90 days after the notice was recorded (Civ. Code §§ 8106, 8110 and 8190).

Design Professional: Design professionals have a special lien right between the time the building permit or other governmental approval is obtained and the time that construction work commences (Civ. Code §§ 8302 and 8304). The lien expires when either (1)

-10-

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construction starts or (2) 90 days after the lien was recorded (Civ. Code § 8306); however, it can be converted into a mechanics lien under certain circumstances (Civ. Code § 8319). Once construction commences, the design professional has the same rights to a mechanics lien as anyone else who provided services to the project (Civ. Code §§ 8312 and 8400).

State or Local Public Work: No mechanics lien is permitted against public property (Civ. Code § 8160; *Mayrhoffer v. Board of Education* (1891) 89 Cal 110, 111-14, 26 Pac 646). Payment bonds on public works projects substitute for the property against which a mechanics lien would otherwise be permitted.

Federal Project: No state law mechanics liens are effective on federal projects **except** post offices (*Loeffler v. Frank* (1984) 486 US 549, 100 LEd2d 549, 108 SCt 1965).

STOP PAYMENT NOTICE

The "stop notice" or "bonded stop notice" under the old statute is now a "stop payment notice" or "bonded stop payment notice" (Civ. Code § 8044).

Private Work – Prime Contractor: Deliver stop payment notice to the construction lender not later than either (1) 60 days after a Notice of Completion or Notice of Cessation was recorded or (2) 90 days after Completion of the Private Work (Civ. Code §§ 8412 and 8508). If the stop payment notice is not accompanied by a bond in 125% of the amount of the claim, the construction lender – but not the owner – can elect to ignore it (Civ. Code § 8536).

Private Work – Subcontractor or Supplier: Deliver stop payment notice to the owner or construction lender not later than either (1) 30 days after the Notice of Completion or Notice of Cessation is recorded or (2) 90 days after Completion of the Private Work (Civ. Code §§ 8414 and 8508). If the stop payment notice is not accompanied by a bond in 125% of the amount of the claim, or if a payment bond was recorded before the **first** stop payment notice was

-11-

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delivered to the construction lender, then the construction lender can elect to ignore the stop payment notice (Civ. Code § 8536).

Public Work – Prime Contractor: The prime contractor has no right to give a stop payment notice on a public work (Civ. Code § 9100).

Public Work – Subcontractor or Supplier: Deliver stop payment notice to the public entity before expiration of either (1) 30 days after the Notice of Completion or Notice of Cessation is recorded, or (2) 90 days after the earlier of (a) the date when the public entity formally accepted the work or (b) the date, except for state projects, when no work has been done on the project for 60 consecutive days (Civ. Code §§ 9200 and 9356)

Federal Project: No stop payment notice procedure exists for federal projects.

GOVERNMENT CODE CLAIM

Generally, before a contractor can sue a public entity for breach of contract, the contractor must present the claim prescribed by Government Code § 910 within one year of the last breach of the contract (Gov. Code § 911.2). This claim is usually in addition to all of the claims required under the contract. However, there are exceptions.

No Government Code claim is required for disputes arising out of contracts with the state (Pub. Cont. Code § 19100). Disputes on contracts under the State Contracts Act (Pub. Cont. Code § 10100 et seq.) for projects of the state Departments of Boating & Waterways, Corrections, General Services, Transportation, and Water Resources go directly to arbitration (Pub. Cont. Code § 10240 et seq.). Disputes on all other state contracts go directly to court, and the lawsuit must be commenced within 6 months after (1) the agency's final written decision under the contract claim provisions or (2) if there is no contract claim provision, within 6 months after accrual of the cause of action (Pub. Cont. Code § 19100).

-12-

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For local agency contracts, a Government Code claim is often required. However, none is required (1) if the contract includes a procedure for the presentation, consideration and payment of claims arising out of or related to the contract (Gov. Code § 930.2), **and** (2) the contract fails to clearly state that, in addition, a Government Code claim is also required (*Arntz Builders v. City of Berkeley* (2008) 166 CA4th 276, 289, 82 CR3d 605).

LAWSUIT

Warning: An attorney usually needs a few days to get the legal papers together. So, he or she cannot be consulted for the first time on the day before the lawsuit must be filed.

Relief from Forfeiture of a Bid Bond (when the public entity refuses to permit withdrawal of a bid with a mistake in it): File lawsuit **and** serve summons within 90 days after the date of the bid opening (Pub. Cont. Code § 5102).

Mechanics Lien: File lawsuit within 90 days after the lien is recorded (Civ. Code § 8460). Within 20 days of filing the lawsuit, record a notice of pendency of the lawsuit; only from the date of that recordation will a purchaser or encumbrancer have constructive notice of the lawsuit (Civ. Code § 8461).

Mechanics Lien Release Bond: File lawsuit within 6 months of the date that notice of recording the bond, with a copy of the bond, was delivered, or sent by certified mail, express mail, or overnight delivery by an express service carrier, to the lien claimant (Civ. Code §§ 8106, 8110 and 8424(d)).

Private Work Stop Payment Notice – by a Prime Contractor: File lawsuit within 90 days after expiration of either (1) 60 days after a Notice of Completion or Notice of Cessation was recorded or (2) 90 days after Completion of the Private Work (Civ. Code §§ 8412, 8508 and 8550). Within 5 days after the action is filed, deliver, or send by certified mail, express

-13-

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mail, or overnight delivery by an express service carrier, notice of commencement of the action to the persons to whom the stop payment notice was given (Civ. Code § 8550).

Private Work Stop Payment Notice – By a Subcontractor/Supplier: File lawsuit **within 90 days after expiration of** either (1) 30 days after the Notice of Completion or Notice of Cessation is recorded or (2) 90 days after Completion of the Private Work (Civ. Code §§ 8414, 8508 and 8550). Within 5 days after the action is filed, deliver, or send by certified mail, express mail, or overnight delivery by an express service carrier, notice of commencement of the action to the persons to whom the stop payment notice was given (Civ. Code § 8550).

Public Work Stop Payment Notice – By a Subcontractor/Supplier: File lawsuit **within 90 days after expiration of** either (1) 30 days after the Notice of Completion or Notice of Cessation is recorded or (2) 90 days after the earlier of the date (a) when the public entity formally accepted the work or (b), except for state projects, when no work has been done on the project for 60 consecutive days (Civ. Code §§ 9200, 9356 and 9502). Within 5 days after the action is filed, deliver, or send by certified mail, express mail, or overnight delivery by an express service carrier, notice of commencement of the action to the persons to whom the stop payment notice was given (Civ. Code § 9354 and 9504).

Private Work Payment Bond: File lawsuit within 6 months after completion of the project, though longer statute of limitations may apply in some circumstances (Civ. Code §§ 8609 and 8610).

State or Local Public Work Payment Bond: File lawsuit **after** the claimant ceases to provide work, but not later than six months after expiration of either (1) 30 days after the Notice of Completion or Notice of Cessation is recorded or (2) 90 days after the earlier of the date (a) when the public entity formally accepted the work or (b), except for state projects, when no work had been done on the project for 60 consecutive days (Civ. Code §§ 9200, 9356 and

9558). The time must be counted in exactly that sequence, because the number of days in the month in which the notice was recorded affects the calculation. Thus, if the notice of completion was recorded on April 15 the limitation is: 30 days to May 15 plus 6 months to November 15 (in other words, 7 months from the recording date). However, if the notice was recorded on May 15 the calculation would be 30 days to June 14 plus 6 months to December 14 (in other words, one day less than 7 months from the recording date).

Money Withheld Under a Notice of Civil Wage and Penalty Assessment (Labor Commissioner) or Notice of Withholding for Violation of Prevailing Wage Laws (agency awarding contract): Request a hearing from the office of the Labor Commissioner that appears on the notice within 60 days after service of the notice. The hearing is an administrative proceeding, which can be reviewed by the courts (Labor Code § 1742).

Federal Project Payment Bond: File lawsuit within one year after the **last** of the labor, services, equipment or materials were provided by the subcontractor or supplier (40 USC § 3133).