

# EIGHT STEPS TO TAKE NOW TO PREPARE FOR PAYMENT DISPUTES

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SWCA CONSTRUCTION EXECUTIVE SUMMIT – MARCH 24, 2022

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Legal advisors. Trusted advocates.

# INTRODUCTIONS

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- Bryce Sinner – Attorney – Landerholm, P.S.
  - Practice Areas
    - Construction
    - Real Estate
    - Litigation
  - Experience
    - Landerholm, P.S. – Attorney – 2017-Present
    - Stellar J Corporation – General Counsel, Corporate Secretary – 2012-2017
    - Duggan Schlotfeldt & Welch – Attorney – 2009-2012
    - Turner Construction – Field Engineer, Project Engineer, Assistant Superintendent, Cost Engineer – 2003-2008



# DISCLAIMER

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- Your attendance of this presentation and/or use of this material, including any discussion during the presentation or implementation of any suggestions set out in this presentation does not create an attorney-client relationship between you and the presenter.
- This should not be considered legal advise. You should seek appropriate counsel for your own situation.

# I – CREATE A SOLID CONTRACT

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- Include project information
  - A description of the project
  - Legal names and contact information for the relevant parties (owner, general contractor, architect/engineer, subcontractor)
  - Project name and address/location
- This will make it easier to determine who to provide notice of claims to, the relevant parties to a payment dispute, and to file a lien on the correct property.



# I – CREATE A SOLID CONTRACT

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- Clearly define the scope of work
  - Include a narrative description of the work
  - Reference plans and specifications when available
  - List inclusions and exclusions
  - Include your proposal, if permitted
  - Ensure the scope of work indicated in the contract is consistent with your proposal
- Many payment disputes arise from poorly defined scopes of work, which leads to arguments over whether the contractor or subcontractors are obligated to perform certain work or entitled to a change order for certain work.





# I – CREATE A SOLID CONTRACT

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- Include the amount and manner of determining the contract price
  - Lump Sum / Unit Price / Allowances
  - Include proposal if permitted
  - Ensure amount and manner of determining the contract price are consistent with your proposal
- If all or a portion of the contract price is to be based on unit price, make sure it is clear how the unit of measure will be quantified and verified on a regular basis.
- If all or a portion of the contract price includes an allowance, make sure it is clear that you will be entitled to the actual cost for allowance items.



# I – CREATE A SOLID CONTRACT

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- Payment Terms
  - Unless it is a very short project, the payment schedule should provide for monthly progress payments based on work completed during the billing period.
  - Pay-if-paid / Pay-when-paid
    - Know whether the contract includes pay-if-paid or pay-when paid provisions and understand how that effects your right to payment.
  - Right to suspend work and/or terminate the contract?
    - Some contracts include a right to suspend work if you are not paid within a certain duration after the date payment is due.
    - If you are concerned or being required to agree to a pay-if-paid term, ask for this right to be included.
  - Include late payment fees or interest terms if possible.



# I – CREATE A SOLID CONTRACT

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- Pay-if-paid example
  - Subcontractor acknowledges and agrees that Owner's payment to Contractor under the Owner Contract of amounts due Subcontractor under the Subcontract is a condition precedent to Contractor's obligation to pay such amounts to Subcontractor. Subcontractor further acknowledges that it is relying on the credit and ability of the Owner to pay for Work performed and not Contractor and accepts the risk that it will not be paid by Contractor for Work performed in the event Contractor is not paid by Owner for such Work.





# I – CREATE A SOLID CONTRACT

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- Do not waive mechanic's lien rights
  - In rare cases, I have seen contracts that include a term stating that the contractor or subcontractor waives their right to assert a lien against the project.
  - Do not agree to this!



# I – CREATE A SOLID CONTRACT

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- Example of a waiver of lien rights
  - SUBCONTRACTOR HEREBY INTENTIONALLY, UNCONDITIONALLY, COMPLETELY, AND KNOWINGLY WAIVES ALL RIGHTS BY STATUTE OR OTHERWISE TO ASSERT, RECORD, SERVE, OR FORECLOSE A CONSTRUCTION LIEN, MECHANIC'S LIEN, LIEN AGAINST THE RETAINED PERCENTAGE, OR CLAIM AGAINST ANY BOND FURNISHED BY CONTRACTOR, OWNER, OR ANY OTHER PERSON OR ENTITY WITH RESPECT TO THE PROJECT.
- Do not agree to this!!!



# I – CREATE A SOLID CONTRACT

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- WATCH FOR CAPITALIZED TERMS
- Often when an entire section of a contract is capitalized, you are giving up legal or statutory rights.



## 2 – PROVIDE THE REQUIRED NOTICES

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- Washington Lien Claims
  - Notice to Owner in accordance with RCW 18.27.114
    - Provide if general contract is for four or fewer residential units or structures with a bid or contract price of \$1,000 or more
    - Provide if general contract is for a commercial building when the bid or contract price totals \$1,000 or more, but is less than \$60,000
    - Subcontractors and Suppliers not contracting directly with the owner are exempt
  - Notice of Right to a Lien
    - Always serve unless
      - (1) contract is directly with the property owner;
      - (2) contract is solely for labor; or
      - (3) contract is directly with the prime contractor (first-tier subs are exempt unless project is an owner-occupied remodel of single family residence or garage; second-tier subs must provide; note the subcontractor exemption doesn't apply to material and equipment suppliers)





## 2 – PROVIDE THE REQUIRED NOTICES

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- Washington “Little Miller” Bond Claims (in general)
  - Sub-tier Subcontractors and Suppliers must provide Pre-Claim Notice within 10 days of first delivery of materials, supplies, or start of work. This is a mandatory requirement and not a relation back.
  - Does not apply to claims for labor only, prime contractor, or first-tier subs or suppliers
  - See RCW 39.08.065
- Washington Retainage Lien Claims
  - All Subcontractors and Suppliers must provide Pre-Claim Notice. First tier Subcontractors and Suppliers are likely exempted, but the statute is not clear and best practice is to provide the notice. Notice relates back but only protects work provided within 60 days prior to the Pre-Claim Notice.
  - See RCW 60.28.015



## 2 – PROVIDE THE REQUIRED NOTICES

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- Oregon Lien Claims
  - Residential
    - If contracting directly with the Owner, you must provide the following
      - Information Notice to Owner
      - Consumer Protection Notice
      - Notice of Procedure
      - Must give Notice of Right to a Lien to Lender to preserve any available priority for materials and supplies
  - Commercial
    - If contracting directly with the Owner, must give Notice of Right to a Lien to Lender to preserve any available priority for materials and supplies.



## 2 – PROVIDE THE REQUIRED NOTICES

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- Oregon Lien Claims
  - Subcontractors and Suppliers
    - Residential
      - Must provide Notice of Right to a Lien to the Owner and Lender to preserve any available priority for materials and supplies
    - Commercial
      - Must provide Notice of Right to a Lien to the Owner except that claims for: (a) labor, or labor and material for a commercial improvement do not require Notice of Right to a Lien to the owner; (b) rented equipment used in the construction of a commercial improvement do not require Notice of Right to a Lien to the owner
      - Must provide Notice of Right to a Lien to the Owner when supplying services or materials—without labor
      - Must provide Notice of Right to a Lien to the Lender to preserve any available lien priority against the lender for materials and supplies



## 2 – PROVIDE THE REQUIRED NOTICES

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- Oregon “Little Miller” Bond Claims
  - No Pre-Claim Notice Requirement





## 2 – PROVIDE THE REQUIRED NOTICES

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- Your attorney or lien filing services like RoHillCo Business Services or Lien Research Corporation can assist you with filing the required notices.



# 3 – INVOICE TIMELY AND ACCURATELY

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- Submit your invoices timely in accordance with the subcontract
- Create a clean record with your invoices
  - Include a schedule of values
  - Include your change orders on the schedule of values
  - Use a payment application form that shows the approved change orders and what you have invoiced for and been paid to date
- Continue to invoice timely even if you are not being paid timely



**SUBCONTRACTOR: Application for Payment****Application Number: 15**

Project:

Subcontractor:

To:

Subcontract number:

Contract for:

Owner:

Application Date:  
Federal ID/SS Number:**Change order Summary**

Change Order #	Approval Date	(+) Additions	(-) Deducts
001	1/22/18	\$780.00	\$2,192.50
002	2/22/18	\$132,000.00	
003	4/16/18		
004	6/13/18	\$19,075.00	
005	7/20/18	\$45,393.00	
006	10/19/18	\$4,211.00	
007	11/16/18	\$11,866.13	
008	12/13/18	\$30,000.00	
TOTALS			
Net change by change order: \$ 241,132.63			

Application is made for Payment, as shown below, in connection with the Subcontract is as follows:

1. ORIGINAL Contract Sum	\$1,251,600.00
2. NET change by Change Order	241,132.63
3. CONTRACT SUM TO DATE (1+2)	1,492,732.63
4. TOTAL Earned to date	1,393,879.63
5. RETAINAGE	69,693.98
6. TOTAL earned less Retainage (4 - 5)	1,324,185.65
7. LESS Prior Payment	1,204,259.55
8. CURRENT PAYMENT DUE (6 - 7)	119,926.10
9. BALANCE Remaining (3 - 7 - 8)	168,546.98



Sub Name:	Application #	15
Address:	Application Date	12/1/2018 thru 12/31/2018
Date: 12/20/2018	Retainage: 5%	

Item #	Description	Total	Previous Billed	Amount This App	Total Complete To Date	% Complete	Balance to Complete
1	Mobilization/Submittals	\$42,050.00	\$42,050.00		\$42,050.00	100.00%	\$0.00
2	Retail Design	\$40,000.00	\$40,000.00		\$40,000.00	100.00%	\$0.00
3	Underground	\$125,000.00	\$118,750.00	\$6,250.00	\$125,000.00	100.00%	\$0.00
4	Underground	\$25,000.00	\$23,750.00	\$750.00	\$24,500.00	98.00%	\$500.00
5	Ground Floor Rough-In	\$220,000.00	\$220,000.00		\$220,000.00	100.00%	\$0.00
6	1st Floor Rough-In	\$150,000.00	\$150,000.00		\$150,000.00	100.00%	\$0.00
7	2nd Floor Rough-In	\$100,000.00	\$100,000.00		\$100,000.00	100.00%	\$0.00
8	3rd Floor Rough-In	\$100,000.00	\$100,000.00		\$100,000.00	100.00%	\$0.00
9	4th Floor Rough-In	\$100,000.00	\$100,000.00		\$100,000.00	100.00%	\$0.00
10	Rough-In	\$75,000.00	\$20,000.00		\$20,000.00	26.67%	\$55,000.00
11	Ground Floor Trim	\$70,000.00	\$35,000.00	\$31,500.00	\$66,500.00	95.00%	\$3,500.00
12	1st Floor Trim	\$55,000.00	\$27,500.00	\$24,750.00	\$52,250.00	95.00%	\$2,750.00
13	2nd Floor Trim	\$40,000.00	\$36,000.00	\$4,000.00	\$40,000.00	100.00%	\$0.00
14	3rd Floor Trim	\$40,000.00	\$36,000.00	\$4,000.00	\$40,000.00	100.00%	\$0.00
15	4th Floor Trim	\$40,000.00	\$38,000.00	\$2,000.00	\$40,000.00	100.00%	\$0.00
16	Trim	\$29,550.00	\$0.00		\$0.00	0.00%	\$29,550.00
17	CO#001 - ASI #12	\$780.00	\$780.00		\$780.00	100.00%	\$0.00
18	CO#002 - Incom System & Off-Site Temp Power Trenching	\$132,000.00	\$118,800.00	\$6,600.00	\$125,400.00	95.00%	\$6,600.00
19	CO#003 - Add Floor Outlet & Trenching Backcharge	-\$2,192.50	-\$2,192.50		-\$2,192.50	100.00%	\$0.00
20	CO#004 - COR#8-10 Exterior Signage, Cat6 Data, Motorized Shades	\$19,075.00	\$17,167.00	\$955.00	\$18,122.00	95.00%	\$953.00
21	CO#005 - COR#11,13,14 FA Changes	\$45,393.00	\$36,314.00	\$9,079.00	\$45,393.00	100.00%	\$0.00
22	CO#006 - COR#05,06,12,15REV2,16,17,18	\$4,211.00	\$3,790.00	\$421.00	\$4,211.00	100.00%	\$0.00
23	CO#007 - Elevator Emergency Generator	\$11,866.13	\$5,933.13	\$5,933.00	\$11,866.13	100.00%	\$0.00
24	CO#008 - Expediting and OT Costs	\$30,000.00	\$0.00	\$30,000.00	\$30,000.00	100.00%	\$0.00
Total this Payment Application \$126,238.00		\$1,492,732.63	\$1,267,641.63	\$126,238.00	\$1,393,879.63	93.38%	\$98,853.00



# 4 – GET ALL CHANGE ORDERS IN WRITING

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- Do not rely on verbal or even written communications
- Follow the change order process in the contract
- Do not perform changed or additional work without a written change order
- If the Owner or General Contractor insist you proceed without a written change order, insist on written direction to proceed and follow the notice provisions in the contract. This is also a good time to get your attorney involved.



## Subcontract Change Order

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Project #

To Subcontractor/Vendor:

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Change Order Number: 007

Date: 11/16/2018

Contract Number:

Contract Date:

Original subcontract Amt:	\$	1,251,600.00
Previous C/O's	\$	199,266.50
Total:	\$	1,450,866.50
This Change Order Amt:	\$	11,866.13
Revised Contract Amt:	\$	1,462,732.63

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This Subcontract is hereby amended as follows:



# 5 – REVIEW LIEN RELEASES BEFORE SIGNING

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- Conditional vs. Unconditional
- Never sign an unconditional release until you have received payment and the funds have cleared
- Make sure releases include an exception for pending change orders and claims



## CONDITIONAL RELEASE

The undersigned, \_\_\_\_\_ ("Subcontractor/Supplier"), upon receipt of a check in the sum of \_\_\_\_\_ USD, payable to Subcontractor/Supplier, and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, hereby waives and releases any construction lien, payment and performance bond, and any other claims Subcontractor/Supplier has with respect to its work on the **Kenton** Project ("Project") under and related to the prime contract for the Project between \_\_\_\_\_ ("Contractor") and \_\_\_\_\_ ("Owner") dated \_\_\_\_\_, to the following extent.

This waiver and release is effective as to a progress payment for labor, services, material, equipment furnished and all other claims by Subcontractor/Supplier and its subcontractors and suppliers at all tiers through \_\_\_\_\_, but excluding retainage.

This document may be relied upon by Owner, Contractor, any principal and surety on the bonds referenced above, and any lender providing construction financing for the Project; provided that any party intending to rely upon this document should first verify evidence of payment to Subcontractor/Supplier of the full amount set out above:

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

## UNCONDITIONAL RELEASE

The undersigned, \_\_\_\_\_ ("Subcontractor/Supplier"), has been paid by and has received progress payments in the sum of \_\_\_\_\_ USD, and hereby waives and releases any construction lien, payment and performance bond, and any other claims Subcontractor/Supplier has with respect to its work on the Project ("Project") under and related to the prime contract for the Project between \_\_\_\_\_ ("Contractor") and \_\_\_\_\_ ("Owner") dated \_\_\_\_\_, to the following extent.

This waiver and release is effective as to progress payments for labor, services, material, equipment furnished and all other claims by Subcontractor/Supplier and its subcontractors and suppliers at all tiers through \_\_\_\_\_, but excluding retainage.

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.





# 6 – GIVE TIMELY NOTICE OF CLAIMS

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- Review the notice provisions in you contract with the owner or general contractor
- If you are a subcontractor, review the notice provisions in both your subcontract and the prime contract
- If you fail to give timely notice, you risk waiving your right to compensation for the claim



# TYPES OF NOTICE

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- Actual Notice – Notice delivered in such a way as to give legally sufficient assurance that actual knowledge of the matter has been conveyed to the recipient.
  - Email, letter, meeting minutes, RFI, etc.
- Constructive Notice – Legal fiction that signifies that a person or entity should have known, as a reasonable person would have, of a legal action taken or to be taken, even if they have no actual knowledge of it.
- Neither actual nor constructive notice will satisfy the obligation for strict compliance with contractual notice requirements.



# WHAT ARE NOTICE PROVISIONS?

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- Legally binding condition in the contract
  - Requiring notice
  - Upon the occurrence of an **event** giving rise to a cost or time impact
    - “Event” is often defined very broadly (common examples)
      - Conflict in the Specifications and/or Drawings
      - Submittal response
      - RFI response
      - Weather condition
      - Differing Site Condition
      - Verbal direction



# WHAT ARE NOTICE PROVISIONS?

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- Typical requirements
  - Specific information
    - Narrative, dates, people involved, cost/time impact
  - Specific documentation
    - Invoices, timesheets, correspondence, schedule analysis
  - Compliance with strict deadlines
    - Triggered on the occurrence of an event
    - Throughout the claims process
    - **Failure to comply = waiver of the claim**





# WSDOT Standard Specifications – Notice Provision

## 1-04.5 Procedure and Protest by the Contractor

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, (3) not responding within the allotted time as outlined in [Section 1-04.4](#), or (4) not protesting in the way this section provides. A change order that is not protested as provided in this section shall be full payment and final settlement of all claims for Contract time and for all costs of any kind, including costs of delays, related to any Work either covered or affected by the change. By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determinations).

If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:

1. Immediately give a signed written notice of protest to the Engineer or the Engineer's field Inspectors before doing the Work;
2. Supplement the written protest within 14 calendar days with a written statement and supporting documents providing the following:
  - a. The date and nature of the protested order, direction, instruction, interpretation or determination;
  - b. A full discussion of the circumstances which caused the protest, including names of persons involved, time, duration and nature of the Work involved, and a review of the Plans and Contract Provisions referenced to support the protest;
  - c. The estimated dollar cost, if any, of the protested Work and a detailed breakdown showing how that estimate was determined;
  - d. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption; and
  - e. If the protest is continuing, the information required above shall be supplemented upon request by the Engineer until the protest is resolved.

# 7 – DOCUMENT CLAIMS

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- Keep a Change Order Log that tracks all potential change orders and tailor it to the notice provisions in the contract
- Document changes in your Daily Site Reports
- Document changes in your Schedule of Values (in pay applications)
- Document changes in your meeting minutes (review meeting minutes prepared by the owner and correct them if necessary)
- Get executed Change Orders
- Does email count?



# 7 – DOCUMENT CLAIMS

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- Identify all costs
  - Engineering (temporary structure, D/B contract)
  - Labor
  - Material
  - Equipment (standby?)
  - Subcontractors
- Identify all delays
  - Delay to critical path
  - Acceleration Costs
  - Disruption by Owner



# 7 – DOCUMENT CLAIMS

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- Establish a separate cost code
  - Ideally, you should be able to;
    - Run a cost report sorted for a specific cost code, and
    - Track every single line item to an invoice or a timesheet
    - Don't procrastinate!
      - Don't rely on moving costs around after the fact.
      - It looks bad to an owner, vendor, mediator, arbiter, judge, jury, etc.
  - Cost reports must be accurate and trustworthy





# 8 – KNOW YOUR DEADLINES TO FILE LIEN AND BOND CLAIMS

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- Washington Lien Claims
  - Must record Claim of Lien within 90 days after claimant ceased furnishing labor, professional services, materials, or equipment
  - A copy of the claim must be given to the Owner via personal service or certified mail within 14 days of recording to be entitled to attorney fees.
  - A lawsuit to foreclose the lien must be filed within 8 months following the date the lien was recorded.
  - Note that there is no allowance for an extension of time if the deadline falls on a weekend or holiday.



# 8 – KNOW YOUR DEADLINES TO FILE LIEN AND BOND CLAIMS

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- Washington “Little Miller” Bond Claims
  - Must serve bond claim within 30 days after acceptance of the work by the public agency. See RCW 39.08.030.
  - Review the bond for deadline to file foreclosure action.
- Washington Retainage Lien Claims
  - Must serve within 45 days of completion of the contract work. This appears to apply to completion of the prime contract work, but best practice would be to serve within 45 days of completion of the subcontract work.
  - Must sue to foreclose within 4 months of filing the claim.



# 8 – KNOW YOUR DEADLINES TO FILE LIEN AND BOND CLAIMS

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- Oregon Lien Claims
  - Must record Claim of Lien within 75 days after the earlier of: (i) the date claimant ceased providing labor, rented equipment or furnished materials, or (ii) 75 days after substantial completion of construction.
  - A copy of the claim must be given to both the Owner and the Lender via personal service or certified or registered mail within 20 days of recording to be entitled to attorney fees.
  - Must provide notice of intent to foreclose to the Owner and the Lender not later than 10 days prior to commencing foreclosure action to be entitled to attorney fees.
  - A lawsuit to foreclose the lien must be filed within 120 days following the date the lien was recorded.
  - Note that there is no allowance for an extension of time if the deadline falls on a weekend or holiday.



# 8 – KNOW YOUR DEADLINES TO FILE LIEN AND BOND CLAIMS

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- Oregon “Little Miller” Bond Claims
  - Must serve bond claim within 180 days after claimant last provided labor or materials. See ORS 279C.605(a).
  - Foreclosure action must be filed within 2 years after claimant last provided labor or materials. See ORS 279C.610(3).





# QUESTIONS?

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