

# **"SECRETS TO GETTING PAID"**

## **A GUIDE FOR MARYLAND CONTRACTORS**

**Brian S. Jablon, Esq.**

**Adelberg, Rudow, Dorf & Hendler, LLC**

3201 Rogers Avenue, Suite 301  
Ellicott City, MD 21043  
**(410)313-8342**

[BJablon@AdelbergRudow.com](mailto:BJablon@AdelbergRudow.com)

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This guide is intended to provide general information regarding prompt payment rights, trusts, liens and bonds. It is not intended to provide legal advice or to be a substitute for professional legal assistance. The relevant law and time periods may have changed since this report was published. If the reader requires legal advice or assistance, he or she should seek the service of an attorney.

# **SECRETS TO GETTING PAID- MARYLAND CONSTRUCTION LAW**

TO: Maryland Contractors, Subcontractors and Suppliers

FROM: Brian S. Jablon, Esq. (410)313-8342

This report provides ammunition - practical and legal information - that you can use as tools to ensure payment. Of course, nothing can ever guarantee that you will be paid in full on every job. But, if you follow the steps outlined in this report, you will shift the odds dramatically in your favor.

Payment is generally withheld for three essential reasons: (1) they can't pay, because they have no money; (2) they don't want to pay, because their profit on the project is too low and they want to keep your money; (3) they won't pay, because of some asserted problem with your work.

As to each of these reasons, a well-drafted agreement and good records can give you the upper hand. Part I of this report identifies essential practical and legal tools necessary. To enforce payment, prompt payment laws, trust laws, mechanics' liens and bonds can provide the funds you are looking for. Part II gives a concise outline of these statutory tools against the owner's property or surety bond. Part III briefly describes the process where you sue the contracting party. Appendix A is a short recap of the time limitations that you should always be aware of.

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## **PART I - PRACTICAL AND LEGAL TOOLS**

A. BEFORE YOU START ANY JOB, HERE IS WHAT YOU MUST REMEMBER:

### **1. REFERENCES.**

Before you enter into a contract, find out whom you are dealing with. Call other contractors who have dealt with this company and ask what their experience has been. Run a Dun & Bradstreet ([www.dnb.com](http://www.dnb.com)) check on the company to find out its financial health.

### **2. GUT FEELINGS.**

If you have a bad gut feeling going in, don't take the job. We can't count the number of clients who tell us that they would not be in this mess if they had listened to their gut and not taken the job in the first place.

### **3. THE CONTRACT.**

#### a. Key Provisions.

Even though many times you will be forced to sign another's form contract, always be sure that you have the following provisions in your contract.

- (1) A precise description of the services and materials to be provided, specifically referring to plans and specifications where applicable; and to the extent you can, identify all exclusions.
- (2) Specify and clearly state the price:
  - (a) Lump sum (try to avoid breaking the lump sum down into elements or activities, as the owner/contractor may haggle with you later on);

- (b) Time and materials - clearly define what will be charged on time basis;
  - (c) Cost plus fee. Clearly define what costs are, the percentage fee and any incentive for beating a certain price.
- (3) Time of payment. Clearly set forth when payment is due.
- (4) If possible, state a penalty for non-payment:
- (a) Interest (consider giving discount for early payment);
  - (b) Attorney's fees. If you are given a form contract that provides the other side with the right to attorney's fees, make sure that you have that right as well. If there is nothing in the contract regarding attorney's fees, unless a statute imposing fees is involved (e.g. the prompt payment statute), each side will bear its own fees.
- (5) For suppliers, always have a properly drafted Credit Agreement and personal guarantees from the principal and his/her spouse.

b. Killer Contract Clauses.

1. **Pay Contingent on Payment Clause.**

Most prime contractors will insist that this provision be in a subcontract. If the prime contractor doesn't get paid, then he doesn't want to have to pull the money out of his pocket to pay his subcontractors.

However, even though a "payment contingent on payment clause" is valid and can be used by a general contractor in a suit against it alone, A "PAYMENT CONTINGENT ON PAYMENT" CLAUSE DOES NOT APPLY IN A SUIT AGAINST A SURETY BOND OR IN A MECHANICS' LIEN SUIT IN MARYLAND.

## 2. **No Damages for Delay Clause.**

This clause prohibits you from being compensated for delay on the job. These clauses have been held to be enforceable in Maryland. If this type of clause is in the contract, you will not be compensated for additional and unexpected labor, rental costs, material handling costs, supervision time, extended general conditions or home office overhead costs caused by delay. If you can argue that these costs are caused by disruption or acceleration, you may be compensated these costs despite this clause.

## 3. **Written change orders.**

These clauses state that if you fail to get signed, written change orders for changed work, you won't be paid. These clauses are valid under Maryland law (with certain legal arguments available to avoid the clause), and therefore, you must be vigilant to obtain written change orders **or to document the job** (see below).

## 4. **Notice Clauses.**

You must make sure that your project manager and superintendent know the contract they are dealing with, especially clauses as to notice and claims procedures. If you fail to follow these requirements, you may lose your right to be paid.

B. AFTER YOU START THE JOB, REMEMBER THE FOLLOWING:

### **1. INVOICES.**

Send invoices promptly and in accordance with your contract. The invoices should precisely describe the work billed for, the amount of payment due, the date payment is due and the contractual interest rate for late payment.

### **2. CHANGES.**

Define and memorialize changes quickly and in accordance with the contract. Always request a directive in writing before you do the change or extra work. In each proposed change order, always reserve rights to later pursue all delay, disruption, acceleration and other costs associated with the change and cumulative changes.

### **3. ESSENTIAL RECORDS**

Good records serve two purposes: 1) communication and 2) evidence to support your position in the event of dispute or litigation. If you have to arbitrate or litigate, it will be your word against the word of the other side. If you are the plaintiff (the one filing the case), you have the burden of proving your case to a “preponderance of the evidence” – that is, you must “tip the balance” in your favor. The judge (or arbitrator) can only view the credibility of a witness objectively. **What tips the scales in your favor is objective DOCUMENTARY EVIDENCE. Truthful documents, including logs and well-written correspondence generated during the job, win cases.**

Keep good records, including the following:

- (a) Daily log/report. Include record of weather, site conditions, labor (number and type of laborers), safety conditions, work activity performed, important conversations, equipment on site, directions given and other factors affecting progress on the job.
- (b) Correspondence (call or email us and ask us for a free report on drafting effective correspondence).
- (c) Meeting minutes. If the minutes are drafted by others, make sure the minutes accurately reflect what was said.
- (d) Change order logs. Logs should contain for each change order: the date of the problem or changed condition; the date claim or request for the change order was made; the date appropriate plan revisions or shop drawings were submitted; the date the change order was quoted; the disposition of the change order request; and delay, disruption or acceleration caused by problem, if any.

- (e) Photographs and video. Use to demonstrate progress, delays, changed conditions (before and after), interferences, weather, etc. Make sure the photographs help and do not hurt you.
- (f) Detailed job schedule (either bar chart or CPM).
- (g) Shop drawing log showing date shop drawings received or sent; date shop drawings submitted to architect for approval; and date drawings were approved.
- (h) Weather data - to substantiate claims for weather delay.
- (i) Records of progress payments.
- (j) Payroll records.
- (k) Equipment use records supplementing daily reports showing type of equipment used, work performed, length of use, amount of idle time and name of equipment operator and nature of work in progress.

#### **4. WAIVERS OF LIEN.**

As discussed below, a subcontractor cannot be made to waive prospective lien rights in a contract. However, most owners and contractors require partial waivers of liens as to work, labor and materials that have been paid. Always carefully read waivers of liens before you sign. Make sure that you are waiving lien rights only for the work, labor and materials for which you have been paid. Also, if there has been delay, disruption, acceleration or other claims associated with the work, be sure that the partial waiver expressly states that you reserve all rights to pursue all delay, disruption and acceleration or other applicable costs and impacts.

#### **5. PICK YOUR BATTLES.**

If you are going to engage in a fight, make sure that it's worth fighting about. Do not haggle over minor issues - take the higher ground. On the other hand, never make an admission that you were wrong - just agree to move on.

## **6. GIVE PROPER NOTICE.**

If you want to preserve your claim, be sure you give notice in accordance with the contract. Also, be aware many contracts require that the claim first be made with the architect within a certain period of time from when you learned of the facts and circumstances giving rise to the claim.

## **7. THE GOLDEN RULE.**

Approach each job and each person with the "golden rule." Treat them right - do quality work in a timely fashion - and they are more likely to treat you right. This probably is the best advice we can give.

Okay, you've done the above, and still have not been paid. What next? Maryland and Federal Statutes provide the devices for contractors, subcontractors, and suppliers to force payment. But, to get the benefits, you must comply with the law. The following is a concise review of the laws.

## **PART II - PROMPT PAYMENT RIGHTS, TRUSTS, RETENTION, LIENS AND BONDS**

### **A. PROMPT PAYMENT STATUTES.**

#### **1. Private Contracts.**

##### **a. Entitlement to prompt payment.**

Maryland's "prompt payment statute" provides strict time limits for a property owner or contractor who owes an undisputed amount, to pay the contractor, subcontractor or supplier who has provided work. If the owner or contractor does not pay within the time limits, the contractor or subcontractor may sue for payment under the statute and may, in certain circumstances, recover the costs of suit and attorneys' fees, remedies which are ordinarily not available in a standard breach of contract suit. The statute applies to most construction contracts for buildings, wells, swimming pools, fencing, landscaping, grading, filling, paving, water lines, sanitary sewers, storm drains, streets and wharfs.

##### **b. When payment is due.**

(1) Prime Contract. If the contract with the owner is silent as to the time final payment is due, full payment is due thirty (30) days after either the occupancy permit is granted or the owner or his agent takes possession, whichever occurs first. If the contract with the owner specifies a payment date, payment must be made within seven (7) days after that date.

(2) Subcontract. In the case of subcontractors or suppliers who do not have a contract with the owner, payment must be made within seven (7) days of the date of the receipt by the contractor of the owner's payment for the subcontractor's or supplier's work or materials.

##### **c. Remedies.**

If a contractor, subcontractor or supplier prevails in its suit, the Court may: (1) order the prompt payment of the undisputed amounts due;

(2) enjoin the nonpaying party from further violations; (3) award interest and any reasonable costs involved in bringing suit; and (4) award attorneys' fees if the nonpayment was in bad faith.

#### **d. Home Construction, Etc.**

The statute excludes certain types of contracts that have special safeguards incorporated into the laws that govern them, including: (1) a contract for construction of a single family residence; (2) contracts under Maryland's Custom Home Protection Act; and (3) contracts entered into by contractors licensed under the Maryland Home Improvement Law.

### **2. Maryland State Contracts.**

A Maryland State statute gives subcontractors rights to prompt payment of undisputed amounts due from contractors on **state** construction projects. The contractor is required to pay the subcontractor within ten (10) days of receiving a progress or final payment from the State.

a. Procedure if payment is not made. The statute provides a detailed procedure which must be complied with. If, after following the procedure, the subcontractor remains unpaid, the representative of the State may suspend the prime contract and impose a penalty not exceeding One-Hundred Dollars (\$100.00) per day.

### **3. Federal Contracts.**

Pursuant to the Federal Prompt Payment Act, government agencies must pay contractors on accepted progress payment requests within fourteen (14) days of receipt, unless the contract specifies otherwise. Retention must be paid within thirty (30) days after final acceptance of the contract, unless the contract specifies otherwise.

a. The invoice must be a "proper invoice" under the Act for the Act to apply.

## **B. TRUST RELATIONSHIPS IN THE CONSTRUCTION INDUSTRY (private and government projects).**

### **1. Monies to be held in trust.**

Monies paid under a contract by an owner to a contractor or by an owner or contractor to a subcontractor for construction work are, by statute, to be held in trust by the contractor or subcontractor for those subcontractors who did work or furnished materials for or about the building. The statute does not require the owner or contractor to place these monies in separate accounts.

### **2. Liability for fraudulent retention or use of monies held in trust.**

Any officer, director or employee of any contractor or subcontractor who knowingly retains or uses the monies held in trust for any purpose other than to pay those subcontractors for whom the monies are held in trust is personally liable to any person damaged by the action.

### **3. Exceptions.**

This statute does not apply to contracts for the construction and sale of a single-family residential dwelling, or to home improvement contracts by licensed home improvement contractors.

## **C. RETENTION.**

In 2008, the Maryland Legislature enacted a statute entitled "Retention Proceeds" that **limits retention in a construction contract, subcontract or sub-subcontract to 5% of the contract sum** where the contractor has furnished payment and performance bonds or other security in the full contract amount. The statute does not apply to a contract in an amount less than \$250,000 or to a contract for a project funded in whole or in part by the department of Housing and Community Development.

The statute also provides that the retention proceeds of any payment due under the terms of a subcontract or sub-subcontract may not exceed the percentage in the prime contract or subcontract respectively.

The statute does not prohibit the owner or contractor from withholding additional amounts where the owner or contractor reasonably determines

that the contractor's or subcontractor's performance provides additional grounds for withholding the additional amount.

#### **D. MECHANICS' LIENS.**

##### **1. Entitlement to a Mechanics' lien.**

The Mechanics' Lien statute gives all persons providing labor and materials to a construction project the right to establish a lien on the property and thereafter to force the sale if payment is not received. Maryland courts have determined that architects who prepare construction documents and supervise the construction are also entitled to a Mechanics' lien.

##### **2. Property subject to a Mechanics' lien.**

a. Types of Property. A Mechanics' lien may be established against new buildings, existing buildings improved to the extent of 15% of their value, condominiums, machines, wharfs, bridges, and site work for or about the building, without regard to the amount contracted for labor or

materials. In addition, water lines, drains, sewers and streets in developments can be the basis for a lien, with each lot subject to a pro-rated share of the lien.

b. Repairs, Etc., 15% Rule. Any project which involves an existing building being repaired, rebuilt, or improved to the extent of 15% of its value is subject to the establishment of a lien. The 15% ratio applies to the total improvement (not simply the work performed by the subcontractor).

### **3. Property not subject to Mechanics' lien.**

a. Government Property. Mechanics' liens will not attach to any land or building owned by the federal, state or local governments. See discussion regarding the Miller Act and the Little Miller Act below.

b. Bona Fide Purchasers. A lien will not be established after legal (or equitable) title to the property has been granted to a "bona fide purchaser," that is, a purchaser who has no knowledge of the debt. Equitable tile passes at the point of time that the purchaser and seller sign a contract of sale for the property! The filing of a petition for Mechanics' lien does constitute notice to a potential purchaser.

c. Tenants By The Entirety. Generally, land held by husband and wife as tenants by the entirety will not be subject to a Mechanics' lien for a debt contracted by one spouse alone.

### **4. Extent of a Mechanics' lien.**

a. Land. A lien extends to the land covered by the building and surrounding land of the building owner as is deemed "necessary for the ordinary and useful purposes of the building."

(1) The boundaries of the land can be defined by the building owner prior to the commencement of construction.

(2) Subsequently, the court will designate the boundaries upon receipt of a written petition filed by the owner or any party entitled to establish a lien.

b. Incomplete Construction. Where construction has begun, but has not been completed, a lien may be established against the portion of work done or materials furnished.

c. If the building is erected or repaired, rebuilt or improved to the extent of 15% of its value by a tenant, any lien established applies only to the extent of the tenant's leasehold interest.

d. Condominiums. In the case of condominiums, if the work is done for an individual unit, the lien will attach to that unit only. If the work is provided for the common areas and has been authorized in writing by the condominium council, the lien attaches to each unit in proportion to its interest in the whole.

## **5. Amount of lien claims.**

a. Value of Contract. The amount for which a contractor can establish a lien is generally set by the value of the contract with the owner. With respect to a lump sum contract, the amount equals the unpaid contract price plus unpaid change orders or extras. As to cost-plus contracts, the claimant is entitled to the agreed percentage of the amount spent for labor and materials, insurance premiums paid, hauling, storage, other direct operating expenses and profit.

b. Subcontractors. A subcontractor can establish a lien in the amount of the reasonable value of the work or materials provided. The contract price is normally the measure of reasonableness.

## **6. Notice of intention to claim a lien.**

a. Only Required If No Contract with Owner. Only a person who does not have a contract with the owner (i.e. subcontractor or supplier) is required to give written notice of intention to claim a lien to the owner.

(1) 120-Day Notice Rule. The notice must be given within 120 days after completing the work or furnishing the materials. The notice must be given by registered or certified mail, return receipt requested, or personally delivered to the owner.

(2) When Time Begins to Run. For suppliers, notice must be given within 120 days of delivering material under each separate order. Under a continuing contract, notice may be given within 120 days of the last delivery.

b. Single-Family Dwelling. The lien of a subcontractor against a single family home built on the owner's land (including home improvement) may not exceed the amount by which the owner is indebted under the contract at the time the notice is given. So, if the owner has paid the contractor in full as of the time the subcontractor's notice is received, the subcontractor has no lien rights.

c. Form of Notice. The notice must be in writing and must take a form substantially the same as the sample in the statute. Feel free to call us at 410-313-8342 or email BJablon@AdelbergRudow.com, and we will send you the sample.

d. Owner Retention From Contractor. On receipt of notice, the owner may retain the amount claimed in the notice from the contractor to pay the subcontractor directly.

## **7. Procedures for filing a Complaint (suit).**

a. File in County Where Land Located. The Complaint must be filed in the circuit court for the county where the land to be subject to the lien is located.

b. File Within 180 Days. The Complaint must be filed within 180 days after the work has been completed or the materials furnished.

c. Contents of Complaint. The statute sets out the required contents of the Complaint.

d. Service. In cases where notice is required, the claimant must show that notice was properly served on the owner (attaching certified mail receipt or affidavit of service).

e. Amendments to Claim. Amendments may be made during the proceedings, except after 180 days after work to enlarge the

amount of a claim. Thus, it is important that the claimant set forth the full extent of its claim in the petition.

## **8. Procedures following filing of a Complaint.**

a. The procedure following the filing of a Complaint is essentially a four step process.

(1) Step One: Show Cause Order. The court will review the Complaint and supporting documents and make a determination of whether a lien should attach. An order will be issued that directs the owner to show cause, within 15 days from the date of service of the order, why the lien should not attach. The Order will also set a hearing date within forty-five (45) days of the Order.

(2) Step Two: Owner Answer. After the show cause order has issued, the owner must file an Answer supported by affidavit. Failure by the owner to file an affidavit refuting the lien will constitute an admission in favor of the claimant.

(3) Step Three: Show Cause Hearing. The show cause hearing is a preliminary hearing designed to provide the claimant with interim lien protection during the course of the proceedings and until a full trial can be held. Based on the evidence presented at the show cause hearing, the court will issue a preliminary order (called an "interlocutory Mechanics' lien") if it finds probable cause that the claimant is entitled to a Mechanics' lien. The claimant is well advised to present witness testimony and other evidence to establish probable cause. The interlocutory Mechanics' lien order will assign a trial date, within six months of the order, for final determination of the lien. If there is no dispute of material fact, the court may grant a final order to establish the lien at the show cause hearing.

(4) Step Four: Trial. At trial, the parties will present witness testimony and evidence, and the court will determine whether a final lien should issue.

b. Owner Payment. After a lien claim has been filed, the owner can make payment to satisfy the lien or petition to have the lien released from the court order upon filing a bond.

c. Order of Satisfaction. If the lien is satisfied, the plaintiff must file an order of satisfaction of lien with the court of record.

## **9. Enforcement of a Mechanics' lien.**

a. One Year to Enforce. The lien claimant has one year from the date of filing the petition to file proceedings to enforce the lien, i.e., foreclosure proceedings or execution on the bond. The proceeds of the sale of the property will be distributed to all persons with valid liens against the property.

b. Priority of Liens. Priority of the various liens will determine how the proceeds of the sale will be distributed. Under the statute, all Mechanics' liens have equal priority. In the event the sale proceeds are insufficient to satisfy all established Mechanics' liens, all Mechanics' liens share the proceeds on an equal, pro rated basis measured by the amounts of the claims. However, previously recorded deeds of trust, mortgages and other judgments, etc., will take precedence.

## **10. Mechanics' lien and other remedies.**

a. Other Remedies. A Mechanics' lien action does not interfere with one's right to pursue an action on other legal theories or claims against the contractor or owner.

b. Waiver of Liens. A subcontractor or supplier may not waive the right to claim a Mechanics' lien prior to doing the work. Thus, even if a subcontractor or supplier is forced to sign such a "waiver of lien" prior to doing its work, the "waiver of lien" will not be enforced by the court. Furthermore, a "pay if paid" clause in a subcontract cannot serve to waive a subcontractor's right to a Mechanics' lien.

c. Taking Note or Other Security For Payment. No person with the right to claim a Mechanics' lien will waive the right by granting a credit or taking a note or other security, when it is received as security, unless the right is expressly waived (by a contractor only).

As noted, a Mechanics' lien will not attach to any land or building owned by a federal, state or local governmental body. However, the

Federal Miller Act and Maryland's Little Miller Act protect subcontractors and some suppliers on government contracts in the event of non-payment.

## **E. THE MILLER ACT - FEDERAL CONTRACTS.**

### **1. Scope of the Miller Act.**

a. Contract. A Contractor who is awarded a federal government contract for the construction, alteration or repair of any public building or public work for the United States must furnish both a payment bond and a performance bond with a surety satisfactory to the officer awarding the contract.

(1) Payment Bond. The payment bond is an instrument issued by a surety that protects those who supply labor or materials for the project by guaranteeing that bills for labor and materials supplied for the project will be paid.

(2) Performance Bond. The performance bond is an instrument issued by a surety which guarantees the government that the contractor will fulfill its obligations under the contract.

b. Where to Obtain Copy of Bond. Copies of the bond must be made available by the contracting agency which awarded the contract.

### **2. Limited protection.**

a. Persons Entitled to Claim. The following persons are entitled to claims under the Miller Act:

(1) Subcontractors or suppliers who have a contract with the prime contractor, the one who posted the bond.

(2) Any supplier or sub-subcontractor who has a contract with a subcontractor.

b. Persons Excluded. The following are not entitled to sue on a payment bond:

(1) A subcontractor or supplier who has a contract with a supplier, as opposed to a subcontractor, and who has no contract with the general or prime contractor is not entitled to sue on the payment bond.

(2) "Third tier claimants" who have a contract with a sub-subcontractor but not with subcontractor of the prime contractor are also precluded.

c. Exempt Contracts. The Miller Act may not apply to some federal government contracts, despite the fact that they meet the monetary requirements.

(1) The Secretaries of the Army, Navy, Air Force, and Treasury may waive the act for certain cost plus or cost-type or other Army, Navy, Air Force and Coast Guard contracts.

(2) The Secretary of Transportation may waive the Miller Act for certain contracts relating to Merchant Marine Vessels.

### **3. Procedure for notice and suit.**

a. 90-Day Notice. For suppliers and subcontractors who have no direct contracts with the prime contractor, their right to sue on the bond is dependant upon notice to the contractor within 90 days of the date the last labor or material was supplied. The notice must state with substantial accuracy the amount to be claimed and the name of the party for whom the work was done or material supplied. Also, it is advisable to set forth the date that the work was provided. The notice must indicate that the sub-subcontractor or supplier to the subcontractor is looking to the prime contractor and its surety for payment of money due from the subcontractor. (Feel free to call us at 410-313-8342 or email BJablon@AdelbergRudow.com, and we will send you a sample). The notice must be served by registered mail, in an envelope addressed to the contractor at any place he maintains his office or conducts his business or his residence. The notice may also be served in any manner in which the U.S. Marshall in the district where the improvement is situated is authorized by law.

(1) The last work performed which triggers the 90-day period must be substantial work, part of the original contract, and not some remedial or corrective work.

(2) For continuing contracts for suppliers, the 90-day period runs from the date the last material was supplied.

b. Suit. Suit may not be brought before 90 days have passed since the last work was performed or materials supplied. Suit must be brought within one (1) year from the last date the last work was performed or materials supplied under the contract.

#### **4. Remedies on federal contracts.**

a. Amount to be Recovered. Under the Miller Act, a subcontractor or supplier who sues on a payment bond may recover the unpaid contract balance owed to him.

(1) Court decisions have added recovery for the reasonable value of any extra work and materials provided, any damages caused by delay of the contractor, and interest.

### **F. THE LITTLE MILLER ACT - STATE OF MARYLAND CONTRACTS.**

#### **1. Entitlement to relief under the Little Miller Act.**

a. Maryland's Little Miller Act requires a contractor on a public project to post payment and performance securities for any state contract exceeding \$100,000.00.

(1) A public body, other than the State or a unit of the state government, may require payment security or performance security for contracts which exceed \$25,000.00, but do not exceed \$100,000.00, if the amount of the security does not exceed 50% of the contract amount. However, many counties require performance or payment securities for contracts under \$25,000.00.

#### **2. Type of security.**

a. The Maryland statute defines the types of payment security that are acceptable. Security may be:

(1) A bond executed by a surety company authorized to do business in the state; or

(2) Cash in an amount equivalent to the bond, or any other security which is acceptable to the public body awarding the contract; or

(3) a mortgage or deed of trust on real property in the State of Maryland (to the satisfaction of the State or public body).

b. The form of security chosen must be approved by the state governmental unit.

c. The contractor must file the security or evidence of it with the appropriate office of the public body.

### **3. Limited protection.**

a. Subcontractors or suppliers who have a contract with the prime contractor may sue on the payment security.

b. Those who have contracts with subcontractors or sub-subcontractors may sue on the payment security.

c. Those with contracts with suppliers are excluded under the Little Miller Act.

### **4. Procedures for notice and suit.**

a. Notice Within 90 Days. A supplier to a subcontractor or a sub-subcontractor must notify the prime contractor within 90 days of the date the last labor or material was supplied. The notice must state with substantial accuracy the amount claimed and the person to whom labor or material was supplied. It is also advisable to set forth the date the work was performed or material supplied. Feel free to call us at 410-313-8342 or

email BJablon@AdelbergRudow.com, and we will send you a sample. The notice must be sent by certified mail to the contractor's office, place of business or residence.

b. Limitations. A suit to enforce a suit on the payment bond must be brought within one (1) year after the public body finally accepts the work performed under the contract. CAVEAT: It is not always clear when the public body finally accepts the work. To be safe, it is advisable to file suit within one (1) year from the last date work was performed or materials supplied.

c. Any subcontractor or supplier who has a right to sue on a payment bond may collect for the amount owed, any delay damages and interest, excluding lost profits as a result of the delay.

## **PART III - LAW SUITS AGAINST CONTRACTING PARTY**

At times, you may not be able to pursue a Mechanics' lien or suit on a bond. In that event, you must pursue the party with whom you contracted. Here are some key points to remember.

If the company or person who contracted with you does not pay you, you can file suit in the District Court of Maryland or Circuit Court of Maryland in the County where the other side conducts its business.

### **A. District Court Suits - For cases which do not exceed \$25,000.00.**

1. Trial is held before a judge only (no Jury);
2. Trial is generally held between three (3) to six (6) months after filing (sometimes longer).

### **B. Circuit Court Suits - General Jurisdiction.**

1. Trial can be before a judge or a jury if either side elects;
2. Trial is generally held between one (1) year and two (2) years after filing.

### **C. Attorneys for corporations, etc.**

For all cases over \$5,000.00, corporations, limited liability companies and partnerships must be represented by counsel.

### **D. Statute of Limitations. (Other limitations apply to Mechanics' Liens and Surety Bond cases: see discussion above).**

The statute of limitations for breach of contract cases is as follows:

1. Standard Contracts. Three (3) years from date cause of action accrued;

2. Contracts Under Seal. Where the body of contract states that it is "under seal" or "sealed" and where the word "seal" appears after the signature line, the statute of limitations is twelve (12) years from date cause of action accrued.

# **APPENDIX A**

## **KEY TIME PERIODS**

### **I. Prompt Payment**

#### **A. Private Contracts.**

1. Prime Contract. The prime contractor must be paid thirty (30) days after occupancy permit or owner possession, whichever occurs first. If the contract specifies a payment date, however, payment must be made within seven (7) days after that date.

2. Subcontract. The subcontractor or supplier must be paid within seven (7) days of contractor's receipt of the owner's payment for the subcontractor's or suppliers work.

#### **B. State Contracts.**

A subcontractor must be paid undisputed amounts due within ten (10) days from date the prime contractor receives a progress or final payment from the state.

#### **C. Federal Contracts.**

Contractors must be paid within fourteen (14) days of the receipt of invoices and retention must be paid within thirty (30) days of final acceptance, unless the contract states otherwise.

### **II. Mechanics' Liens (Suit against property and owner)**

A. Notice - 120 Days. Only persons who do not have a contract with the owner must file a notice. Notice is due within 120 days after completing the work or supplying the last of the materials.

B. Suit - 180 Days. Suit must be filed within 180 days after completing work or supplying the last of the materials.

III. **Miller Act (Federal Contracts) (Suit on Federal Surety Bond)**

A. Notice - 90 Days. Notice is required for those who do not have a contract with a prime contractor. Notice is due within 90 days of completing the work or supplying the last of the materials.

B. Suit - One Year from Work. Suit must be filed within one year of completing the work or supplying the materials.

IV. **Little Miller Act (State Contracts) (Suit on State Surety Bond)**

A. Notice - 90 Days. Notice is required for those who do not have a contract with the prime contractor. Notice is due within 90 days of completing the work or supplying the materials.

B. Suit - One Year from Substantial Completion. Suit must be filed within one year of public body's acceptance of the contract.

V. **Direct Suit Against Contracting Party.**

A. Standard Contract. Three (3) years from date cause of action accrued.

B. Contract Under Seal. Twelve (12) years from date cause of action accrued.