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### **CBRC Update**

The Contractor Bill of Rights Coalition (CBRC) has continued to meet during the summer in preparation for the next legislative session. You may recall seeing a call for a Legislative Survey earlier in the year. The ASA provided the same survey to the many associations making up the CBRC; the resulting input is being used to help develop legislation.

More recently, we are issuing a call for subcontractor stories that illustrate the issues we are trying to address. A copy of the call is included in this newsletter. We will take the best stories, pull them together and use them in discussions with legislators.

Discussion with subcontractors and attorneys representing them during our meetings led to a realization that many are not aware of the rights they already have under existing law. We have asked ASA MN Attorney and Board Member Curt Smith of Moss & Barnett P.A. to address this concern and thank him for the following article.

### **CONTRACTOR'S BILL OF RIGHTS FOR PRIVATE CONSTRUCTION PROJECTS**

Minnesota Statutes provide certain protections to contractors, subcontractors and suppliers for private construction projects. The areas covered by these statutes include: (1) the location of litigation or arbitration and the law governing them, (2) lien waivers, (3) prompt payment to subcontractors and material suppliers, and (4) progress payments and retainage.

### **Choice of law and venue**

Commercial and industrial construction has become a regional, if not a national, business. Many projects are being constructed by out-of-state general contractors using Minnesota subcontractors and suppliers. With increasing frequency, these out-of-state contractors have been using subcontracts which contain clauses requiring that all

disputes be resolved in a court or arbitration proceeding in the general contractor's home state and applying the law of that state to the contract, rather than in Minnesota. Such clauses can pose an unfair economic burden on a subcontractor or supplier who has not been paid.

Minn. Stat. § 337.10, subd. 1, renders such clauses void and unenforceable. The effect is to cause disputes arising out of Minnesota projects to be resolved in Minnesota, applying Minnesota law. A question exists, however, whether a court in another state would honor Minnesota's law if an out-of-state contractor commenced a lawsuit in that court. In addition, federal courts have invalidated such provisions to the extent they seek to render void an arbitration clause that requires an arbitration hearing to be held in a particular location, as a violation of the Federal Arbitration Act. Accordingly, prudence may dictate that Minnesota subcontractors and suppliers commence a lawsuit or arbitration in Minnesota before a general contractor commences one in its home state.

### **Waiver of lien or bond claims**

Lenders or developers sometimes require a general contractor and its subcontractors and suppliers to prospectively waive mechanics' lien rights in the contract or before beginning work. For example, the Mall of America was a project where such a requirement was imposed. A variation on this same theme occurs when a contractor or subcontractor is required to waive lien rights or a bond claim before receiving payment. Obviously, such requirements can have devastating effects on unpaid subcontractors or suppliers whose lien rights are lost.

Minn. Stat. § 337.10, subd. 2 renders such clauses and requirements void and unenforceable. However, if an innocent third party, such as a lender or owner, relies on a lien waiver in making a payment, it may be enforced against the party who signed the lien waiver. The statute strikes a balance between the need to rely on lien waivers in the disbursement process, and insuring that those who supply labor and materials get paid.

The statute does not, however, resolve all issues regarding the scope of a lien waiver. For example, a commonly used form states that all lien rights are waived up to the date of the waiver. Disputes can arise regarding extra work or delay which precedes the date of the lien waiver. An owner may claim that all lien rights for work predating the lien waiver has been waived, while the contractor or subcontractor claim that the waiver only relates to undisputed sums owed. The statute does not expressly address this situation, but gives the contractor or subcontractor an additional argument for limiting the scope of the waiver.

### **Prompt payment to subcontractors**

Minn. Stat. § 337.10, subd. 3 essentially requires the same prompt payment for private projects as for public ones. A prime contractor must pay subcontractors or

suppliers within ten days of receipt of payment from the Owner. Likewise, subcontractors must pay its sub-subcontractors and suppliers within ten days of receipt of payment from the prime contractor. The parties may agree to a shorter, but not a longer, period. Late payments accrue interest at 1½% per month, and attorneys' fees are recoverable if litigation is necessary to collect.

### **Progress payments and retainage.**

Minn. Stat. § 337.10, subd. 4 requires an owner or other person making a progress payment to make payments monthly, unless the contract specifically requires otherwise. The parties may specify a different payment schedule in their contract which supersedes the statutory time. The amount shall be based on estimates of work completed as approved by the owner or the owner's agent. By making a progress payment, the owner does not accept the work or waive any defective work.

The statute also limits the amount of retainage to 5%, unless the contract specifically provides otherwise. The parties may expressly state a higher percentage in their contract, but if no amount is stated the 5% limit applies. Due to the subcontractor prompt payment provision discussed above, a contractor may not withhold more retainage from a subcontractor than has been withheld by the owner. Contractors must take care to specify the same retainage percentage in subcontracts as is in the prime contract, or they may be limited to 5%.

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