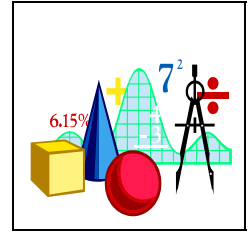




CONSTRUCTION LAWLETTER

For Industry Professionals, Managers, Trades & Suppliers



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SUBCONTRACTOR LIENS ON PUBLIC PROJECTS

Subcontractor's liens on Ohio public improvements are governed by the provisions of Revised Code 1311.26: "Any subcontractor, materialman, or laborer who is performing or has performed labor or work *** for any public improvement provided for in a contract between the public authority and a principal contractor, and under a contract between the subcontractor *** may serve the public authority an affidavit stating the amount due and unpaid for the labor and work performed and material furnished, when the last of the labor or work was performed and when the last of the material was furnished with all credits and setoffs thereon."

The affidavit should include an itemized statement of the labor performed or materials furnished. After receiving the affidavit on the subcontractor's claim, "the public authority shall detain from the principal contractor or from the balance of the funds remaining in the contract with the principal contractor, an amount, up to the balance remaining in the contract that does not in the aggregate exceed the claim or claims." R.C. 1311.28.

Pursuant to this statutory framework, a materialman who is owed money by the general contractor only may retain a lien upon payments that are due to the principal contractor. The lien does not attach to the funds held by the public authority until those funds are due to the principal contractor, even though the lien is properly filed.

The rights of the subcontractor are subordinate to the rights of the principal

contractor, since the contractor's rights are based upon the contract between itself and the principal contractor, and are therefore subordinate to the contract.

The only funds that may attach to a valid subcontractor's lien are those that are owed to the principal contractor.

In the event that contractors do not promptly pay their subcontractors and materialmen when they are paid, on the eleventh day following receipt from the owner, they are penalized at the rate of 18 percent (interest) until such payment is made, under the Ohio Prompt Payment Act, R.C. 4113.61(A)(1). While the statute does not use the word "penalize" or "penalty", it is penal in nature, since it imposes a pecuniary fine of 18% interest, which is well over the average market rate of interest.

Once the contractor fails to pay within ten days, and the interest begins to accrue, the statute allows the trial court to impose a sanction of attorney's fees after considering all relevant factors. Clearly, the purpose of the statute is to encourage contractors to pay promptly when they are paid.

Intercargo Ins. Co. v. Mun. Pipe Contrs., Inc., 127 Ohio Misc. 2d 48, 54,57.

* * *

"I have never killed a man, but I have read many obituaries with great pleasure." Clarence Darrow

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