



Effective Use of the Subcontractor's Sworn Statement

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Effective Use of the Subcontractor's Sworn Statement

Written by: Randolph E. Ruff (Chicago) – 9/24/18

The subcontractor's sworn statement is one of most effective tools that contractors can use to ensure that lower-tier subcontractors and suppliers receive adequate payment throughout the job, yet many contractors either fail to appreciate how the sworn statement works or simply fail to utilize it, thereby increasing their risk of mechanics liens, bond claims, and double payments.

The risk of unpaid lower-tier subcontractors and suppliers generally falls on the solvent general contractor for three reasons:

First, in most general contract agreements, the general contractor promises to provide a lien-free job and in many contracts, the contractor indemnifies the owner against mechanics liens.

Second, most mechanics lien statutes provide little protection to a general contractor that has paid a subcontractor in full before receiving an unknown supplier's timely notice of lien. If the owner is [retaining funds from the general contractor](#) when the owner receives notice of the lien, the lien claimant is usually entitled to prevail.

Third, on bonded projects, the general contractor's guaranty to the bonding company indirectly places the risk of unpaid subtier

contractors and suppliers on the general contractor via the payment bond.

The subcontractor's sworn statement provides information from which the general contractor can estimate whether all of the lower-tier subcontractors and suppliers have been identified and determine from whom the general contractor should demand waivers of lien. Included on many of the commonly used waiver-of-lien forms, the subcontractor's sworn statement requires the subcontractor to identify all subtier contractors and materials suppliers with which the subcontractor has dealt, the amounts of their contracts, the amounts paid to each to date, and the future amounts to be paid to each. Subcontractors are obligated to provide such sworn statements by statute in Illinois (see 770 ILCS 60/22) and in several other states, and usually by contract as data substantiating the schedule of values (see AIA A401 sections 11.5 and 12.2; ConsensusDocs 750 sections 8.2.1, 8.3.2).

Materials constitute between 50 and 60 percent of subcontract prices for many trades. A completed subcontractor's sworn statement permits the general contractor to estimate whether the subcontractor has listed suppliers comprising more than half of the subcontract price and whether the subcontractor has paid its suppliers and subtrades in roughly the same percentage as the subcontractor has received payment from the general contractor. If the percentages are askew, the general contractor can ask questions and withhold payment until it receives satisfactory answers. For example, a sworn statement on a \$100,000 electrical subcontract might look like this:

NAMES	WHAT FOR	CONTRACT PRICE	AMOUNT PAID	THIS PAYMENT	BALANCE DUE
XYZ Switch	switch gear	\$20,000	\$10,000	\$5,000	\$5,000
ABC Supply Co.	material and fixtures	\$40,000	\$15,000	\$10,000	\$15,000

This subcontractor intends to purchase \$60,000 worth of materials for a \$100,000 subcontract. So, chances are good that, absent fraud, the subcontractor has identified all of its major suppliers. If the subcontractor has received \$40,000 to date, it has passed 60 percent (\$25,000) to its suppliers. If the subcontractor is seeking payment of \$20,000 in this application and is intending to pay \$15,000 to suppliers, this subcontractor is passing on more than 60 percent. The subcontractor will have \$40,000 remaining in the subcontract after this payment with which to pay suppliers 50 percent or \$20,000. Assuming that the general contractor is withholding a 10 percent retention, this subcontractor should be able to pay its obligations to suppliers well in advance of the retention release.

If the percentages do not work out because, for example, the subcontract price is \$200,000 instead of \$100,000, the general contractor knows that suppliers or subtrades have been omitted and

must ask pointed questions of the subcontractor before releasing funds.

Once the general contractor is satisfied that all suppliers and lower-tier subcontractors have been listed and that the subcontract appears to be in balance, the general contractor can next ensure that the subcontractor is paying its subtrades and suppliers by requiring partial lien waivers from each identified supplier and subtier contractor in the amount listed. If the supplier and subtier contractor waivers do not match the amounts set forth in the subcontractor's sworn statement, the general contractor should consider withholding payment until the numbers are harmonized. In this way, the system contains an internal check and balance.

For this tool to be effective, the general contractor must insist that the subcontractor's sworn statement be filled out completely and corresponding waivers of lien be obtained before releasing payment. Subcontractors often try to avoid detailed disclosure by submitting the statement "All material was taken from fully paid stock and delivered in our trucks." This type of disclosure provides little help to the general contractor trying to manage its mechanics lien and bond exposure risks. Indeed, since at least 1962, Illinois courts have repeatedly held that reliance on such a sworn statement is unreasonable and offers no defense to an undisclosed supplier's mechanics lien. While some trades stock materials, virtually no subcontractors stock all materials used on a job; therefore, a statement that "all material was taken from fully paid stock" is most likely false.

The subcontractor's sworn statement is a common document that is part of many standard waiver-of-lien forms. The sworn statement is one of the general contractor's most significant tools in managing the

risk of mechanics lien and bond claim exposure to subtrades and suppliers, and general contractors would be wise to make effective use of it.

Randolph E. Ruff (Chicago)



Mr. Ruff has been representing general contractors, subcontractors, suppliers and other participants in the construction industry since 1986. As the chair of Ogletree's construction practice group, that U.S. News and World Report has ranked as a Tier-1 practice group, Mr. Ruff prosecutes and defends claims arising out of public and private construction projects in federal and state court litigation, arbitration and mediation. Mr. Ruff handles claims involving construction and material...

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