

**NAVIGATING PENNSYLVANIA’S NEW PROVISIONS IMPACTING
MECHANICS’ LIENS**

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Major changes made in 2014 to the Pennsylvania Mechanics’ Lien Law are set to take effect on December 31, 2016, when the new Pennsylvania State Construction Notices Directory (“Directory”) is expected to be operational. As provided by the 2014 amendments to the Lien Law, creation of the Directory establishes a statewide system where owners of construction projects exceeding \$1.5 million can register their projects on a searchable online platform maintained by the Pennsylvania Department of General Services. Projects registered with the Directory (a “searchable project”) will be searchable by property location, name of the owner, name of the general contractor and a unique identification number for the project. Although registration on the Directory is optional, doing so can trigger important new requirements impacting the mechanics’ lien rights of subcontractors and suppliers furnishing labor and materials on searchable projects.

An owner of a searchable project may potentially limit mechanics’ lien claims by filing what is termed a “Notice of Commencement” with the Directory and following the strict procedures set forth in the new provisions of the Lien Law regarding notice to subcontractors and suppliers on the project. If an owner properly complies with the requirements for providing a “Notice of Commencement”, subcontractors and suppliers on the searchable project will lose their lien rights if they do not timely and properly file a “Notice of Furnishing” with the Directory, as is further discussed below. Accordingly, owners of searchable projects are incentivized to utilize the “Notice of Commencement” procedure (which is otherwise optional) to limit the pool of potential lien claimants.

Pursuant to the new provisions of the Lien Law, the owner of a searchable project (or the owner’s contractor if contractually permitted to do so) has the option of filing a Notice of Commencement with the Directory prior to the commencement of labor, work or the furnishing of materials for a searchable project that may give rise to a mechanics’ lien. The Notice of Commencement must identify: (i) the full name, address and e-mail address of the contractor; (ii) the full name and location of the searchable project; (iii) the county in which the searchable project is located; (iv) the legal description of the property upon which the improvements are being made, including the tax identification number of each parcel included in the searchable project; (v) the full name, address and e-mail address of the searchable project owner of record of the property and the searchable project being constructed; (vi) the full name, address and e-mail address of a surety for the performance and payment bonds and the bond numbers, if any; and (vii) the unique identifying number that is assigned to the project through the Directory.

In addition to filing a Notice of Commencement with the Directory, the owner/authorized contractor of a searchable project must ensure that the Notice of Commencement is conspicuously posted at the project site before physical work commences, and must take reasonable measures to ensure that the Notice of Commencement remains posted at the searchable project site until

completion of the project. Further, the owner/contractor of a searchable project must take reasonable measures to ensure that the Notice of Commencement is made part of contract documents provided to all subcontractors/suppliers awarded work on the searchable project. Further still, a contract for a searchable project must include a written notice that a subcontractor or supplier will lose lien rights if the subcontractor does not file a “Notice of Furnishing” (discussed below).

If an owner/authorized contractor of a searchable project complies with the above requirements for a Notice of Commencement, subcontractors and suppliers must file a Notice of Furnishing with the Directory in order to preserve their mechanics’ lien rights (general contractors do not have to file a Notice of Furnishing because they have a direct contract with the owner). A Notice of Furnishing must be filed within 45 days of commencing work or first providing materials for the project, and must include: (i) a general description of the labor or materials furnished; (ii) the full name and address of the subcontractor or supplier; (iii) the full name and address of the person that contracted for the services or items; (iv) a description sufficient to identify the searchable project, based on the description in the Notice of Commencement. Under the new provisions of the lien law, a subcontractor or supplier who fails to substantially comply with the Notice of Furnishing requirement forfeits the right to file a mechanics’ lien claim.

Notably, the new provisions of the Lien Law make it unlawful for owners and contractors to suggest, encourage or require that subcontractors or suppliers not file a Notice of Furnishing. Violation of this provision is a second degree misdemeanor, and creates a civil cause of action where the subcontractor/supplier can recover actual damages, reasonable attorneys fees and costs. Further, lien rights will not be limited where the subcontractor can show that its failure to comply with the Notice of Furnishing requirements resulted from such unlawful conduct by the owner/contractor. Additionally, the amendments provide for damages where a party “abuses the directory” by filing notices with the directory without a good faith reason to do so, with the intent to exact more payment than is due, or to obtain an unjustified advantage or benefit.

In addition to the Notice of Commencement/Notice of Furnishing procedures, the new amendments to the Lien Law also set forth options to file two additional types of optional notices, termed “Notices of Completion” and “Notices of Nonpayment,” both of which are informational in purpose and intended to help owners, contractors, subcontractors and suppliers monitor the project through the Directory. Notices of Completion, filed by the owner/authorized contractor, may be filed with the Directory within 45 days of actual completion of the work as defined in the statute. The purpose of the Notice of Completion is to provide notice to those working on the project that it has been completed, and does not have any effect in court proceedings in determining compliance with timing requirements or in determining the completion date for a timing purpose, including limitation periods or warranty obligations. Similarly, an unpaid subcontractor or supplier on a searchable project with lien rights may file a Notice of Nonpayment with the Directory. Again, this notice is informational; there is no requirement to file such a notice, nor does filing a Notice of Nonpayment relieve a subcontractor from complying with other written notice requirements under the Mechanics Lien Law. The new provisions of the Lien Law do not specify a form for either the Notice of Completion or Notice of Nonpayment.

Sample contractual language pertaining to Notices of Commencement and Notices of Furnishing are provided is provided on the following pages.

Sample Notices for Contracts for Searchable Project

- By statute, the following language must be included in all contracts for a “searchable project”:

A subcontractor that fails to file a Notice of Furnishing on the Department of General Services publicly accessible Internet website as required by the act of August 24, 1963 (P.L. 1175, No. 497), known as the Mechanics' Lien Law of 1963, may forfeit the right to file a mechanics lien. It is unlawful for a searchable project owner, searchable project owner's agent, contractor or subcontractor to request, suggest, encourage or require that a subcontractor not file the required notice as required by the Mechanics' Lien Law of 1963.

- In addition to the language required above, it is also advisable that a contract for a searchable project include the following explicit language:

If a Notice of Commencement has been filed with the Pennsylvania Department of General Services publicly accessible Internet website as required by the act of August 24, 1963 (P.L. 1175, No. 497), known as the Mechanics' Lien Law of 1963, Subcontractor acknowledges receipt of a copy of the Notice of Commencement. Subcontractor is advised that if the Owner has filed a Notice of Commencement, the Subcontractor must file a Notice of Furnishing to preserve its mechanics' liens rights. The Notice of Furnishing must be filed within forty-five (45) days after first performing work or services at the job site or first providing material to the job site.

Form Notice of Furnishing

- The following form for a “Notice of Furnishing” by a subcontractor/supplier is set forth by statute:

Notice of Furnishing

To:

(Name of searchable project owner)

(Address of searchable project owner)

(Notice of Commencement Number)

Please take notice that the undersigned is performing certain work or labor or furnishing certain materials to (Name and address of other contracting party) in connection with the improvement to the real property located at The labor, work or materials were performed or furnished first, or will be furnished first, on (date).

(Name and Address of Lien Claimant)

By

(Name and capacity of party signing for lien claimant)

(Address of Signing Party)

(Date)

Form Notice of Commencement

- Although the statute does not set forth an actual form for the Notice of Commencement, it does specify the information required in such a Notice. The following can be tailored for use for searchable projects:

Notice of Commencement

CONTRACTOR: (identify the full name, address and e-mail address of the contractor).

PROJECT: (identify the full name and location of the searchable project).

COUNTY: (identify the county in which the searchable project is located).

PROPERTY: (provide the legal description of the property upon which the improvements are being made, including the tax identification number of each parcel included in the searchable project).

OWNER(S): (identify the full name, address and e-mail address of the searchable project owner of record of the property and the searchable project being constructed—note that these owners may sometime be different entities).

SURETY: (if applicable, provide the full name, address and e-mail address of a surety for the performance and payment bonds and the bond numbers).

IDENTIFYING NUMBER: (provide the unique identifying number that is assigned to the Notice of Commencement; it is expected that this will be generated by the DGS upon registration of the project or the filing of a Notice of Commencement)

By

(Name and capacity of party signing for owner/authorized contract)

(Address of Signing Party)

(Date)