

The Construction Supplier's Guide to Getting Paid (Quickly) in New Jersey



Second Edition
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BENDER COMMERCIAL COLLECTION LAW

The Construction Supplier's Guide to Getting Paid (Quickly) in New Jersey

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ABOUT THE AUTHOR



Jon Bender wants to help you increase your profits. This book will help you collect your receivables and spend more time making money instead of chasing it.

The Construction Supplier's Guide is one of four books Jon's written on business collections in New Jersey. In addition, he's written a collection guide for goods suppliers generally, one for service providers generally, and a specific guide for the staffing industry.

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Jon has spent 27 years handling accounts receivable litigation. His clients include suppliers and service providers in various industries, as well as commercial lenders.

In his free time, Jon is an avid boxing, Eagles and Phillies fan. He resides in Cherry Hill, New Jersey with his wife and four children.

To learn more about construction supplier collections, or business collections in general, visit my website at www.NJCollectionLawyer.com.

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PREFACE

PREFACE

Welcome. My name is Jon Bender and I'm an attorney focusing on accounts receivable collections.

This is one of four books I've dedicated to business collections in New Jersey, having also written a book for goods suppliers generally, one for service providers generally, and a specific guide for the staffing industry.

In *The Construction Supplier's Guide*, we'll discuss collection issues that range from general to industry-specific. We'll discuss collection litigation in general, how the law treats a sale of goods differently from services, and what to expect when you sue for receivables in New Jersey. We'll also talk about construction law remedies that protect suppliers, and contractual provisions in the industry you'll want to avoid.

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In addition, we'll talk about developing internal credit and collection policies to minimize your need to sue and maximize your recovery when you do, and industry-specific issues you'll want to incorporate.

I hope you'll find the content helpful, and invite you to reach out with any questions, comments or suggestions, and to connect through social media.

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GENERAL COLLECTION ISSUES – GOODS VERSUS SERVICES



Whether a vendor sells goods or provides services, suing for unpaid receivables involves an alleged breach of contract.

Yet there are 2 important differences between goods and services that could impact your right to payment. One relates to oral contracts, the other relates to the Statute of Limitations, and both appear in the Uniform Commercial Code.

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THE UNIFORM COMMERCIAL CODE

The UCC is a set of rules that govern commercial transactions in the United States. It's not a federal law, but a uniform statute each state has adopted with minor variances to standardize commercial expectations throughout the country. In New Jersey, it appears at *NJSA 12A:1-101, et seq.*

Article 2 of the UCC relates to sales of goods.¹ The statute defines “goods” as all things which are movable, other than money, investment securities and non-possessory rights (called “things in action”), like the right to collect on a debt.²

In other words, “goods” refers to any physical items you might sell, including construction materials.

WHETHER YOUR CONTRACT NEEDS TO BE IN WRITING

In general, a contract can be oral or written, unless a specific law requires it to be in writing. Such a law is called a Statute of Frauds.

Article 2 contains a Statute of Frauds for sales of goods. In general, it provides that a contract for the sale of goods totaling \$500 or more is unenforceable, unless there's a signed writing which indicates a contract was made and specifies the quantity of goods sold.³

However, the statute makes important exceptions:

One exception exists where the seller and buyer are both merchants of the type of goods involved, such as a manufacturer selling to a wholesaler, or a wholesaler selling to a retailer. Under the statute, a “merchant” is someone who deals in the kind of goods involved, or who, by his profession, holds himself out as or is charged with having peculiar knowledge of such goods.⁴

¹ -- *NJSA 12A:2-101, et seq.*

² -- *NJSA 12A:2-105*

³ -- *NJSA 12A:2-201(1)*

⁴ -- *NJSA 12A:2-104(1)*

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Between merchants, an unsigned confirmation of sale will suffice, if you send it within a reasonable time and there's no objection within 10 days.⁵

Other important exceptions exist if the customer already received and accepted your goods,⁶ if the goods are specially manufactured for the customer and unsuitable for sale to others,⁷ or if the customer admits during a lawsuit that the contract was made.⁸

THE STATUTE OF LIMITATIONS

The Statute of Limitations is a law that limits how much time you have to file a lawsuit.

For most contracts in New Jersey, you have 6 years from the breach of contract.⁹ This includes non-payment for services rendered.

But for goods sold, Article 2 limits you to 4 years from the date of breach.¹⁰ You can limit this further to 1 year by contract, but can only extend the 4 years by a subsequent agreement, not the initial contract.¹¹

As a construction supplier, you'll generally need to commence suit within 4 years of when payment was due. However, you could still find yourself under a 6-year statute if you're providing related services, such as installing the goods you've sold. The issue will depend on your contract and whether the sale or services aspect predominates.¹²

⁵ -- *NJSA 12A:2-201(2)*

⁶ -- *NJSA 12A:2-201(3)(c)*

⁷ -- *NJSA 12A:2-201(3)(a)*

⁸ -- *NJSA 12A:2-201(3)(b)*

⁹ -- *NJSA 2A:14-1*

¹⁰ -- *NJSA 12A:2-725*

¹¹ -- *NJSA 12A:2-725*

¹² -- See, e.g., *Integrity Material Handling Systems, Inc. v. Deluxe Corporation*, 317 NJ Super. 406 (App. Div. 1999)

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As a practical matter, you never want it to get that far. The older debt is, the harder it normally is to collect. Legally, you may have 4 or 6 years to commence a lawsuit, but the decision should come much earlier.

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SUING FOR RECEIVABLES: WHAT YOU NEED TO KNOW



WHAT IS ACCOUNTS RECEIVABLE LITIGATION?

Accounts Receivable Litigation means lawsuits to recover business debt. The common thread in all such matters is an alleged breach of contract.

Think of your lawsuit in 2 stages: the litigation stage, where you prove your case to obtain a judgment, and the post-judgment stage, where you look for assets to collect it.

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THE K.I.S.S. CONCEPT (KEEP IT SIMPLE, SELLER)

From a litigation standpoint, you want to frame the issues in simple terms. Proving your case should come down to 4 Basic Questions:

- 1) Did the Customer Order the Goods or Services?
- 2) Did It Agree to a Price?
- 3) Did It Receive and Accept the Goods or Services? and
- 4) Did It Pay for Them?

These questions should lead inevitably to one conclusion: that the customer owes you the money. From your perspective, everything else is detail.

Questions 1 and 2 speak to whether you have a contract. Questions 3 and 4 speak to performance. If you had a contract, you performed and the other side didn't, you have a claim for your damages under breach of contract.

HOW LONG DOES IT TAKE?

Getting to Judgment

The litigation stage leading to judgment can be relatively quick or drawn out, depending on whether the customer defaults or fights the lawsuit.

After you commence the lawsuit, you have a process server serve it on the defendant, who then has 35 days in New Jersey to file an answer.

If your customer doesn't answer, you can enter a default in the case and apply for a judgment. Factoring in time to serve the defendant, this can take as little as 6 or 7 weeks.

But if the customer files an answer, it can take more than a year to go to trial, depending on the discovery period assigned at the beginning of the case.

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The purpose of trial is to determine what the facts of the case are, so the judge can apply the law and enter judgment accordingly.

Discovery is the process of exchanging information and records so you can prepare for trial. Examples include interrogatories (written questions under oath), depositions (interviews under oath), and demands for documents and other records. After discovery, the court will schedule the matter for trial.

Yet if discovery shows you agree on the facts, you may not need a trial. Either side can make a motion for summary judgment, which states the material facts are undisputed and asks the court to rule in its favor.

Enforcing The Judgment

Unfortunately, winning a judgment doesn't guarantee payment. Collecting can be easy or hard, can take a few months or several years, if ever, depending on whether the debtor has assets and you're able to find them.

The first thing you should always do is record a judgment lien. This creates a statewide lien on all real estate interests the debtor has or later acquires. The lien is good for 20 years, and you can renew it. As a result, the debtor will have to deal with your judgment if it ever sells, buys or refinances real estate in New Jersey.

In my practice, I've collected many judgments, years after the fact, which did not appear collectible at the time we received them.

The Sheriff can seize physical assets and real estate if you find them, but selling them to satisfy your judgment involves time and expense. Therefore, the best assets to seize are liquid funds, like bank accounts, which just require a court order to turn them over to you. If you know where your customer banks, you might collect quickly.

To locate assets, you can formally demand information from the debtor or third parties with relevant knowledge. This is called post-judgment discovery.

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However, doing so warns the debtor that you're looking for assets, and may lead to it moving them.

Therefore, it's better to first find what you can under the radar. Your own records may reveal bank information, like on a credit application or copies of payments received. You can also have an investigator perform a bank account search. After you identify any accounts, you can have the Sheriff seize them without the debtor's prior knowledge.

Settlement

If both sides are willing, you can settle a case at any time, whether before litigation, during litigation or post-judgment. In exchange for a discount or a payment plan, settlement reduces the risk, expense and uncertainty of having to litigate and collect.

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CREDIT POLICIES FOR ALL INDUSTRIES

CREDIT POLICY

Whatever the industry, every business that sells on credit should develop an internal credit policy. The goal is to minimize the number of accounts that go unpaid. Consider adopting the following practices:

- do your due diligence on the customer;
- have clear credit terms;
- paper each order properly;
- invoice quickly and clearly;
- *motivate* the customer to pay you; and
- motivate the customer to pay *early*.

Do Your Due Diligence

A good credit policy begins with information-gathering, so you can make good credit decisions about your customers.

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Start with a detailed credit application. For each new customer, the financial information and trade references should help you decide whether to extend credit, or how much to extend.

Credit applications are limited, however, because a customer may provide false information or list only the creditors it pays. Therefore, before extending large amounts of credit, consider ordering a business credit report. Agencies like Experian or Dun & Bradstreet will give you objective financial data such as annual sales, the customer's payment history and public records like judgments, bankruptcies and UCC lien filings. This information, and the credit score based on it, can help you predict a customer's payment behavior.

Have Clear Credit Terms

Terms and conditions may appear on your credit application, in a sales agreement or even on your invoices. Terms that are conspicuous on your invoices may not be enforceable the first time around, but put the customer on notice for future transactions.¹³

Basic provisions include payment terms (such as Net 30) and a forum selection clause (for out of state customers, this lets you litigate any disputes locally). Other terms may include warranty information, inspection and return requirements, limitations on seller liability, etc. And as discussed below, you should also include interest on past-due accounts and attorney fees if you go to collections.

Sometimes, a supplier's terms may state that title to goods only passes at the time of payment, not at the time of delivery. This may give you a priority over other creditors in a bankruptcy proceeding. However, it also risks losing the delivery-and-acceptance exception to the Statute of Frauds discussed

¹³ -- see Loizeaux Builders Supply Co. v. Donald B. Ludwig Co., 144 N.J.Super. 556, 561-62 (Law Div., 1978)

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above.¹⁴ Thus, such a provision in your terms underscores the need to paper each order properly.

Paper Each Order Properly

The issue here is two-fold. First, to prove what you agreed upon, and second, to satisfy the Article 2 Statute of Frauds.

A signed agreement that specifies the quantity and price will satisfy the Statute. So will a signed purchase order that indicates an existing contract and specifies quantity. If the purchase order does not include prices, send a confirmation of sale that includes them.

Invoice Quickly and Clearly

The sooner you bill a paying customer, the sooner you get paid; the sooner you bill a nonpaying customer, the sooner you identify a problem account. You therefore want to send your invoices out promptly, either at the time of delivery or immediately thereafter.

Before sending an invoice, have quality control measures in place to check it. Make sure the invoice is clear, itemized and free of errors. Errors can cause confusion for paying customers and provide delay opportunities for nonpaying customers.

Motivate The Customer To Pay You

Your terms and conditions are your ticket to getting paid, both on time and in general. Motivate the customer by charging interest on past-due accounts,

¹⁴ -- see *International Associates v. Champ Hats*, 18 N.J. Super. 524 (Law Div., 1952)

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typically between 1.5%-2% *per month* if the customer is incorporated,¹⁵ and attorney fees if you go to collections.

For customers who view paying as a business decision, you want to make it more expensive *not to pay you*. Interest and attorney fees will make them choose between paying what they owe now, or paying more later.

For creditors who intend to pay you, but have limited ability and competing creditors, interest and legal fees should get you higher on the priority list.

I would also include an acceleration clause in your terms and conditions, which states that if the customer is in default under one invoice, you can declare all other invoices immediately due and owing. If you ever need to sue a customer, you want the right to sue now for the full balance it owes, not just the invoices that are already past due.

Finally, try to get a personal guarantee from the customer's owner. A corporation or LLC normally shields its owner from the company's debts, but a personal guarantee obligates him to pay if the business doesn't. This gives you another party to collect from, and a higher priority in the owner's mind.

The guarantee would normally appear in your credit application. While you would typically request it when the customer first applies for credit or when it requests a higher limit, you can require it any time as a condition of future sales.

If the owner refuses, he may lack confidence in his business's ability to pay. In that event, just be practical and make your best business decision.

¹⁵ -- see *NJSA* 31:1-6

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Motivate The Customer To Pay *Early*

Offer the carrot, not just the stick. Incentivize early payments. If your terms are Net 30 and you're adding interest at 45 days, offer a discount if the customer pays within 15. Whatever this represents in lost revenue, consider the value of faster cash flow and not having to chase your money.

To view a sample credit application or sales terms, you can download a free copy at my website, www.njcollectionlawyer.com/services/collections-for-goods-services-generally.

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COLLECTION POLICIES FOR ALL INDUSTRIES

Collection Policy

In addition to a credit policy, every business should develop an internal collection policy. Having clear processes can help you identify problem accounts, find amicable solutions, determine which accounts require litigation, and increase your chances of winning and collecting a judgment.

IDENTIFY ISSUES QUICKLY

The longer an account remains unpaid, the harder it usually is to collect, so identifying problems early is crucial. By watching the age of your receivables closely, you can identify accounts you need to pursue.

Develop an Accounts Receivable Aging Report

An accounts receivable aging report is a list of unpaid invoices which you can make on most accounting softwares. It lets you monitor the age of open receivables and identify problems early.

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REACH OUT TO THE CUSTOMER

Once you've identified a problem account, don't wait. The older a debt is, the less likely you are to collect. You therefore want to move quickly.

During the first 30 days of delinquency, be proactive by reaching out to the customer in a direct but nonthreatening manner. Phone calls are better than demand letters because you want to speak to the customer.

If the customer refuses your calls and fails to return them, that's a sign it's avoiding you. Although settlement is usually better than litigation, you may need to sue in such cases.

Yet if the customer takes your call, start with a polite reminder that the account's past due, and ask if there's any reason it hasn't paid you. Whether the issue is financial or otherwise, identifying the problem is half-way to solving it. And whatever the customer tells you, send an email memorializing the conversation. If you find yourself in a lawsuit, you'll need contemporaneous business records as evidence.

FIND OUT THE REASONS FOR NONPAYMENT

In almost every collection situation, there are 3 basic reasons a customer doesn't pay you: either it can't, it doesn't want to, or it genuinely disputes the charges.

The most important step is to find out the reasons for nonpayment. Once you understand them, you can gauge how to approach settlement or litigation.

KNOW WHEN TO SETTLE

Settlement can occur at any time, before or after you file a lawsuit.

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Given the cost of litigation and the uncertainty of collection, settlement can be a good option where there's a genuine dispute or the customer is having trouble paying.

Customer Disputes Charges

People tend to fight harder when they believe they're right. The customer that knows it owes the money, but just doesn't want to pay, may think twice about paying to defend a suit it can't win. But when the customer thinks it's right, drawn-out litigation may result.

If you feel the customer's acting in good faith, even if you disagree, consider a compromise before the conflict escalates. Settlement will eliminate the expense and uncertainty of litigation, and if both sides are reasonable, it may preserve your relationship and pay for itself many times in future sales.

Customer Can't Pay

If your customer wants to pay but has financial problems, consider making a deal. But first find out what the problem is, and how serious it is, so you'll know what the customer can really afford.

Every settlement comes down to an amount and terms. If you're giving a big discount, you want to get paid quickly. If you're giving a long payout, you might charge the full amount and possibly interest. The balance between discount and the time to pay is a matter of negotiation, but they're usually inversely related.

Keep in mind that the longer the payment terms, the more risk of nonpayment. If the customer goes out of business, you probably won't collect.

Therefore, a lump sum (or a few short payments) makes sense where you think the customer's on the verge of closing. But you may also prefer it if you need cash now, or just don't want to police a payment plan.

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On the other hand, if the customer's just having a cash flow problem and is likely to rebound, you might offer longer terms and demand full payment.

In sum, the terms you offer may depend on the customer's ability to pay, your own cash flow or financial needs, or your willingness to police a long payout.

Whatever the settlement terms, you should always have a written agreement. If you've already filed suit, you'll want to file a stipulation stating that if the customer breaches the settlement, you're entitled to judgment. If you haven't filed suit yet, you could hold off for a lump sum that's due shortly. But if you need to police a payment plan, I would file a complaint and an immediate stipulation of settlement. The purpose of the stipulation is to motivate the customer to make the payments, and streamline your path to a judgment if it doesn't.

INCREASE YOUR CHANCE OF WINNING A JUDGMENT

For each customer, you want to keep certain records you would need if you ever had to prove a collection suit. This includes contracts, invoices, payment histories, and correspondence.

For uncontested matters, your contract will show what your terms were, and the invoices and payment history will show the amount due.

For contested cases, your correspondence also becomes important. By sending emails or letters after each important conversation, you might show, for example, that the customer previously admitted owing the money. Or that it's distorting a conversation you had, or making one up that never occurred.

Maintaining proper records is therefore key to winning a judgment.

In addition, your terms and conditions, which are normally part of your credit policy, can also play a role in your collection policy. For example, if your terms let you apply payments to the oldest open charges, rather than the

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specific invoices the customer intended, you can use that to defeat a Statute of Limitations defense.

INCREASE YOUR CHANCE OF COLLECTING A JUDGMENT

Winning a judgment does not guarantee payment, but allows you to seize assets you're able to locate. Once again, keeping proper records will help you achieve this.

The best assets to seize are generally bank accounts, and you'll want to know where to find them. Keeping copies of every check or wire payment received will tell you where the customer banks.

Also, your credit application should require bank references and the customer's tax number. Even if the bank information becomes outdated, an investigator can use the tax number to search for current bank accounts.

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LAWS THAT PROTECT CONSTRUCTION SUPPLIERS



Besides your standard breach of contract claim, construction law provides several statutory remedies for unpaid suppliers.

These statutes may apply to private (non-government) projects only, to public (government) projects only, or to both. They don't focus on suppliers specifically, but include them in general payment rules for construction projects.

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PRIVATE (NON-GOVERNMENT) PROJECTS

The Construction Lien Law

The Construction Lien Law (the “CLL”),¹⁶ which applies only to private projects,¹⁷ gives unpaid suppliers the right to file a lien on the improved property.¹⁸

What Protection It Offers

The statute provides that if you furnish materials pursuant to a written contract, you're entitled to a lien for the value of the materials based on the contract price.¹⁹

As a supplier, a delivery slip will satisfy the contract requirement if your customer signs it.²⁰

What Suppliers It Protects

Under the statute, a “supplier” means a supplier to the owner, a contractor or the contractor's subcontractor.²¹ This definition excludes a supplier to a supplier.

Determining Your Lien Amount

Your maximum lien claim is for the unpaid portion of your contract price.²²

However, your lien is limited by the “lien fund,” i.e., the pool of money from which all claims may be paid.²³

¹⁶ -- NJS 2A:44A-1, *et seq.*

¹⁷ -- NJS 2A:44A-5(b)

¹⁸ -- NJS 2A:44A-3

¹⁹ -- NJS 2A:44A-2; 2A:44A-3

²⁰ -- NJS 2A:44A-2

²¹ -- NJS 2A:44A-2

²² -- NJS 2A:44A-9(a)

²³ -- NJS 2A:44A-2

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If you have a direct contract with the owner (i.e., called a “first tier” claimant), the lien fund is the amount you earned under your contract, less payments received, before you serve your lien claim.²⁴

If you're supplying a contractor (i.e., you're a “second tier” claimant), it's the amount earned by the contractor under the general contract, less payments it received, before you serve your lien claim.²⁵

And if you're supplying a subcontractor (i.e., you're a “third tier” claimant), it's the amount earned minus payments under the general contract, or the amount earned minus payments under the subcontract, whichever is less, before you serve your claim.²⁶

Beyond the third tier, there are no lien rights under the statute.²⁷

Note that only payments of *earned* amounts lower the lien fund.²⁸ For example, the owner can't defeat your claim by paying the contractor money before it's due.²⁹

Procedural Requirements

Your procedural requirements depend on whether the project's commercial or residential.

In either case, you need to file your lien claim with the county clerk where the property's located,³⁰ and then have 10 days to serve the owner and any contractor or subcontractor against whom you assert it.³¹

²⁴ -- NJSa 2A:44A-9(b)

²⁵ -- NJSa 2A:44A-9(b)

²⁶ -- NJSa 2A:44A-9(b)

²⁷ -- NJSa 2A:44A-9(g)

²⁸ -- Craft v. Stevenson Lumber Yard, Inc., 179 N.J. 56 (2004)

²⁹ -- NRG REMA LLC v. Creative Environmental Solutions Corp., 454 N.J. Super. 578 (App. Div. 2018)

³⁰ -- NJSa 2A:44A-2

³¹ -- NJSa 2A:44A-7(a)

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For commercial projects, you have 90 days to file after last supplying the materials underlying the claim.³²

For residential projects, it's more involved. Before filing a lien claim, you must first file a Notice of Unpaid Balance and a demand for arbitration.³³ You have 60 days after last supplying the materials to file the NUB, and then 10 days to serve it with the demand for arbitration.³⁴

If the arbiter determines you have a valid lien, you must file the lien claim within 10 days from receiving his decision,³⁵ and within 120 days after last supplying the materials.³⁶

After receiving your lien claim, the owner can withhold money payable under the general contract.³⁷ The contractor or sub against whom you assert the claim has 20 days to notify the owner in writing why it doesn't owe the money; otherwise, the owner can pay you and deduct it from its contract price.³⁸

If the owner doesn't pay you, your next step is an action in Superior Court to enforce the lien. This is a lawsuit to sell the property in order to pay you. Under the statute, your deadline to file suit is 1 year after last supplying the materials, or within 30 days if the owner makes a written demand that you commence suit.³⁹

What This Means For Your Collection Policy

If you're supplying an owner, contractor or subcontractor on a private project, your collection policy should incorporate all the statutory requirements under the CLL to preserve your lien rights on the improved property. Be sure to always get a written contract from your customer (signed delivery slips count), and calendar all relevant deadlines.

³² -- NJSA 2A:44A-6(a)

³³ -- NJSA 2A:44A-21(b)

³⁴ -- NJSA 2A:44A-21(b)

³⁵ -- NJSA 2A:44A-21(b)

³⁶ -- NJSA 2A:44A-6(a)

³⁷ -- NJSA 2A:44A-12

³⁸ -- NJSA 2A:44A-12

³⁹ -- NJSA 2A:44A-14(a)

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For commercial projects, calendar 90 days or less after last supplying the materials to file your claim with the county clerk, and then 10 days or less to serve it.

For residential projects, calendar 120 days or less after last supplying the materials to file your claim, and then 10 days or less to serve it. However, you first need to schedule 60 days or less to file the NUB, and then 10 days or less to serve it with the arbitration demand. After receiving a favorable decision, schedule 10 days or less to file the claim, which in any event, must be within the 120 day period.

After you file your claim, whether within the 90 or 120 day period, calendar 1 year or less after last supplying the materials to commence your action in Superior Court. However, if you receive a written demand from the owner to commence the suit, contact your attorney immediately because you only have 30 days to file.

PUBLIC (GOVERNMENT) PROJECTS

For public projects, 3 statutes offer protection to unpaid suppliers: the Municipal Mechanics Lien Law (the "MMLL"),⁴⁰ the Public Works Bond Act (the "Bond Act")⁴¹ and the Construction Trust Fund Act.⁴²

The Municipal Mechanics Lien Law

Unlike the CLL, the MMLL doesn't encumber land, since you can't have a lien on government property. Instead, it attaches to monies owed by a public agency under a contract for public improvement.

⁴⁰ -- NJSA 2A:44-125 *et seq.*

⁴¹ -- NJSA 2A:44-143, *et seq.*

⁴² -- NJSA 2A:44-148

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What Protection It Offers

The statute applies to public-improvement contracts in which a “county, city, town, township, public commission, public board or other municipality” is the contracting party.⁴³ This excludes the State, and refers only to municipalities below the State level which are authorized to make public improvement contracts.⁴⁴

The statute provides that if you furnish materials towards the performance of a public improvement contract, and satisfy certain procedural requirements, you have a lien on the monies “due or to grow due under the contract and in the control of the public agency.”⁴⁵

In other words, your lien attaches to monies due to the general contractor which are still in the public agency's hands. Thus, you need to assert the lien before the government pays the contractor, at which point there's nothing left to attach.

What Suppliers It Protects

The statute uses the term “materialman” instead of “supplier,” but doesn't actually define it. However, it states clearly that the lien exists for a person “furnishing materials to the contractor or subcontractor.”⁴⁶

A “subcontractor” under the statute includes the contractor's direct subcontractor, and the subcontractor's own subcontractor.⁴⁷

Thus, the statute covers a supplier to the contractor or its subcontractor⁴⁸ (and appears to cover one supplying a sub-subcontractor), but doesn't include a supplier to a supplier.⁴⁹

⁴³ -- *NJSA 2A:44-126*

⁴⁴ -- *NJSA 2A:44-126*

⁴⁵ -- *NJSA 2A:44-128(a)*

⁴⁶ -- *NJSA 2A:44-128(a)*

⁴⁷ -- *NJSA 2A:44-126*

⁴⁸ -- *Hiller & Skoglund, Inc. v. Atlantic Creosoting Co.*, 40 N.J. 6 (1963); *Morris County Indus. Park v. Thomas Nicol Co.*, 35 N.J. 522 (1961)

⁴⁹ -- *Morris County Indus. Park v. Thomas Nicol Co.*, 35 N.J. 522 (1961)

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Also, note that merely selling to a contractor or subcontractor doesn't protect you. To qualify for a lien, your product must become part of the actual improvement.⁵⁰

Procedural Requirements

To obtain a lien, you have 60 days to file a Notice of Lien Claim with the public agency, measured from when the contractor completes performance (or when the public agency accepts its performance).⁵¹ This applies whether you're supplying the contractor or a subcontractor.

In addition, if you're supplying a subcontractor, you have to provide a Notice of Delivery to the municipal clerk within 20 days from your first delivery.⁵²

The public agency, after receiving your notice of lien claim, may (but isn't required to) notify the contractor and other parties with an interest in the funds, requiring them to refute your lien claim within 5 days.⁵³ If they fail to do so, the public agency can pay you without a court order.⁵⁴

On the other hand, if the contractor or other interested parties refute your lien claim, or if the public agency otherwise fails to pay it, you must bring an action in Superior Court to enforce it. The deadline for this is also 60 days from the contractor's completing performance.⁵⁵ So technically, you can file the lien claim and commence the action both on the last day, but as a practical matter, it's better to stagger them and give the public agency a chance to pay you.

Under the statute, the Superior Court will determine which lien claims are valid and direct the public agency to pay them. If the lien claims exceed the

⁵⁰ -- Township of Parsippany-Troy Hills v. Lisbon Contractors, Inc., 303 N.J.Super. 362 (App. Div. 1997)

⁵¹ -- NJSA 2A:44-132

⁵² -- NJSA 2A:44-128(b)

⁵³ -- NJSA 2A:44-135; 2A:44-136

⁵⁴ -- NJSA 2A:44-136

⁵⁵ -- NJSA 2A:44-138

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amount due the contractor, the public agency will pay them on a prorated basis.⁵⁶

What This Means For Your Collection Policy

If you're supplying a contractor or subcontractor on a municipal project (State excluded), your collection policy should incorporate all the statutory requirements under the MMLL to preserve your lien rights on monies due to the contractor. Be sure to calendar all relevant deadlines.

If you're supplying a subcontractor, calendar 20 days or less after your first delivery to provide Notice of Delivery to the municipal clerk.

Whether you're supplying a contractor or subcontractor, calendar 60 days or less, measured from when the contractor completes performance, to file both a Notice of Lien Claim with the public agency and a suit to enforce the lien in Superior Court. Filing the Notice ahead of time may avoid the need for a suit if the public agency then pays you.

The Public Works Bond Act

The Bond Act doesn't give you a lien on public money owed to the contractor. Rather, it makes the contractor post a bond to ensure your payment.

What Protection It Offers

The Bond Act requires the general contractor on all public projects – State included – to furnish a payment bond for the protection of suppliers, subcontractors and laborers.⁵⁷

What Suppliers It Protects

Like the MMLL, the Bond Act doesn't define "supplier" or "materialman." Instead, it refers to "material suppliers in contract with the contractor, or ... with a subcontractor to the contractor."⁵⁸

⁵⁶ -- NJSA 2A:44-140

⁵⁷ -- NJSA 2A: 44-143(a)

⁵⁸ -- NJSA 2A: 44-143(a)

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Thus, like the MMLL, it protects a supplier to the contractor or its direct subcontractor, and excludes a supplier to a supplier. Yet unlike the MMLL, it also seems to exclude a supplier to a sub-subcontractor.

In addition, the Bond Act only covers materials “used or consumed” in the public project (like the MMLL, which only attaches to products which become part of the improvement).⁵⁹ It doesn't protect you for mere delivery, only if your materials are actually incorporated.⁶⁰

Procedural Requirements

The procedural requirements involve notice to the contractor, providing a statement of amount due, and commencing an action on the bond.

If you're supplying the contractor directly, there's no notice requirement. If you're supplying a subcontractor, you must notify the contractor in writing that you're a beneficiary under the bond.⁶¹ Remember to do so before furnishing any materials, since the bond only protects you for materials supplied after the notice.⁶²

If your customer doesn't pay you, you can then seek payment under the bond. The statute requires you to send the bond sureties and contractor a statement of amount due, and give them 90 days to pay you.⁶³ If they don't pay within the 90 days, you can sue on the bond in Superior Court.⁶⁴

Your deadline for commencing suit is 1 year from when you last furnished materials.⁶⁵ Therefore, since you can't bring the suit before the end of 90 days, be sure to provide the statement a few months before the 1-year mark.

⁵⁹ -- NJSA 2A:44-143(a); 2A: 44-144

⁶⁰ -- Poly-Flex, Inc. v. Cape May County Mun. Utilities Authority, 832 F.Supp. 889 (D.NJ. 1993)

⁶¹ -- NJSA 2A: 44-145

⁶² -- NJSA 2A: 44-145

⁶³ -- NJSA 2A: 44-145; 2A: 44-146

⁶⁴ -- NJSA 2A: 44-145; 2A: 44-146;

⁶⁵ -- NJSA 2A: 44-146

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What This Means For Your Collection Policy

If you're supplying a contractor or direct subcontractor on any public project (State included), your collection policy should incorporate the statutory requirements to preserve your right to payment under the contractor's bond. Be sure to provide the required notice if supplying a subcontractor, and calendar the relevant deadlines.

If you're supplying the contractor directly, there's no notice requirement. If you're supplying a subcontractor, notify the contractor that you're a bond beneficiary before you supply any materials.

In either case, calendar 1 year or less after last supplying materials to commence a Superior Court action on the bond. However, you first need to give the contractor and bond sureties a statement of amount due and 90 days to pay you. Therefore, make sure to calendar 90 days or more before the 1-year mark to send them the required statement.

The Construction Trust Fund Act

A third form of security, the Trust Fund Act, is much simpler than the other 2 public-project statutes. It has no notice or filing requirements, and protects a larger, more-general class of persons.⁶⁶

What Protection It Offers

The statute applies to all public entities, including the State, and provides that on any public improvement contract, monies paid to the contractor constitute a trust fund for the payment of all labor and materials.⁶⁷

What this means is that contractors must use the funds to pay their subcontractors and suppliers, etc. on the project, who must use them to pay their own providers on the project, etc.

⁶⁶ -- Wilson v. Robert A. Stretch, Inc., 44 N.J.Super. 52 (Ch. Div., 1957)

⁶⁷ -- NJSA 2A: 44-148

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Furthermore, you can impose personal liability on corporate officers who violate the statute.⁶⁸

Unlike the MMLL, which applies to money owed to the contractor that's still in the government's hands, the Trust Fund Act imposes a trust on the funds after they're paid.⁶⁹

What Suppliers It Protects

The Act requires every party in the contractual chain, where it knows it received public funds, to apply them for purposes of the project⁷⁰ and not to the detriment of its providers' claims.⁷¹

Thus, unlike the MMLL and Bond Act, it protects a supplier to a supplier, not just to a contractor or subcontractor.

Procedural Requirements

There are no procedural requirements to satisfy. The statute automatically imposes a trust on all project funds once the government pays them out.

What This Means For Your Collection Policy

Because there are no procedural requirements under the Trust Fund Act, you don't need to incorporate anything into your collection policy in order to sue under it.

⁶⁸ -- Reliance Ins. Co. v. The Lott Group, Inc., 370 NJ Super. 563 (App. Div. 2004)

⁶⁹ -- National Surety Corp. v. Barth, 11 N.J. 506 (1953)

⁷⁰ -- Hiller & Skoglund, Inc. v. Atlantic Creosoting Co., 40 N.J. 6 (1963)

⁷¹ -- Universal Supply Co. v. Martell Const. Co., Inc., 156 N.J. Super. 327 (App. Div. 1978)

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PRIVATE and PUBLIC PROJECTS

The Prompt Payment Act

Finally, the Prompt Payment Act (the “PPA”)⁷² applies to both private and public projects, and in relevant part, requires contractors and subcontractors to pay their providers shortly after receiving payment themselves.

What Protection It Offers

The PPA provides that, unless the parties agree otherwise in writing, a contractor has 10 days after receiving payment to pay its subcontractor, who in turn has 10 days to pay its sub-subcontractor.⁷³

For violations, you're entitled to statutory interest on late payments,⁷⁴ and the prevailing party in a lawsuit under the statute is entitled to reasonable attorney fees.⁷⁵

What Suppliers It Protects

The PPA doesn't refer to “suppliers” or “materialmen” per se, and speaks only in terms of “subcontractors” and “sub-subcontractors.”

However, a “subcontractor” under the statute includes those who furnish materials to the contractor, and a “sub-subcontractor” includes those who furnish them to a subcontractor.⁷⁶

Thus, the plain language seems to protect even a supplier to a supplier, not just to a contractor or subcontractor (used here in the colloquial sense).⁷⁷

⁷² -- NJSA 2A:30A-1, et seq.

⁷³ -- NJSA 2A:30A-2(b)

⁷⁴ -- NJSA 2A:30A-2(c)

⁷⁵ -- NJSA 2A:30A-2(f)

⁷⁶ -- NJSA 2A:30A-1

⁷⁷ -- see also *Vimco, Inc. v. Terminal Construction Corp.*, 2010 WL 2776838 (D.N.J. 2010)(*case involving a supplier to a supplier; decided on other grounds*)

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Procedural Requirements

There are no procedural requirements to satisfy. You're automatically entitled to the interest on late payments, and to attorney fees if you win a lawsuit under the statute.

However, to suspend your own performance without penalty for breach of contract, you need to give 7 days written notice that you won't perform until you're paid.⁷⁸

The statute also says that contracts for the improvement of structures must provide that PPA disputes may be submitted to alternative dispute resolution.⁷⁹

What This Means For Your Collection Policy

Because there are no procedural requirements under the PPA, you don't need to incorporate any affirmative measures into your collection policy. However, make sure you don't sign a contract which waives its protections.

Also, if you haven't been paid and haven't completed performance, provide the notice of your intent to suspend performance, both to motivate the customer to pay and to protect yourself against a counterclaim.

SUMMARY

In summary, the CLL, MMLL and Bond Act are all fast-tracked remedies. If you're going to use them, you need to move quickly and be familiar with all the required procedures. However, they can be very effective tools for getting paid.

A standard collection action for breach of contract, which adds counts under the Trust Fund Law and PPA, not only gives you more time to react, but also

⁷⁸ -- NJSA 2A:30A-2(b)

⁷⁹ -- NJSA 2A:30A-2(f)

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provides grounds for personal liability, statutory interest and attorney fees. This can be very powerful.

If you're a construction supplier, you and your collection lawyer should be aware of the various remedies available to you, what their requirements are, and how to use them to your advantage.

For an easy chart summarizing the statutes, you can download a free copy at my website, www.NJCollectionLawyer.com/services/collections-for-construction-suppliers.

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PAY-WHEN-PAID & PAY-IF-PAID PROVISIONS



Pay-When-Paid and Pay-If-Paid clauses are contractual provisions that can be detrimental to construction suppliers.

A Pay-When-Paid clause creates a timing mechanism for payment. It doesn't succeed in making your customer's obligation contingent upon receiving payment itself; rather, it suspends the customer's obligation for a reasonable time while the customer seeks payment itself.⁸⁰

⁸⁰ -- See, e.g., *Seal Tite Corp. v. Ehret, Inc.*, 589 F. Supp. 701 (D.NJ 1984)

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A Pay-If-Paid provision, on the other hand, does succeed in making the customer's obligation contingent upon receiving payment itself. There's no magical language to create a Pay-If-Paid clause, but it must be clear from the contract that you're accepting the risk of nonpayment from the owner to the contractor, or if you're supplying a subcontractor, the risk of nonpayment from the contractor to the subcontractor.⁸¹

As a construction supplier, you may find yourself in a situation where your customer claims it has a Pay-If-Paid clause and doesn't have to pay you. Don't concede that point without having an attorney review the contract critically. Many clauses which claim to be Pay-If-Paid may only be Pay-When-Paid; it really depends on whether you clearly accepted the risk of nonpayment higher up in the chain.

When confronted with a Pay-When-Paid or Pay-If-Paid provision, it's important to know what you're signing and consider whether the opportunity justifies the risk of delayed or non-payment. A better scenario, if it's negotiable, would be to avoid them and rely on your normal sales terms.

To learn more about construction supplier collections, or business collections in general, visit my website at www.NJCollectionLawyer.com.

⁸¹ -- See, e.g., *Avon Bros., Inc. v. Tom Marton Construction Co., Inc.*, 2000 WL 34241102 (App. Div. 2000)

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ATTORNEY FEES: THE COST OF LITIGATION



BILLING MODELS FOR ATTORNEY FEES

Attorneys have different billing models, which commonly include hourly, contingency, and flat billing.

Hourly means you pay for the amount of time the lawyer works on your case, based on an hourly rate. Contingency means you pay a percentage of any recovery. And flat billing means you pay a fixed amount, which doesn't depend on time or results.

In collections, lawyers commonly accept cases on a contingency basis, though you need a clear agreement which states what services this includes. The advantage to you is that you only pay a fee if there's a recovery.

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But not all clients want a contingency fee. For example, for a particularly large balance, you may not want to pay a percentage of the recovery. Therefore, under New Jersey's ethics rules, an attorney who offers you contingency billing must also offer hourly.

In addition, your lawyer may offer a blended (hybrid) model, which combines a lower hourly rate with a lower percentage of the recovery.

CHARGING ATTORNEY FEES TO THE CUSTOMER

New Jersey courts generally follow the "American Rule," which provides that each side pays its own attorney fees.⁸² However, a prevailing party can recover reasonable fees if provided for by contract, statute or court rule.⁸³

When determining a reasonable fee award, the Court determines a reasonable amount of time spent on the matter and multiplies it by a reasonable hourly rate.⁸⁴ Yet when a contingency fee is involved, it may award a higher amount to reflect the risk of nonpayment.⁸⁵

To shift fees by contract, you would state in your sales agreement, in your terms and conditions or on your credit application, etc., that in the event of nonpayment, the customer is obligated to pay reasonable attorney fees. You might even provide that fees equal to one-third (33.3%) of the unpaid balance will be deemed reasonable.

Statutory fees apply in particular kinds of cases where the legislature deems them appropriate. For example, we said above that in a lawsuit for violations of the Prompt Payment Act, the prevailing party is entitled to reasonable attorney fees.⁸⁶

⁸² -- see Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242, 258 (2023)

⁸³ -- see Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009) and *RPC 1.5(a)*

⁸⁴ -- Litton, 200 N.J. at 385

⁸⁵ -- see Walker v. Giuffre, 209 N.J. 124, 127–28 (2012) and Rendine v. Pantzer, 141 N.J. 292, 316–17 (1995).

⁸⁶ -- *NJSA 2A:30A-2(f)*

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Finally, the Court may award fees when permitted by court rule. Rule 1:4-8(b), for example, provides that a party may move for sanctions for frivolous litigation, and the Court may award the prevailing party reasonable attorney fees incurred in presenting or opposing the motion.⁸⁷

Of these exceptions to the American Rule, the one you can prepare for is contractual fees. You can't control at the outset if there will be a relevant statute or court rule to shift legal fees, but you can create a contractual right to fees if the customer fails to pay you.

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⁸⁷ -- N.J. Ct. R. 1:4-8(b)

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WHETHER TO SUE: PRACTICAL CONSIDERATIONS



The decision to litigate isn't always obvious. Even if litigation is the only way you'll get paid, a practical approach balances 3 questions: How hard will it be to get a judgment? What will litigation cost? And what's the likely return on investment?

How Hard Will It Be To Get A Judgment?

This factors in the likelihood of winning, how long it'll take and how hard you would fight if the lawsuit were contested.

Do you expect the customer to default or defend? If the customer defaults, winning is more certain, it shouldn't take long and you won't need to fight hard.

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But if the customer defends, it takes longer and is more difficult. What reasons did the customer give for not paying? Is there a legitimate dispute? How about counterclaims? Are there other possible defenses, like the Statute of Limitations?

If the facts and law are on your side, you should still prevail in the end, but a determined adversary can make it harder.

What Will Litigation Cost?

What will it cost if you're paying your lawyer on an hourly basis? If you expect the customer to default, it should cost much less than if the customer defends. If you've retained your lawyer on a contingency basis, does the contingency fee include contested litigation?

What's The Likely Return On Investment?

Will there be assets to satisfy a judgment?

Is the company still operating? Even if the customer is struggling, if the lights are still on and the phone is ringing, assume it's paying someone. Suing should make you a higher priority.

On the other hand, if the customer's out of business, collecting is harder. The longer it's been closed, the less likely you'll find active bank accounts or other assets to seize.

What about other judgments? The more judgment creditors, and the more aggregate judgment debt, the more competition you face for the limited assets available. If other creditors have already executed, there may not be assets left for you to seize. But if they're not actively executing, you have an opportunity to take a judgment and levy aggressively.

Finally, can you go after the owners? Absent fraud or a guarantee, personal liability will depend on the customer's corporate status. If the customer was

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incorporated at the time of the sale, the owners should be shielded from liability. If it wasn't incorporated, or if the corporation was suspended, you could go after them personally.

Corporate status reports and certain filings are available to the public. For a modest fee, you can obtain them on the State's website.⁸⁸

To learn more about construction supplier collections, or business collections in general, visit my website at www.NJCollectionLawyer.com.

⁸⁸ -- <https://www.njportal.com/DOR/businessrecords/>

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CONCLUSION



CONCLUSION

The purpose of this book was to provide construction suppliers with the knowledge they need to collect their receivables quickly and efficiently.

We addressed general topics like important differences between goods and services, collection litigation generally, and the need regardless of industry to develop good credit and collection policies.

We also addressed construction-industry topics like the statutory remedies available, harmful Pay-When-Paid and Pay-If-Paid provisions and the preference, if possible, to include your normal payment terms.

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In addition, we discussed attorney fees, including fee shifting, and practical considerations regarding the decision to litigate.

Whether or not you have current collection needs, I recommend working with an experienced collection lawyer to review your credit and collection policies, or if you have none in place, to help you develop them. These policies should comply with any requirements for your statutory remedies.

If you do have current collection needs, an experienced collection lawyer should be adept at spotting relevant issues and finding available assets.

I'm happy to hear from you if you have any questions, comments or ideas about the subject matter, or about business collections in general. Feel free to contact me as follows:

- jbender@NJCollectionLawyer.com; or
- (856) 667-1669.

Finally, if you found this book helpful, please share it and feel free to copy and use it with source attribution.

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APPENDIX



THE CONSTRUCTION LIEN LAW **NJSA 2A:44-1 to 38 (Excerpts)**

Due to its length, I've included select sections of the CLL in this appendix. However, you can find the full statute at <https://law.justia.com/codes/new-jersey/2009/title-2a/2a-44a>.

NJSA 2A:44A-2 Definitions (Excerpts – see link for full section)

As used in this act:

“Contract” means any agreement, or amendment thereto, in writing,

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signed by the party against whom the lien claim is asserted and evidencing the respective responsibilities of the contracting parties, including, but not limited to, price or other consideration to be paid, and a description of the benefit or improvement to the real property subject to a lien.

In the case of a supplier, “contract” shall include a delivery or order slip referring to the site or project to which materials have been delivered or where they were used and signed by the party against whom the lien claim is asserted or that party’s authorized agent.

As referenced herein: the phrase “party against whom the lien claim is asserted” means the party in direct privity of contract with the party asserting the lien claim; and the term “signed” means a writing that bears a mark or symbol intended to authenticate it.

“Contractor” means any person in direct privity of contract with the owner of real property, or with a community association in accordance with section 3 of P.L.1993, c. 318 (C.2A:44A-3), for improvements to the real property.

“First tier lien claimant” means a claimant who is a contractor.

“Lien” or “construction lien” means a lien on the owner’s interest in the real property arising pursuant to this act.

“Lien claim” means a claim, by a claimant, for money for the value of work, services, material or equipment furnished in accordance with a contract and based upon the contract price and any amendments thereto, that has been secured by a lien pursuant to this act.

“Lien fund” means the pool of money from which one or more lien claims may be paid.

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The amount of the lien fund shall not exceed the maximum amount for which an owner can be liable.

The amount of the lien that attaches to the owner's interest in the real property cannot exceed the lien fund.

“Owner” or “owner of real property” means any person, including a tenant, with an interest in real property who personally or through an authorized agent enters into a contract for improvement of the real property.

“Public entity” includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

“Second tier lien claimant” means a claimant who is, in relation to a contractor: (1) a subcontractor; or (2) a supplier.

“Subcontractor” means any person providing work or services in connection with the improvement of real property pursuant to a contract with a contractor or pursuant to a contract with a subcontractor in direct privity of contract with a contractor.

“Supplier” means any supplier of material or equipment, including rental equipment, having a direct privity of contract with an owner, community association, contractor or subcontractor in direct privity of contract with a contractor.

“Third tier lien claimant” means a claimant who is a subcontractor to a second tier lien claimant or a supplier to a second tier lien claimant.

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NJSA 2A:44A-3 Entitlement To Lien For Work, Services, Material Or Equipment Provided Pursuant To Contract (*Excerpts – see link for full section*)

- a. Any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract and based upon the contract price, subject to sections 6, 9, and 10 of P.L.1993, c. 318 (C.2A:44A-6, 2A:44A-9 and 2A:44A-10).

The lien shall attach to the interest of the owner or unit owner of the real property development, or be filed against the community association, in accordance with this section.

Nothing in this act shall be construed to limit the right of any claimant from pursuing any other remedy provided by law.

NJSA 2A:44A-6 Filing Of Lien Claim; Requirements; Attachment Of Lien

- a. A contractor, subcontractor or supplier entitled to file a lien pursuant to section 3 of P.L.1993, c. 318 (C.2A:44A-3) shall do so according to the following process:
 - (1) The lien claim form as provided by section 8 of P.L.1993, c. 318 (C.2A:44A-8) shall be signed, acknowledged and verified by oath of the claimant setting forth:
 - (a) the specific work or services performed, or material or equipment provided pursuant to contract; and
 - (b) the claimant's identity and contractual relationship with the owner or community association and other known parties in the construction chain.

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(2) In all cases except those involving a residential construction contract, the lien claim form shall then be lodged for record within 90 days following the date the last work, services, material or equipment was provided for which payment is claimed.

In the case of a residential construction contract, the lien claim form shall be lodged for record, as required by paragraph (8) of subsection b. of section 21 of P.L.1993, c. 318 (C.2A:44A-21), not later than 10 days after receipt by the claimant of the arbitrator's determination, and within 120 days following the date the last work, services, material or equipment was provided for which payment is claimed.

If requested, at the time of lodging for record, the clerk shall provide a copy of the lien claim form marked with a date and time received.

b. A lien shall not attach or be enforceable unless the lien claim or other document permitted to be filed is:

(1) filed in the manner and form provided by this section and section 8 of P.L.1993, c. 318 (C.2A:44A-8); and

(2) a copy thereof served in accordance with section 7 of P.L.1993, c. 318 (C.2A:44A-7), except that every document lodged for record that satisfies the requirements of this section, even if not yet filed, shall be enforceable against parties with notice of the document.

A document shall be first filed, however, in order to be enforceable against third parties without notice of the document, including, but not limited to, an owner, bona fide purchaser, mortgagee, grantee of an easement, or a lessee or a grantee of any other interest in real estate.

c. In the case of a residential construction contract the lien claim shall also comply with section 20 of P.L.1993, c. 318 (C.2A:44A-20) and section 21 of P.L.1993, c. 318 (C.2A:44A-21).

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For purposes of this act, warranty or other service calls, or other work, materials or equipment provided after completion or termination of a claimant's contract shall not be used to determine the last day that work, services, material or equipment was provided.

NJSA 2A:44A-7 Service Of Lien Claim; Time; Manner; Form; Improper Service (Excerpts – see link for full section)

- a. Within 10 days following the lodging for record of a lien claim, the claimant shall serve on the owner, or community association in accordance with section 3 of P.L.1993, c. 318 (C.2A:44A-3), and, if any, the contractor and subcontractor against whom the claim is asserted, a copy of the completed and signed lien claim substantially in the form prescribed by section 8 of P.L.1993, c. 318 (C.2A:44A-8) and marked "received for filing" or a similar stamp with a date and time or other mark indicating the date and time received by the county clerk.
- b. The service of the lien claim provided for in this section shall be a condition precedent to enforcement of the lien; however, the service of the lien claim outside the prescribed time period shall not preclude enforceability unless the party not timely served proves by a preponderance of the evidence that the late service has materially prejudiced its position.

NJSA 2A:44A-9 Amount Of Lien Claim Allowed; Lien Fund; Fund Computation (Excerpts – see link for full section)

- a. The amount of a lien claim shall not exceed the unpaid portion of the contract price of the claimant's contract for the work, services, material or equipment provided.
- b. Except as set forth in sections 15 and 21 of P.L.1993, c. 318 (C.2A:44A-15 and 2A:44A-21), and subject to section 7 of P.L.1993, c. 318 (C. 2A:44A-7) and subsection c. of this section, the lien fund shall not exceed:

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- (1) in the case of a first tier lien claimant or second tier lien claimant, the earned amount of the contract between the owner and the contractor minus any payments made prior to service of a copy of the lien claim; or
 - (2) in the case of a third tier lien claimant, the lesser of: (a) the amount in paragraph (1) above; or (b) the earned amount of the contract between the contractor and the subcontractor to the contractor, minus any payments made prior to service of a copy of the lien claim.
- c. A lien fund regardless of tier shall not be reduced by payments by the owner, or community association in accordance with section 3 of P.L.1993, c. 318 (C.2A:44A-3), that do not discharge the obligations for the work performed or services, material or equipment provided, including, but not limited to:
- (1) payments not in accordance with written contract provisions;
 - (2) payments yet to be earned upon lodging for record of the lien claim;
 - (3) liquidated damages;
 - (4) collusive payments;
 - (5) use of retainage to make payments to a successor contractor after the lien claim is lodged for record; or
 - (6) setoffs or backcharges, absent written agreement by the claimant, except for any setoffs upheld by judgment that are first determined by:
 - (a) arbitration or alternate dispute resolution in a proceeding conducted in accordance with section 21 of P.L.1993, c. 318 (C.2A:44A-21); or
 - (b) any other alternate dispute resolution agreed to by the parties.

No lien rights shall exist for other than first, second, or third tier lien claimants.

NJSA 2A:44A-12 Notice Of Lien Claim; Authorized Withholding Of Amount Claimed From Contract Price

Upon receipt of notice of a lien claim, the owner, or community association in accordance with section 3 of P.L.1993, c. 318 (C.2A:44A-3), shall be

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authorized to withhold and deduct the amount claimed from the unpaid part of the contract price that is or thereafter may be due and payable to the contractor or subcontractor, or both.

The owner or community association may pay the amount of the lien claim to the claimant unless the contractor or subcontractor against whose account the lien is filed notifies the owner and the lien claimant in writing within 20 days of service of the lien claim upon both the owner or community association and the contractor or subcontractor, that the claimant is not owed the monies claimed and the reasons therefor.

Any such payment made by the owner or community association shall constitute a payment made on account of the contract price of the contract with the contractor or subcontractor, or both, against whose account the lien is filed.

NJSA 2A:44A-14 Failure To Commence Action; Forfeiture Of Enforcement Right; Penalty For Failure To Discharge Lien

- a. A claimant filing a lien claim shall forfeit all rights to enforce the lien, and shall immediately discharge the lien of record in accordance with section 30 of P.L.1993, c. 318 (C.2A:44A-30), if the claimant fails to commence an action in the Superior Court, in the county in which the real property is situated, to enforce the lien claim:
 - (1) Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or
 - (2) Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner, community association, contractor, or subcontractor against whose account a lien claim is filed, requiring the claimant to commence an action to enforce the lien claim.
- b. Any lien claimant who forfeits a lien pursuant to this section and fails to discharge that lien of record in accordance with section 30 of P.L.1993, c.

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318 (C.2A:44A-30), shall be liable for all court costs, and reasonable legal expenses, including, but not limited to, attorneys' fees, incurred by the owner, community association, contractor, or subcontractor, or the total costs and legal expenses of all or any combination of them, in defending or causing the discharge of the lien claim.

The court shall, in addition, enter judgment against the claimant who fails to discharge the lien for damages to any of the parties adversely affected by the lien claim.

c. (Deleted by amendment, P.L.2010, c. 119)

Any disputes arising out of the improvement which is the subject of a lien claim but which are unrelated to any action to enforce a lien claim may be brought in a separate action or in a separate count in the same action.

NJSA 2A:44A-21 Legislative Findings; Additional Requirements For Filing Of Lien On Residential Construction (*Excerpts – see link for full section*)

b. The filing of a lien for work, services, material or equipment furnished pursuant to a residential construction contract shall be subject to the following additional requirements:

(1)As a condition precedent to the filing of any lien arising under a residential construction contract, a lien claimant shall first file a Notice of Unpaid Balance and Right to File Lien by lodging for record the Notice within 60 days following the last date that work, services, material or equipment were provided for which payment is claimed in accordance with subsection b. of section 20 of P.L.1993, c. 318 (C.2A:44A-20), and comply with the remainder of this section.

(2)Upon its lodging for record, a Notice of Unpaid Balance and Right to File Lien, shall be served in accordance with the provisions for the service of lien claims in section 7 of P.L.1993, c. 318 (C.2A:44A-7).

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(3) Unless the parties have otherwise agreed in writing to an alternative dispute resolution mechanism, within 10 days from the date the Notice of Unpaid Balance and Right to File Lien is lodged for record, the lien claimant shall also serve a demand for arbitration and fulfill all the requirements and procedures of the American Arbitration Association to institute an expedited proceeding before a single arbitrator designated by the American Arbitration Association.

The demand for arbitration may be served in accordance with the provisions for the service of lien claims in section 7 of P.L.1993, c. 318 (C.2A:44A-7) along with: (a) a copy of the completed and signed Notice of Unpaid Balance and Right to File Lien; and (b) proof by affidavit that the Notice of Unpaid Balance and Right to File Lien has been lodged for record.

The arbitrator shall grant or deny a request for a consolidated arbitration proceeding at the arbitrator's discretion.

- (4) Upon the closing of all hearings in the arbitration, the arbitrator shall make the following determinations:
- (a) whether the Notice of Unpaid Balance and Right to File Lien was in compliance with section 20 of P.L.1993, c. 318 (C.2A:44A-20) and whether service was proper under section 7 of P.L.1993, c. 318 (C.2A:44A-7);
 - (b) the earned amount of the contract between the owner and the contractor in accordance with section 9 of P.L.1993, c. 318 (C.2A:44A-9);
 - (c) the validity and amount of any lien claim which may be filed pursuant to the Notice of Unpaid Balance and Right to File Lien;
 - (d) the validity and amount of any liquidated or unliquidated setoffs or

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counterclaims to any lien claim which may be filed; and

(e) the allocation of costs of the arbitration among the parties.

When making the above determination, the arbitrator shall also consider all determinations made by that arbitrator in any earlier arbitration proceeding pertaining to the same residential construction.

(6) The arbitrator shall make such determinations set forth in paragraphs (4) and (5) of this subsection and the arbitration proceeding shall be completed within 30 days of receipt of the lien claimant's demand for arbitration by the American Arbitration Association unless no response is filed, in which case the arbitrator shall make such determinations and the arbitration proceeding shall be deemed completed within 7 days after the time within which to respond has expired.

(8) Upon determination by the arbitrator that there is an amount which, pursuant to a valid lien shall attach to the improvement, the lien claimant shall, within 10 days of the lien claimant's receipt of the determination, lodge for record such lien claim in accordance with section 8 of P.L.1993, c. 318 (C.2A:44A-8) and furnish any bond, letter of credit or funds required by the arbitrator's decision.

The failure to lodge for record such a lien claim, or furnish the bond, letter of credit or funds, within the 10-day period, shall cause any lien claim to be invalid.

(9) Except for the arbitrator's determination itself, any such determination shall not be considered final in any legal action or proceeding, and shall not be used for purposes of collateral estoppel, res judicata, or law of the case to the extent applicable.

Any finding of the arbitrator pursuant to this act shall not be admissible for any purpose in any other action or proceeding.

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- (10) If either the lien claimant or the owner or community association in accordance with section 3 of P.L.1993, c. 318 (C.2A:44A-3) is aggrieved by the arbitrator's determination, then the aggrieved party may institute a summary action in the Superior Court, Law Division, for the vacation, modification or correction of the arbitrator's determination.

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THE MUNICIPAL MECHANICS LIEN LAW NJSA 2A:44-125 to 142

NJSA 2A:44-125 Short Title; Municipal Mechanics' Lien Law

This article may be cited as the "municipal mechanics' lien law".

NJSA 2A:44-126 Definitions

As used in this article:

"Contractor" means a person, his assigns or legal representatives, with whom a contract with a public agency is made.

"Public agency" means any county, city, town, township, public commission, public board or other municipality in this state authorized by law to make contracts for the making of any public improvement in any city, town, township or other municipality.

"Subcontractor" means a person having a contract under a contractor for the performance of the same work, or any specified part thereof, and also a person having such a contract with a subcontractor, for the performance of the same work or any specified part thereof.

NJSA 2A:44-127 Action To Recover Debt Not Barred

Nothing in this article contained shall affect or impair the right of a creditor for labor performed or materials furnished to maintain an action to recover such debt against the person liable therefor.

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NJSA 2A:44-128 Funds Liable For Debts For Labor And Materials; Notice Of The Delivery Of Labor Or Materials

- a. Any person who, as laborer, mechanic, materialman, merchant or trader, or subcontractor, in pursuance of or conformity with the terms of any contract for any public improvement made between any person and a public agency as defined in N.J.S.2A:44-126 and authorized by law to make contracts for the making of public improvements, performs any labor or furnishes any materials, including the furnishing of oil, gasoline or lubricants and vehicle use, toward the performance or completion of any such contract, shall, on complying with the provisions of subsection b. of N.J.S.2A:44-128, N.J.S.2A:44-132 and N.J.S.2A:44-133, have a lien for the value of the labor or materials, or both, upon the moneys due or to grow due under the contract and in the control of the public agency, to the full value of the claim or demand.

The lien may be filed and, to the extent of the amount due or to grow due under the contract, shall become an absolute lien to the full value of the labor performed or materials furnished in favor of every person and his representatives and assigns employed by or furnishing materials to the contractor or subcontractor.

No public agency shall be required to pay a greater amount than the contract price of the labor performed and materials furnished or the value thereof when no specific contract is made with respect to the same by the contractor or subcontractor, respectively.

- b. Any person who may seek to assert a lien under subsection a. of this section shall, within 20 days of the first performance of work or performance of work or delivery of labor or materials to a subcontractor, file with the municipal clerk, the chief financial officer of the county or the chairman of the commission, board or authority, whichever is appropriate, written notice that he or she has furnished labor or materials to the subcontractor.

The notice shall contain the name, address and telephone number of the

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person providing the labor or materials, the name and geographical location of the public improvement for which the labor or materials have been supplied, the name of the subcontractor to which the labor or materials have been supplied, a description of the labor or materials supplied, and the date that the labor or materials were first supplied to the subcontractor.

The officer of the public agency shall maintain a separate file for all written notices which shall be available to the public for inspection and copying during regular business hours. Failure to provide this written notice as required within 20 days of the first performance of work or delivery of labor or materials to the subcontractor shall be a bar to secure a lien for the labor or materials provided, unless there is money owing from the contractor to the subcontractor to whom the labor or materials were provided, in which case the lien shall be limited in value to a sum not greater than the money owing from the contractor to the subcontractor.

The public entity with which the notice required by this section is filed may charge an inquiry fee for information contained in the notice to any person, including the contractor. The inquiry fee shall be reasonable and shall be set to reflect the cost to the public entity of retrieving the information.

Notwithstanding the provisions of this section to the contrary, if a notice is filed after the 20-day period, the person so filing may assert a lien under subsection a. of this section for any labor or materials provided on or after that filing date.

No additional notice shall be required for work or materials provided under the same public improvement contract subsequent to the initial notice, notwithstanding that the work and materials may be provided under a separate contract or purchase order.

Written notice shall be substantially in the following form:

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NOTICE OF THE DELIVERY OF LABOR OR MATERIALS

In accordance with the terms and provisions of the "Municipal Mechanics' Lien Law," N.J.S. 2A:44-125 et seq., notice is hereby given that:

1. (Name of person supplying labor or materials) of (address of person supplying labor or materials) has on (date) provided to (name of subcontractor) the following: (description of labor or materials). My telephone number is (telephone number of person supplying labor or materials).

2. The (description of labor or materials) were provided for the (name of public improvement) in (name of municipality), New Jersey.

Signed: _____

For: _____

Individual, firm or corporation _____

- c. Funds received by a contractor and paid to a subcontractor or supplier for work performed or labor or materials supplied pursuant to a contract for any public improvement shall be applied only to amounts due and owing for work performed or labor or materials supplied for such public improvement.

Any subcontractor or supplier who knowingly applies such payment received from the contractor on the public improvement to amounts due and owing for work performed or labor or materials supplied on a construction project other than the public improvement and then claims a lien on the public improvement for non-payment shall forfeit all lien rights under this title.

A subcontractor or supplier forfeiting his lien rights pursuant to this section shall be liable for all damages incurred by any contractor as a result of the misapplication of such funds, including attorney's fees, and shall be liable for

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all court costs and reasonable legal expenses, including attorneys' fees, incurred by the contractor in defending or causing the discharge of the lien claim.

NJSA 2A:44-129 Commencement And Extent Of Lien; Exception

A lien created by this article shall, from the time of the filing thereof, attach, to the extent of the liability of the contractor or subcontractor as the case may be, for the claim preferred upon any funds due or to grow due to the contractor from the public agency under the contract against which the lien claim is filed unless released as provided by section 2A:44-130 of this title.

NJSA 2A:44-130 Release Of Funds From Lien; Bond

The funds to which a lien has attached as provided by section 2A:44-129 of this title may be released and paid to the contractor by the financial officer of the public agency upon the filing with such officer of a bond in double the sum of all claims filed under the provisions of this article against the contract or the funds due or to grow due thereunder, and conditioned for the payment of such sum as may be adjudged to be due under such claims.

The bond shall be approved, as to the form by the chief law officer of the public agency, and, as to the sufficiency thereof, by the financial officer with whom it is filed.

NJSA 2A:44-131 Priority Of Lien Over Assignments

The lien given by and filed pursuant to this article shall have priority over an assignment, by a contractor or subcontractor to a third person of moneys due or to grow due to such contractor or subcontractor for labor performed or materials furnished for a public improvement referred to in this article even though such assignment was made prior to filing of notice by the lien claimant, but not if such money had been paid to the assignee at the time of the filing of notice.

NJSA 2A:44-132 Filing Notice Of Lien Claim

A lien claimant may, at any time before the whole work to be performed by

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the contractor for the public agency is either completed or accepted by resolution of the public agency, or within 60 days thereafter, file with the chairman or other head officer or with the secretary or clerk of the public agency, a notice of lien claim verified by oath of the claimant or his agent.

NJSA 2A:44-133 Contents Of Notice; Variance Of Names Not To Affect Validity Of Lien

The notice of claim under section 2A:44-132 of this title shall state:

- a. The name and residence or place of business of the claimant;
- b. The amount claimed and from whom due and if not due when it will be due;
- c. The amount, as near as may be, of the demand after deducting all just credits and offsets;
- d. The name of the person by whom employed or to whom the materials were furnished and whether he is the contractor with the public agency or a subcontractor;
- e. The general nature of the public work to which the contract relates;
- f. The name of the contractor and the name of the public agency with which the contract was made; and
- g. That the labor was performed for, or materials furnished to, the contractor or subcontractor, specifying which, and that they were actually performed or used in the execution or completion of the contract with the public agency.

No variance as to the name of the contractor or subcontractor or name of the public agency shall affect the validity of the claim or lien.

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NJSA 2A:44-134 Lien Docket; Entries; Validity Of Claim Not Affected By Failure To Make Entry

The officer of the public agency with whom a notice of lien claim is filed pursuant to section 2A:44-132 of this title shall give notice of the filing thereof to the financial officer of the public agency who shall, in a lien book kept by him, enter:

- a. The name and residence or place of business of the claimant;
- b. The name of the contractor and of the subcontractor, if any, referred to in the lien;
- c. The amount and date of the filing; and
- d. A brief designation of the contract upon which the claim is made.

Failure of the officer of the public agency to notify the financial officer or of the financial officer to make entry in the lien book, shall not affect the validity of the claim.

NJSA 2A:44-135 Notice By Public Agency To Contractor Or Person In Interest

A public agency may, upon a notice of lien claim being filed with it pursuant to section 2A:44-132 of this title, serve notice upon the contractor and upon any person who may appear, by the records of the public agency, to have an interest in the fund in the possession of the public agency, that the claim is filed and requiring the contractor or person in interest to show cause before the governing board of the public agency, within 5 days from the service of notice, why the claim should not be paid.

NJSA 2A:44-136 Payment Of Claim By Public Agency If Statement Not Filed; Credit For Amount Paid; Priority Of Claim Of Laborer

If the contractor or person in interest shall fail to file with the financial officer

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of the public agency, within the time prescribed by notice under section 2A:44-135 of this title, a statement duly verified, that the lien claim is unfounded and untrue, specifying in what respects the same is unfounded and untrue, the public agency may pay, without the order of any court, the claim out of the funds in its possession upon which the claimant has a lien.

When payment is so made the public agency shall not be obliged to pay the same to the contractor but shall be entitled to credit upon the contract for the amount so paid. Nothing in this article contained shall impair the right of the priority of the claim or lien of a laborer as between the right of the laborer and a claimant or other person entitled to a lien.

NJSA 2A:44-137 Actions In Superior Court

Any claimant who has filed a notice under sections 2A:44-132 and 2A:44-133 of this title may enforce his claim against the fund therein designated by an action of an equitable nature in the superior court. An action of the same nature to determine or terminate said liens may be brought in said court by the contractor, subcontractor or public agency.

NJSA 2A:44-138 Commencement Of Action; Lien Of Other Claimants Preserved

No lien created under this article shall be binding on the funds of the public agency, unless an action to enforce the lien claim be brought within 60 days from the time when the whole work to be performed by the contractor is either completed or accepted by resolution of the public agency, but if any action be brought by any claimant the lien of any other claimant may be preserved and enforced by filing an answer setting up his claim in such action within the time allowed by the practice of, or within such time as may be allowed him by, the court.

NJSA 2A:44-139 Parties To Action; County Or Municipality When Public Agency Not Corporation

The claimant first bringing an action for the enforcement of his claim in the superior court as provided by this article, shall make parties to the action all who have filed claims, the contractor, the subcontractor referred to in the claims, and the public agency with whom the contract was made. If the public

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agency is not a corporation, then the county or municipality under which it is constituted shall be made a party defendant.

NJSA 2A:44-140 Determination Of Validity Of Liens And Amount Due; Judgment; Ratable Distribution; Priority Of Laborer's Lien; Claim Of Subcontractor Chargeable With Amount Paid To Claimants

The superior court shall determine the validity and priorities of the liens of the plaintiffs and defendants and of all other liens which may be filed within the time prescribed by this article and the amount due from the public agency to the contractor under the contract and from the contractor or subcontractor to the respective claimants and shall enter judgment directing the public agency, out of moneys due from it to the contractor, to pay to the several claimants the sums found due to them respectively, with interest and costs upon claims adjudged to be just and valid under this article.

If the amount due from the public agency to the contractor is not sufficient to make the payments in full, distribution shall be made ratably without regard to the priority in filing claims, and in either case the claims of the subcontractors shall be chargeable with the amounts paid to the claimants under them for labor performed and materials furnished in the execution of the subcontract; provided, however, a laborer shall have a lien prior to other liens upon filing notice under this article at any time before payments are due and made.

NJSA 2A:44-141 Payment By Public Agency Into Court

The public agency may at any time during the pendency of the action pay into the superior court the amount which it admits to be due the principal contractor upon the contract. The contractor or claimants shall not be precluded thereby from seeking judgment for a further sum.

NJSA 2A:44-142 How Discharged

A lien created under this article may be discharged by:

- a. Filing with the financial officer of the public agency a duly acknowledged

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or proved certificate of the claimant or his successor in interest, or his duly authorized attorney or agent or his attorney of record, stating that the lien is discharged;

- b. The lapse of 60 days since the completion of the work to be performed or the acceptance of the same by resolution of the public agency without the commencement of an action to enforce the lien claim or the filing of answer, within the time allowed by the practice of, or within such time as may be allowed him by, the superior court, asserting such lien in an action brought by another claimant;
- c. Satisfaction of a judgment rendered in an action to enforce the lien or claim; or

The final judgment of the superior court in an action to enforce the lien to which the claimant was a party.

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THE PUBLIC WORKS BOND ACT NJSA 2A:44-143 to 147

NJSA 2A:44-143 Additional Bond For Payment Of Claims For Labor, Material And Supplies; Waiver; Extent Of Surety's Obligation

a.

(1) When public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the State or any contracting unit, as defined in section 2 of P.L.1971, c. 198 (C.40A:11-2), or school district, the board, officer or agent contracting on behalf of the State, contracting unit or school district, shall require delivery of the payment and performance bond issued in accordance with N.J.S.2A:44-147 and otherwise, as provided for by law, with an obligation for the performance of the contract and for the payment by the contractor for all labor performed or materials, provisions, provender or other supplies, teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of such buildings, works or improvements provided by subcontractors or material suppliers in contract with the contractor, or subcontractors or material suppliers in contract with a subcontractor to the contractor, which class of persons shall be the beneficiaries of the payment and performance bond.

The board, officer or agent shall also require that all payment and performance bonds be issued by a surety which meets the following standards:

(a) The surety shall have the minimum surplus and capital stock or net cash assets required by R.S. 17:17-6 or R.S. 17:17-7, whichever is appropriate, at the time the invitation to bid is issued; and

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(b) With respect to all payment and performance bonds in the amount of \$850,000 or more,

- (i) if the amount of the bond is at least \$850,000 but not more than \$3.5 million, the surety shall hold a current certificate of authority, issued by the United States Secretary of the Treasury pursuant to 31 U.S.C. § 9305, that is valid in the State of New Jersey as listed annually in the United States Treasury Circular 570, except that if the surety has been operational for a period in excess of five years, the surety shall be deemed to meet the requirements of this subsubparagraph if it is rated in one of the three highest categories by an independent, nationally recognized United States rating company that determines the financial stability of insurance companies, which rating company or companies shall be determined pursuant to standards promulgated by the Commissioner of Insurance by regulation adopted pursuant to the “Administrative Procedure Act,” P.L.1968, c. 410 (C.52:14B-1 et seq.), and
- (ii) if the amount of the bond is more than \$3.5 million, then the surety shall hold a current certificate of authority, issued by the United States Secretary of the Treasury pursuant to 31 U.S.C. § 9305, that is valid in the State of New Jersey as listed annually in the United States Treasury Circular 570 and, if the surety has been operational for a period in excess of five years, shall be rated in one of the three highest categories by an independent, nationally recognized United States rating company that determines the financial stability of insurance companies, which rating company or companies shall be determined pursuant to standards promulgated by the Commissioner of Insurance by regulation adopted pursuant to the “Administrative Procedure Act,” P.L.1968, c. 410 (C.52:14B-1 et seq.).

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A surety subject to the provisions of subparagraph (ii) of this subparagraph which does not hold a certificate of authority issued by the United States Secretary of the Treasury shall be exempt from the requirement to hold such a certificate if the surety meets an equivalent set of standards developed by the Commissioner of Insurance through regulation which at least equal, and may exceed, the general criteria required for issuance of a certificate of authority by the United States Secretary of the Treasury pursuant to 31 U.S.C. § 9305.

A surety company seeking such an exemption shall, not later than the 180th day following the effective date of P.L. 1995, c. 384, certify to the appropriate contracting unit that it meets that equivalent set of standards set forth by the commissioner as promulgated.

- (2) When such contract is to be performed at the expense of the State and is entered into by the Director of the Division of Building and Construction¹ or State departments designated by the Director of the Division of Building and Construction, the director or the State departments may:
 - (a) establish for that contract the amount of the bond at any percentage, not exceeding 100%, of the amount bid, based upon the director's or department's assessment of the risk presented to the State by the type of contract, and other relevant factors, and
 - (b) waive the bond requirement of this section entirely if the contract is for a sum not exceeding \$200,000.
- (3) When such a contract is to be performed at the expense of a contracting unit or school district, the board, officer or agent contracting on behalf of the contracting unit or school district may:
 - (a) establish for that contract the amount of the bond at any percentage,

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not exceeding 100%, of the amount bid, based upon the board's, officer's or agent's assessment of the risk presented to the contracting unit or school district by the type of contract and other relevant factors, and

(b) waive the bond requirement of this section entirely if the contract is for a sum not exceeding \$100,000.

- b. A surety's obligation shall not extend to any claim for damages based upon alleged negligence that resulted in personal injury, wrongful death, or damage to real or personal property, and no bond shall in any way be construed as a liability insurance policy.

Nothing herein shall relieve the surety's obligation to guarantee the contractor's performance of all conditions of the contract, including the maintenance of liability insurance if and as required by the contract.

Only the obligee named on the bond, and any subcontractor performing labor or any subcontractor or materialman providing materials for the construction, erection, alteration or repair of the public building, work or improvement for which the bond is required pursuant to this section, shall have any claim against the surety under the bond.

- c. A board, officer or agent contracting on behalf of the State, contracting unit or school district shall not accept more than one payment and performance bond to cover a single construction contract.

The board, officer or agent may accept a single bond executed by more than one surety to cover a single construction contract only if the combined underwriting limitations of all the named sureties, as set forth in the most current annual revision of United States Treasury Circular 570, or as determined by the Commissioner of Insurance pursuant to R.S. 17:18-9, meet or exceed the amount of the contract to be performed.

- d. A board, officer or agent contracting on behalf of the State, contracting

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unit or school district shall not accept a payment or performance bond unless there is attached thereto a Surety Disclosure Statement and Certification to which each surety executing the bond shall have subscribed.

This statement and certification shall be complete in all respects and duly acknowledged according to law, and shall have substantially the following form:

SURETY DISCLOSURE STATEMENT AND CERTIFICATION

_____, surety(ies) on the attached bond, hereby certifies(y) the following:

- (1) The surety meets the applicable capital and surplus requirements of R.S.17:17-6 or R.S.17:17-7 as of the surety's most current annual filing with the New Jersey Department of Insurance.
- (2) The capital (where applicable) and surplus, as determined in accordance with the applicable laws of this State, of the surety(ies) participating in the issuance of the attached bond is (are) in the following amount(s) as of the calendar year ended December 31, (most recent calendar year for which capital and surplus amounts are available), which amounts have been certified as indicated by certified public accountants (indicating separately for each surety that surety's capital and surplus amounts, together with the name and address of the firm of certified public accounts that shall have certified those amounts):

.....
.....
.....

- (3)

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(a) With respect to each surety participating in the issuance of the attached bond that has received from the United States Secretary of the Treasury a certificate of authority pursuant to 31 U.S.C. § 9305, the underwriting limitation established therein and the date as of which that limitation was effective is as follows (indicating for each such surety that surety's underwriting limitation and the effective date thereof):

.....
.....
.....

(b) With respect to each surety participating in the issuance of the attached bond that has not received such a certificate of authority from the United States Secretary of the Treasury, the underwriting limitation of that surety as established pursuant to R.S.17:18-9 as of (date on which such limitation was so established) is as follows (indicating for each such surety that surety's underwriting limitation and the date on which that limitation was established):

.....
.....
.....

(4) The amount of the bond to which this statement and certification is attached is \$.....

(5) If, by virtue of one or more contracts of reinsurance, the amount of the bond indicated under item (4) above exceeds the total underwriting limitation of all sureties on the bond as set forth in items (3)(a) or (3)(b) above, or both, then for each such contract of reinsurance:

(a) The name and address of each such reinsurer under that

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contract and the amount of that reinsurer's participation in the contract is as follows:

.....
.....
.....; and

(b) Each surety that is party to any such contract of reinsurance certifies that each reinsurer listed under item (5)(a) satisfies the credit for reinsurance requirement established under P.L.1993, c. 243 (C.17:51B-1 et seq.) and any applicable regulations in effect as of the date on which the bond to which this statement and certification is attached shall have been filed with the appropriate public agency.

CERTIFICATE (to be completed by an authorized certifying agent for each surety on the bond)

I (name of agent), as (title of agent) for (name of surety), a corporation/mutual insurance company/other (indicating type of business organization) (circle one) domiciled in (state of domicile), DO HEREBY CERTIFY that, to the best of my knowledge, the foregoing statements made by me are true, and ACKNOWLEDGE that, if any of those statements are false, this bond is VOIDABLE.

(Signature of certifying agent)

(Printed name of certifying agent)

(Title of certifying agent)

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Footnotes

- ¹ Title of the Director of the Division of Building and Construction changed to Director of Property Management and Construction by Reorganization Plan 003-1997, set out under N.J.S.A. § 52:18A-178.

NJSA 2A:44-144 Sureties On And Amount Of Bond; Condition For Payment Of Claims; Bond Deposited And Held For Use Of Interested Parties

The bond required by this article shall be executed by the contractor with such sureties in accordance with N.J.S.2A:44-147 as shall be approved by the board, officer or agent acting on behalf of the State, contracting unit or school district, in an amount equal to 100 per cent of the contract price.

The payment bond shall be conditioned for the payment by the contractor of all indebtedness which may accrue to any person, firm or corporation designated as a “beneficiary” pursuant to N.J.S.2A:44-143, in an amount not exceeding the sum specified in the bond, on account of any labor performed or materials, provisions, provender or other supplies, or teams, fuels, oils, implements or machinery used or consumed in, upon, for or about the construction, erection, alteration or repair of the public building or public work or improvement.

The payment bond shall be deposited with and be held by the board, officer or agent acting on behalf of the State, contracting unit or school district, for the use of any beneficiary thereof.

NJSA 2A:44-145 Statements Of Claimants Filed With Sureties On Bond; Time For Action On Bond

Any person who may be a beneficiary of the payment bond, as defined in this article, and who does not have a direct contract with the contractor furnishing the bond shall, prior to commencing any work, provide written notice to the contractor by certified mail or otherwise, provided that he shall have proof of delivery of same, that said person is a beneficiary of the bond.

If a beneficiary fails to provide the required written notice, the beneficiary

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shall only have rights to the benefits available hereunder from the date the notice is provided.

Any beneficiary, as defined in N.J.S. 2A:44-143, to whom any money shall be due on account of having performed any labor or furnished any materials, provisions, provender or other supplies, or teams, fuels, oils, implements or machinery in, upon, for or about the construction, erection, alteration or repair of any public building or other public work or improvement, shall, at any time before the expiration of one year from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project, in the case of a material supplier, furnish the sureties on the bond required by this article a statement of the amount due to him.

No action shall be brought against any of the sureties on the bond required by this article until the expiration of 90 days after provision to the sureties and the contractor of the statement of the amount due to him, but in no event later than one year from the last date upon which such beneficiary shall have performed actual work or delivered materials to the project.

NJSA 2A:44-146 Limitation Of Action On Bond

If the indebtedness due to any person as shown by the statement required to be filed by N.J.S.2A:44-145 shall not be paid in full at the expiration of 90 days from the date of notice of the amount due to the person, such person shall, within one year from the last date that work was performed or materials were supplied by that person, bring an action in his own name upon the bond required by this article.

NJSA 2A:44-147 Form Of And Conditions In Bond

The bond required by this article shall be in substantially the following form:

“Know all men by these presents, that we, the undersigned as principal and as sureties, are hereby held and firmly bound unto in the penal sum of dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors,

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administrators, successors and assigns.

“Signed this day of, 19....

“The condition of the above obligation is such that whereas, the above named principal did on the day of, 19..., enter into a contract with , which said contract is made a part of this the bond the same as though set forth herein;

“Now, if the said shall well and faithfully do and perform the things agreed by to be done and performed according to the terms of said contract, and shall pay all lawful claims of beneficiaries as defined by N.J.S. 2A:44-143 for labor performed or materials, provisions, provender or other supplies or teams, fuels, oils, implements or machinery furnished, used or consumed in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any beneficiary as defined in N.J.S. 2A:44-143 having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

“The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said contract or in or to the plans or specifications therefor shall in anywise affect the obligation of said surety on its bond.”

Recovery of any claimant under the bond shall be subject to the conditions and provisions of this article to the same extent as if such conditions and provisions were fully incorporated in the form set forth above.

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THE CONSTRUCTION TRUST FUND ACT NJSA 2A:44-148

NJSA 2A:44-148

All money paid by the state of New Jersey or by any agency, commission or department thereof, or by any county, municipality or school district in the state, to any person pursuant to the provisions of any contract for any public improvement made between any such person and the state or any agency, commission or department thereof, or any county, municipality or school district in the state, shall constitute a trust fund in the hands of such person as such contractor, until all claims for labor, materials and other charges incurred in connection with the performance of such contract shall have been fully paid.

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THE PROMPT PAYMENT ACT NJSA 2A:30-1 to 2

NJSA 2A:30A-1 Definitions

As used in this act:

“Billing” means, in accordance with the terms and definitions of the applicable contract, any periodic payment, final payment, written approved change order or request for release of retainage.

“Prime contractor” means a person who contracts with an owner to improve real property.

“Improve” means: to build, alter, repair or demolish any structure upon, connected with, on or beneath the surface of any real property; to excavate, clear, grade, fill or landscape any real property; to construct driveways and private roadways on real property; to furnish construction related materials, including trees and shrubbery, for any of the above purposes; or to perform any labor upon a structure, including any design, professional or skilled services furnished by an architect, engineer, land surveyor or landscape architect licensed or registered pursuant to the laws of this State.

“Structure” means all or any part of a building and other improvements to real property.

“Owner” means any person, including any public or governmental entity, who has an interest in the real property to be improved and who has contracted with a prime contractor for such improvement to be made.

“Owner” shall be deemed to include any successor in interest or agent acting on behalf of an owner.

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“Prime rate” means the base rate on corporate loans at large United States money center commercial banks.

“Real property” means the real estate that is improved upon or to be improved upon.

“Subcontractor” means any person who has contracted to furnish labor, materials or other services to a prime contractor in connection with a contract to improve real property.

“Subsubcontractor” means any person who has contracted to furnish labor, materials or other services to a subcontractor in connection with a contract to improve real property.

NJSA 2A:30A-2 Payments On Contracts Approved And Certified By Owner; Time For Payments To Contractors, Subcontractors, And Subsubcontractors; Alternative Dispute Resolution

- a. If a prime contractor has performed in accordance with the provisions of a contract with the owner and the billing for the work has been approved and certified by the owner or the owner's authorized approving agent, the owner shall pay the amount due to the prime contractor for each periodic payment, final payment or retainage monies not more than 30 calendar days after the billing date, which for a periodic billing, shall be the periodic billing date specified in the contract.

The billing shall be deemed approved and certified 20 days after the owner receives it unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the reason for withholding payment, except that in the case of a public or governmental entity that requires the entity's governing body to vote on authorizations for each periodic payment, final payment or retainage monies, the amount due may be approved and certified at the next scheduled public meeting

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of the entity's governing body, and paid during the entity's subsequent payment cycle, provided this exception has been defined in the bid specifications and contract documents.

- b. If a subcontractor or subsubcontractor has performed in accordance with the provisions of its contract with the prime contractor or subcontractor and the work has been accepted by the owner, the owner's authorized approving agent, or the prime contractor, as applicable, and the parties have not otherwise agreed in writing, the prime contractor shall pay to its subcontractor and the subcontractor shall pay to its subsubcontractor within 10 calendar days of the receipt of each periodic payment, final payment or receipt of retainage monies, the full amount received for the work of the subcontractor or subsubcontractor based on the work completed or the services rendered under the applicable contract.

In the case of ongoing work on the same project for which partial payments are made, the amount of money owed for work already completed shall only be payable if the subcontractor or subsubcontractor is performing to the satisfaction of the prime contractor or subcontractor, as applicable.

- c. If a payment due pursuant to the provisions of this section is not made in a timely manner, the delinquent party shall be liable for the amount of money owed under the contract, plus interest at a rate equal to the prime rate plus 1%.

Interest on amounts due pursuant to this section shall be paid to the prime contractor, subcontractor or subsubcontractor for the period beginning on the day after the required payment date and ending on the day on which the check for payment has been drawn.

The provisions of this subsection c. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c. 73 (C.27:1B-3), if that project receives federal funding and the awarding agency has been notified by the federal government that it will be classified as a high risk

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grantee pursuant to 49 C.F.R. 18.12.

- d. A prime contractor, subcontractor or subsubcontractor may, after providing seven calendar days' written notice to the party failing to make the required payments, suspend performance of a construction contract, without penalty for breach of contract, until the payment required pursuant to this section is made, if the contractor, subcontractor or subsubcontractor: is not paid as required by this section; is not provided a written statement of the amount withheld and the reason for the withholding; and the payor is not engaged in a good faith effort to resolve the reason for the withholding.

The provisions of this subsection d. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c. 73 (C.27:1B-3), if that project receives federal funding and the application of this provision would jeopardize the funding because the owner could not meet the federal standards for financial management systems as outlined in 49 C.F.R. 18.20.

- e. (1) The rights, remedies or protections provided by this section for prime contractors, subcontractors and subsubcontractors shall be in addition to other remedies provided pursuant to any other provision of State law.

To the extent that the provisions of this section provide greater rights, remedies or protections for prime contractors, subcontractors and subsubcontractors than other provisions of State law, the provisions of this section shall supersede those other provisions.

- (2) No provision of this section shall be construed as restricting in any way the rights or remedies provided by any other applicable State or federal law to an owner who is a resident homeowner or purchaser with

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respect to the real property being improved.

- f. All contracts for the improvement of structures entered into after the effective date of P.L.2006, c. 96 between owners, prime contractors, subcontractors or subsubcontractors shall provide that disputes regarding whether a party has failed to make payments required pursuant to this section may be submitted to a process of alternative dispute resolution.

Alternative dispute resolution permitted by this section shall not apply to disputes concerning the bid solicitation or award process, or to the formation of contracts or subcontracts.

In any civil action brought to collect payments pursuant to this section, the action shall be conducted inside of this State and the prevailing party shall be awarded reasonable costs and attorney fees.