


# Ohio's Mechanics' Lien Law *Public Improvements, Miscellaneous Provisions and Prompt Payment*

A photograph of three men at a construction site. On the left, a man in a dark suit and glasses looks at a set of blueprints. In the center, a man in a dark pinstripe suit and a red hard hat points at the blueprints with a pen. On the right, a man in a light blue shirt, a tan jacket, and a white hard hat looks on. The background shows a rusty, textured wall.

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### **IV. PUBLIC IMPROVEMENTS**

- A. Revised Code provisions dealing with claims against funds in public improvements also provide for a notice of commencement and notices of furnishing. The format and use of each, however, are different than for private projects.
- B. A "lien" is a claim on funds, not a lien on real estate.
- C. Principal contractors have no lien rights.
- D. Notice of Commencement. R.C. 1311.252.
  - 1. Prior to commencement of a public improvement, a public authority is to prepare a notice of commencement.
  - 2. The notice of commencement must be in affidavit form and contain the following information:
    - a. The name, location, and a number, if any, used by the public authority to identify the improvement sufficient to permit the improvement to be identified;
    - b. The name and address of the public authority;
    - c. The name and address of all principal contractors, as well as the trade of each;
    - d. For notices of commencement after April 16, 1993, the date the public authority first executed a contract with a principal contractor for the public improvement.
    - e. The name and address of the sureties for all principal contractors;
    - f. The name and address of the representative of the public authority upon whom service may be made for purposes of serving an affidavit pursuant to R.C. 1311.26.
  - 3. The notice of commencement is to be "readily available to the public upon request."

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- E. Although notices of commencement are not required to be served on anyone, each principal contractor and subcontractor must provide "in writing" the name and address of the public authority and principal contractor "on the date of entering into any agreement with a subcontractor or material supplier." R.C. 1311.261(C), (D).
- F. Notices of Furnishing. R.C. 1311.261.
  - 1. The notice of furnishing for public improvement is simpler than that for private projects.
  - 2. There is no requirement that notices of furnishing be served on the public authority. To preserve lien rights, however, any subcontractor or material supplier not in privity with the principal contractor must serve the principal contractor with a notice of furnishing.
  - 3. To preserve lien rights a notice of furnishing must be served regardless of whether or not a notice of commencement exists.
  - 4. As with private project lien law, the notice of furnishing must be served within 21 days after the date of first work or material in order to preserve lien rights for the entire value provided.
  - 5. Effective for contracts in excess of \$30,000 entered into on or after September 30, 1998, service of a notice of furnishing is also a precondition to a bond claim. R.C. 153.56(C).
- G. Perfection of a Claim
  - 1. Subcontractors, material suppliers and laborers have the right to assert a claim. Principal contractors do not.
  - 2. The statutory requirements described in R.C. 1311.26 are simple:
    - a. An affidavit.
    - b. Stating the amount due and unpaid for labor and work performed and material furnished to a public improvement;
    - c. The date of last performance or furnishing;
    - d. With all credits and setoffs thereon; and

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- e. The post-office address of the claimant.
- 3. The claim is to be "served" on, not "filed with," the public authority and must be served on the representative of the public authority named in the notice of commencement. R.C. 1311.26.
  - a. Service is to be within 120 days of the last labor, work or furnishing of material, instead of four months as under prior law.
  - b. One or more laborers may set forth their claims in one affidavit.
  - c. Am. Sub. S.B. 338 makes it clear that the claim affidavit must be served on the representative of the public authority named in the notice of commencement.
- 4. If the claimant is a subcontractor or material supplier not in privity of contract with the principal contractor, the following must also be served on the public authority:
  - a. A copy of the notice of furnishing; and
  - b. A sworn statement as to when the notice of furnishing was provided to the principal contractor. R.C. 1311.28.
- 5. If the claim is based upon a contract with a subcontractor (i.e., no privity with principal contractor), the claimant must serve a copy of the claim affidavit on the subcontractor within 20 days after its filing or the claim is forfeited. R.C. 1311.31.
- 6. The statute provides that the claim affidavit "shall" be recorded with the county recorder. R.C. 1311.29.
  - a. The time for recording has been extended from 10 days to 30 days after service on the public authority.
  - b. Recording gives notice of the claim to other would be claimants and establishes priority over claims that have not been recorded.
- 7. Recording of the lien claim achieves priority over unrecorded claims. Otherwise, all claims have the same priority. R.C. 1311.29; 1311.31.

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8. As in private commercial projects, a contingent payment clause in a subcontract or purchase order does not preclude the perfection of a claim. R.C. 4113.62(D).

**H. Reaction to a Claim**

1. Upon receiving a claim affidavit, the public authority is to detain from the principal contractor "or from the balance of the funds remaining in the contract with the principal contractor," the larger of the claim amount and the balance remaining in the contract. R.C. 1311.28.
2. If the claimant is a subcontractor or material supplier not in privity of contract with the principal contractor, the public authority "shall not" detain any claimed amount unless the claimant has served the public authority with:
  - a. A copy of the notice of furnishing; and
  - b. A sworn statement as to when the notice of furnishing was provided to the principal contractor. R.C. 1311.28.
3. All public authorities are required to place detained funds in a R.C. 153.63 escrow account. Funds are to be released:
  - a. As ordered by court;
  - b. As agreed by the principal contractor and claimant; or
  - c. Upon failure to commence suit as provided in R.C. 1311.311.
4. The public authority "shall, or the claimant ... may" serve the principal contractor with a copy of the R.C. 1311.26 affidavit within five days after receiving it. R.C. 1311.31.
  - a. Notification that the principal contractor must give notice of its intention to dispute the claim is to be served also.
  - b. The notice of dispute must be served on the public authority within 20 days of receipt of the affidavit.

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5. A subcontractor may also dispute the claim on behalf of the principal contractor by filing a notice of dispute with the public authority within 20 days of the subcontractor receiving a copy of the affidavit. R.C. 1311.31.
  6. If no notice of intention to dispute the claim is served, the principal contractor and/or subcontractor is deemed to have assented to its correctness. R.C. 1311.31.
  7. If detained funds are less than the total of the mechanics' liens, the funds are to be distributed pro rata. R.C. 1311.31.
- I. Discharge of Claim. R.C. 1311.311.
1. In addition to a public authority and principal contractor, a subcontractor has standing to serve a notice to commence suit.
  2. The notice to commence suit is served pursuant to the rules that apply to service generally, i.e., typically certified mail, return receipt.
  3. Consistent with the time frame for private project liens, the claimant has 60 days instead of 30 days to commence suit.
  4. The amount of bond needed to bond off the claim is now 1½ times the claim. As under prior law, only a surety bond is acceptable.
  5. Failure of the public authority to discharge the claim affidavit and make payment subjects the public authority to damages. If the public authority is determined to have "improperly failed" to discharge the affidavit and make payment, the court may award reasonable attorney fees.

## **V. MISCELLANEOUS PROVISIONS**

- A. "Service" means certified or registered mail, overnight delivery, hand delivery, or any other method that provides written evidence of receipt. R.C. 1311.19.
1. Pursuant to Amended House Bill 514 effective March 13, 2003, written evidence of receipt is not necessary if actual receipt can be proven by a preponderance of the evidence.

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2. A lien related document is presumed to have been received three days after its mailing unless "a written acknowledgement, receipt or other evidence provides proof to the contrary."
- B. An owner, public authority, original contractor, principal contractor or subcontractor, as the case may be, may pay directly the claim of any subcontractor or material supplier who serves a notice of furnishing, or the claim of any laborer. The amount paid may then be set off against the amount owed the original contractor, principal contractor or subcontractor who employed the claimant. R.C. 1311.15.

### **VII. PROMPT PAYMENT**

- A. Prompt payment provisions are set forth in Revised Code Section 4113.61.
- B. Contractors who receive payment requests from subcontractors and material suppliers in sufficient time to include such requests with their own payment requests to the owner must pay those subcontractors and material suppliers within ten days of receiving payment from the owner.
  1. This requirement also applies to requests made by lower tier subcontractors and material suppliers to their subcontractors and material suppliers.
  2. The only exception to the prompt payment requirement is for disputed liens or claims and retainage not yet due.
- C. Funds not paid within ten days begin accruing interest on the 11th day of 18% per annum.
- D. A court action may be instituted 30 days after payment is due and the statute provides that attorney fees "shall" be paid to the prevailing party, subject to a court's ability to consider relevant factors.
- E. The prompt payment provisions cannot be waived by contract, but the parties may contract to shorten the period for payment or increase the rate of interest.

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