Ahlers & Cressman PLLC

LIEN AND BOND CLAIM MANUAL

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TABLE OF CONTENTS

I. WASHINGTON PRIVATE WORKS / MECHANICS' AND MATERIALMEN'S LIENS 1

A. BACKGROUND 2

1. DEFINITION 2

2. PURPOSE 2

3. GENERAL INTERPRETATION OF LIENS 2

B. WHO HAS THE RIGHT TO A CONSTRUCTION LIEN IN WASHINGTON? 2

1. GENERALLY 2

2. ACTIVITIES CREATING LIENS 2

C. WHAT ITEMS ARE COVERED BY THE LIEN? 3

1. GENERALLY 3

2. PROFESSIONAL SERVICES 3

3. FIXTURES 3

D. WHO CAN ORDER WORK THAT GIVES A RIGHT TO LIEN? 3

1. GENERALLY 3

2. "CONSTRUCTION AGENTS" 3

E. HOW IS A LIEN CREATED? 4

1. GENERALLY 4

2. BASIC LIEN FILING REQUIREMENTS 4

3. CONTENTS OF THE CLAIM OF LIEN 4

4. EXECUTION OF THE CLAIM OF LIEN 5

5. PROFESSIONALS, SUPPLIERS, AND LOWER-TIER SUBCONTRACTORS 5

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6. PROFESSIONALS WHERE NO WORK HAS BEEN COMMENCED AND WHERE THE PROFESSIONAL SERVICES ARE NOT VISIBLE FROM A SITE INSPECTION 6

7. SPECIAL RULES FOR OWNER-OCCUPIED, SINGLE-FAMILY RESIDENTIAL REMODEL PROJECTS 7

8. SPECIAL NOTICE TO CUSTOMER FROM GENERAL CONTRACTOR REQUIRED FOR CERTAIN RESIDENTIAL AND COMMERCIAL PROJECTS 7

9. SUMMARY OF STEPS TO PERFECT LIEN RIGHTS 8

F. WHERE TO GET THE INFORMATION TO FILE A CLAIM OF LIEN AND NOTICE TO OWNER 8

1. INFORMATION REQUIRED TO BE POSTED BY GENERAL CONTRACTOR 8

2. GENERAL CONTRACTOR MUST PROVIDE LIEN CLAIMANTS CERTAIN INFORMATION 9

3. INFORMATION REQUIRED ON BUILDING PERMIT APPLICATION 9

G. HOW MUCH CAN THE LIEN BE? 9

1. GENERALLY 9

2. ADDITIONAL AMOUNTS 9

3. SPECIAL RULES FOR OWNER-OCCUPIED, SINGLE-FAMILY RESIDENTIAL REMODEL PROJECTS 9

H. HOW LONG DOES A LIEN LAST? 9

1. GENERALLY 9

2. LAWSUIT MUST BE FILED WITHIN EIGHT MONTHS 10

3. PAYMENT ON FORECLOSURE 10

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I. CAN THE OWNER "BOND AROUND" THE LIEN? 10

1. GENERALLY 10

2. AMOUNT OF BOND IN LIEU OF LIEN CLAIM 10

J. DOES A CONTRACTOR HAVE SECURITY FOR PAYMENT OTHER THAN A LIEN? 10

1. PRIVATE PAYMENT AND PERFORMANCE BONDS 10

K. WHAT RIGHTS DOES A LIEN CLAIMANT HAVE TO BE PAID DIRECTLY FROM THE CONSTRUCTION LOAN? 12

1. GENERALLY 12

2. PROCEDURE AND TIME LIMITATIONS 12

3. CONTENTS OF THE NOTICE TO REAL PROPERTY LENDER 12

4. FILING REQUIREMENTS 13

5. EFFECTS OF A VALID NOTICE TO REAL PROPERTY LENDER 13

L. DOES THE OWNER HAVE CLAIMS AGAINST A LIEN CLAIMANT FOR FILING A LIEN? 13

1. GENERALLY 13

2. PROCEDURE 13

M. DOES A LIEN CLAIMANT HAVE ADDITIONAL RIGHTS AGAINST SOMEONE WHO COERCES IT NOT TO FILE A CLAIM OF LIEN? 14

II. WASHINGTON PUBLIC WORKS BOND AND RETAINAGE CLAIMS 29

A. IS THE PROJECT A STATE OR FEDERAL PUBLIC WORKS PROJECT? 30

1. GENERALLY 30

2. WASHINGTON PUBLIC WORKS 30

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3. FEDERAL PUBLIC WORKS 30

4. GENERAL CONTRACTORS 30

B. WASHINGTON STATE RETAINAGE AND BOND CLAIMS 30

1. RETAINAGE CLAIMS 30

2. BOND CLAIMS 34

III. FEDERAL MILLER ACT BOND CLAIMS 38

A. FEDERAL PROJECTS – MILLER ACT PAYMENT BOND 39

1. IS THE PROJECT A FEDERAL PROJECT? 39

2. WHAT WORK IS COVERED BY THE PAYMENT BOND? 39

3. WHO IS COVERED BY THE PAYMENT BOND? 39

4. WHAT ARE THE NOTICE REQUIREMENTS? 40

5. HOW IS THE CLAIM AGAINST THE PAYMENT BOND ENFORCED? 41

6. FEDERAL PROMPT PAYMENT ACT APPLICABLE TO GENERAL CONTRACTORS, SUBCONTRACTORS, AND SUPPLIERS 41

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FORMS / CHARTS

I. WASHINGTON PRIVATE WORKS / MECHANIC'S AND MATERIALMAN'S LIENS

CLAIM OF LIEN 15

NOTICE TO OWNER 24

NOTICE OF FURNISHING PROFESSIONAL SERVICES 26

NOTICE TO CUSTOMER 27

NOTICE TO REAL PROPERTY LENDER 28

II. WASHINGTON PUBLIC WORKS BOND AND RETAINAGE CLAIMS

PRECLAIM NOTICE TO CONTRACTOR BY SUBCONTRACTORS, MATERIALMEN, OR SUPPLIERS FOR CLAIM AGAINST BOND AND RETAINED PERCENTAGE 36

NOTICE OF CLAIM AGAINST BOND AND RETAINED PERCENTAGE 37

III. FEDERAL MILLER ACT BOND CLAIMS

MILLER ACT NOTICE (FOR SECOND-TIER SUBCONTRACTORS OR SUPPLIERS TO FIRST-TIER SUBCONTRACTORS) 43

IV. CHARTS

WASHINGTON PRIVATE PROJECTS 45

EXTENDING LIEN FILING REQUIREMENTS 46

COMMERCIAL PROJECT 47

RESIDENTIAL PROJECT 48

PUBLIC PROJECTS 49

PUBLIC WORKS BOND PRECLAIM NOTICE 50

FATAL PUBLIC WORKS BOND PRECLAIM NOTICE 51

COVERAGE UNDER THE FEDERAL MILLER ACT 52

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I. WASHINGTON PRIVATE WORKS / MECHANICS' AND MATERIALMEN'S LIENS

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I. WASHINGTON PRIVATE WORKS / MECHANICS' AND MATERIALMEN'S LIENS

A. BACKGROUND

1. ***DEFINITION:*** A lien is an involuntary security interest in favor of a person or entity who improves the property of another. Lien laws were so fundamental to the development of the United States that the third piece of legislation enacted by the first Oregon Territorial Legislature in 1854, when Washington was part of the Oregon Territory, was the construction lien statute.

2. ***PURPOSE:*** The purpose of lien laws was to encourage the development of the undeveloped territories. The government wanted to promote development. Development was more likely and would be less expensive if workers had fewer concerns about being paid for their labor. The work incorporated into undeveloped land makes the land more valuable, and until paid for, the increased value belongs to the workers who improved the property. Liens create a legal interest by workers and others who improve property until they are paid.

3. ***GENERAL INTERPRETATION OF LIENS:*** Construction liens are statutory and have no basis in common law or in equity. As such, Courts strictly construe construction lien statutes in determining the **extent** of the statutory rights. The provisions of the law relating to liens are to be liberally construed, however, to provide security for all parties **intended** to be protected by their provisions. Courts strictly construe the coverage of lien statutes as to the parties who may have a claim of lien, the scope of improvements to which a lien may be claimed, and the steps necessary for protection of the lien claim. Once these strictly construed elements have been satisfied, however, Courts generally liberally apply the individual provisions of the statutes to "provide security for all parties intended to be protected by their provisions."

B. WHO HAS THE RIGHT TO A CONSTRUCTION LIEN IN WASHINGTON?

1. ***GENERALLY:*** A contractor, supplier, architect, engineer, or surveyor who furnishes labor, materials, services, or equipment to be used in demolishing or improving private real property has a right to a lien upon that property.

2. ***ACTIVITIES CREATING LIENS:***

   a. ***Building and Structures:*** Anyone (including legal entities such as partnerships, joint ventures, and corporations) who furnishes labor, professional services, materials (including delivery costs), supplies, or rental equipment for the demolition, construction, alteration, or repair of any

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building or structure is given a lien. The lien extends to work on adjoining property, streets, and roads.

b. ***Condominium Improvements:*** Anyone who furnishes any of the above-described items for improvement of a condominium project has lien rights. Generally, improvements before the declaration creating the condominium has been recorded are "lienable" against all units. After the declaration creating the condominium has been recorded, the lien for improvements attaches only to those units that are actually improved. Work on common areas ordered by the condominium association creates a lien, attaching to each unit based on its proportionate responsibility for common expense liabilities.

C. WHAT ITEMS ARE COVERED BY THE LIEN?

1. ***GENERALLY:*** The labor or professional services performed, materials supplied, or equipment furnished must actually or constructively add to or become part of the property in order for a lien to arise.

2. ***PROFESSIONAL SERVICES:*** Professional services rendered need not result in actual construction to be lienable.

3. ***FIXTURES:*** Not all materials and supplies provided in the improvement of the property form the basis of an enforceable materialman's lien. Examples of "supplies" that are not lienable are tools used in performing the work, safety equipment, such as gloves, goggles, and hearing protection, or demurrage on containers in which the materials are shipped. Improvements or repairs to large pieces of equipment, such as a stand-by generator, which are not attached to the real property create rights only against the improved piece of equipment ("chattel liens"), not against the real property. Such liens are not addressed in this Manual.

D. WHO CAN ORDER WORK THAT GIVES A RIGHT TO LIEN?

1. ***GENERALLY:*** The labor, professional services, materials, supplies, or rental equipment must be furnished at the request of the owner of the property improved or by his or her actual agent, or "construction agent," to be lienable.

2. ***"CONSTRUCTION AGENTS"***

a. ***Licensed and Registered Persons:*** For lien purposes, every licensed or registered contractor or subcontractor, architect, engineer, or person in charge of the construction is treated as an agent of the owner.

b. ***Unlicensed or Unregistered Persons:*** Only a registered contractor can create a lien. Each subcontractor must know the registration status of the person immediately above it in the contract chain, and may rely on information

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provided by the State for confirming registration. The absence or loss of registration by a contractor or subcontractor affects only those who have contracts directly with the unregistered entity.

c. ***Tenant Improvements:*** In some cases, a tenant may also be deemed to be the agent of an owner, although this depends upon the terms of the lease. When a lease requires that the tenant improve the property, the claimant may also lien the interest of the landlord in the property, in addition to the interest of the tenant. The lien will attach to the landlord's interest when the tenant has an obligation under the lease, as opposed to a privilege, to make the improvements. By requiring that the improvements be made, the landlord grants the power to the tenant to act on the landlord's behalf, and consents to the formation of a principal/agent relationship (the tenant is deemed an agent of the owner/landlord), assuming liabilities for the acts of the tenant.

E. HOW IS A LIEN CREATED?

1. ***GENERALLY:*** Certain steps must be taken before a lien is considered enforceable. This is known as "perfecting" the lien. There are basic steps to perfecting a lien in all cases. Additional steps are required for second-tier subcontractors, suppliers, and service professionals. Some different rules and additional requirements apply to new residential construction, owner-occupied, single-family residential remodel projects, and small commercial projects. The basic procedure is set out below. The additional steps are separately stated.

2. ***BASIC LIEN FILING REQUIREMENTS:*** The lien is given by law and attaches to the property as of the date the first work (labor or material) was performed on the site. The requirement of on-site work does not apply to liens for professional services. The lien must be "claimed" by the lien claimant by recording a Claim of Lien in the office of the County Auditor, Recorder, or Department of Records and Elections (depending on the county) where the property is located. The Claim of Lien must be filed for recording within **90 days** from the last day labor, professional services, materials, or equipment were supplied. "Punch list" work extends the **90-day** filing deadline; warranty work does not (*see* **page 46** for an illustration of how punch list work extends the lien filing deadline).

   The Claim of Lien must be personally served on or mailed by certified or registered mail, return receipt requested, to the owner within **14 days** of recording. Failure to do so results in forfeiture of any right the claimant may have to attorneys' fees and costs against the owner.

3. ***CONTENTS OF THE CLAIM OF LIEN:*** The Claim of Lien must include the following elements:

   a. The name, phone number, and address of the claimant;

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b. The first and last date on which labor, professional services, materials, or equipment were furnished;

c. The name of the person indebted to the claimant;

d. The name of the owner or reputed owner of the property, if known, and if not known, that fact shall be stated;

e. The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the property, and if possible, the property should be described by a complete legal description; and

f. The principal amount for which the lien is claimed.

Sample Claims of Lien forms are found at **pages 15 through 23.** You should consult with legal counsel to ensure you are using the correct form.

4. ***EXECUTION OF THE CLAIM OF LIEN:*** The Claim of Lien must be signed by the claimant (or someone with authority to act on its behalf). The person signing must swear to the truth of the items in the Claim of Lien. The signature must also be acknowledged before a notary public.

To ensure that these steps have been taken, the Claim of Lien should be reviewed with a lawyer prior to recording it with the proper county office.

5. ***PROFESSIONALS, SUPPLIERS, AND LOWER-TIER SUBCONTRACTORS:*** In addition to recording a Claim of Lien, professionals, material and equipment suppliers who did not contract directly with the owner or the owner's common law agent, and second-tier or lower-tier subcontractors must give a "Notice to Owner." The purpose of the Notice is to advise the owner of the existence of persons or entities not necessarily present on the site that have lien rights.

a. ***Form of the Notice:*** The law provides the form of the Notice, including the size of font to be used. A copy of the Notice is found at **pages 24 and 25. Do not use other forms**.

Note: The statute requires that the Notice to Owner form be typed using lower and upper case, 10-point type where appropriate. The form of Notice is set by statute, and statutes are subject to change. Therefore, a lawyer should be consulted to ensure the form used is current.

b. ***Time of Serving the Notice:*** The Notice must be served in the manner set forth below within **60 days** of first work or material delivery for commercial projects or within **10 days** for new construction of a single-family residence. If it is served after that date, a lien can only be claimed for equipment or

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material delivered within the **60-day** period before the Notice was served or **10 days** for new construction of a single-family residence (*see* **pages 47 and 48** for illustrative examples of operation of the "relation back" doctrine).

c. ***Manner of Service:*** The Notice should be sent to the owner and usually also the general contractor. The Notice must be mailed by certified or registered mail, return receipt requested, or personally served with a signed acknowledgment of receipt.

d. ***To Whom Must the Notice be Sent?*** The Notice should always be sent to the owner. If the general contractor has posted the project with the information specified in Section F.1., furnished the potential claimant with the information required to be posted as soon as the identity and mailing address of such claimant are made known to the general contractor, and is in compliance with the requirements to include information on the building permit application as specified in Section F.3., then the Notice must also be provided to the general contractor.

e. ***Claimants Who Are Not Required to Give Notice.*** The Notice is not required to be given by the following categories of claimant:

   i. Persons who contract directly with the owner or the owner's common law agent;

   ii. Laborers whose lien is based solely on performing labor; or

   iii. First-tier subcontractors who contract directly with the general contractor, except for first-tier subcontractors involved in connection with the repair, alteration, or remodel of an existing owner-occupied, single-family residence or appurtenant garage.

f. ***Consequences if the Notice is Not Provided:*** If the Notice is not provided, the lien claimant may not claim for professional services, materials, or equipment. The failure to provide the Notice if required for the repair, alteration, or remodel of an existing owner-occupied, single-family residence or appurtenant garage is addressed in Section E.7. below.

6. ***PROFESSIONALS WHERE NO WORK HAS BEEN COMMENCED AND WHERE THE PROFESSIONAL SERVICES ARE NOT VISIBLE FROM A SITE INSPECTION:*** Professionals, even those dealing directly with the owner, may record a Notice with the appropriate county agency (Auditor, Recorder, or Department of Records and Elections, depending on the county) of the professional's name, address, telephone number, legal description, owner or reputed owner's name, and general nature of professional services. The form used shall substantially comply with the Notice of Furnishing Professional Services set out on **page 26.** No specific

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time frame is set for this recording. The Notice should be recorded as soon as professional services are commenced. The failure to record such a Notice may invalidate the professional's lien as to subsequent lenders and purchasers.

7. **SPECIAL RULES FOR OWNER-OCCUPIED, SINGLE-FAMILY RESIDENTIAL REMODEL PROJECTS:** Even first-tier subcontractors must give the Notice to Owner (referred to above and found on **pages 24 and 25**) to single-family owners occupying residences being remodeled. The liens of persons furnishing professional services, materials, or equipment for the repair, alteration, or remodel of an existing owner-occupied, single-family residence or appurtenant garage may only be satisfied from amounts not yet paid to the general contractor by the owner at the time the Notice is received by the owner, regardless of whether amounts not yet paid to the general contractor are due. "Received" means actual receipt by personal service, or certified or registered mail, return receipt requested, or three days after mailing by certified or registered mail, return receipt requested, excluding Saturdays, Sundays, or legal holidays. Note: This applies even to first-tier subcontractor involved in such projects.

8. ***SPECIAL NOTICE TO CUSTOMER FROM GENERAL CONTRACTOR REQUIRED FOR CERTAIN RESIDENTIAL AND COMMERCIAL PROJECTS:***

   a. General contractors (contractors who contract directly with the owner of the property) on private construction projects (except those exempt discussed below) must provide the owner with a specific disclosure statement or Notice to Customer prior to starting work (a copy of the Notice to Customer appears on **page 27**). This Notice to Customer must be signed by the customer. The contractor must retain the signed copy of the Notice in its files for a minimum of three years and produce a signed or electronic signature copy of the Notice if requested by the Washington State Department of Labor and Industries. If the contractor fails to provide the required Notice to Customer prior to the commencement of work, the contractor is barred from maintaining a lien. The Notice to Customer is required by the general contractor (a) for the repair, alteration, or construction of four or fewer residential units or accessory structures on residential property when the bid or contract price is $1,000 or more; or (b) for the repair, alteration, or construction of a commercial building where the bid or contract price is $1,000 or more, but less than $60,000.

      Practice Pointer: Residential apartment buildings, regardless of size or the number of units, are considered commercial buildings.

   b. The Notice to Customer is not required on the following projects:

      i. Projects on which the bid price or contract price is less than $1,000.

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ii. Contracts for construction of five or more residential units.

iii. Contractors contracting with other contractors.

iv. Public works contracts.

v. Contracts for the repair, alteration, or construction of a commercial building where the bid or contract price is in excess of $60,000.

c. The Notice to Customer must be signed by the customer.

9. ***SUMMARY OF STEPS TO PERFECT LIEN RIGHTS:*** A lien claimant must perform the following five steps to perfect its lien rights:

a. Record the required Notice, if providing professional services;

b. Provide the Notice to Customer, if required;

c. Provide a Notice to Owner to the owner and often also the general contractor to have a claim for professional services, materials, or equipment, if a supplier or second-tier subcontractor. If working on an owner-occupied, single-family remodel project, a first-tier subcontractor should always promptly provide the Notice to Owner.

d. Record a Claim of Lien within **90 days** after the last date of performance, and provide copy of Claim of Lien to the Owner within **14 days** thereafter; and

e. Commence a foreclosure lawsuit within **eight months** of the date of recording the Claim of Lien.

F. WHERE TO GET THE INFORMATION TO FILE A CLAIM OF LIEN AND NOTICE TO OWNER:

1. ***INFORMATION REQUIRED TO BE POSTED BY GENERAL CONTRACTOR:*** For projects over $5,000, the general contractor is required to post a notice on the job site listing the owner's name, address, and phone number; the legal description or tax parcel number; the general contractor's name, address, and phone number; and the name, address, and the phone number of the lender or payment bond issuer of a bond for 50% or more of the total amount for construction.

General contractors can comply with the posting requirements by posting the inspection record card at the construction site. The inspection record card is issued in connection with the building permit and must already be posted at the job site.

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2. ***GENERAL CONTRACTORS MUST PROVIDE LIEN CLAIMANTS CERTAIN INFORMATION:*** By law a general contractor must immediately supply the same information specified in Section F.1. above to all potential lien claimants as soon as the identity and mailing address of such lien claimants are made known to the general contractor.

3. ***INFORMATION REQUIRED ON BUILDING PERMIT APPLICATION:*** The same information required to be posted by the general contractor and provided by the general contractor to a potential lien claimant, as specified in Sections F.1. and F.2. above, is required to be included on the building permit application, kept on record in the office where building permits are issued, and made available to any person on request.

G. HOW MUCH CAN THE LIEN BE?

1. ***GENERALLY:*** The law allows a lien for the "contract price" of services, labor, materials, or equipment. This means the reasonable value if there is no formal contract and reliance is placed on an implied contract or *quantum meruit* (a Latin phrase meaning "as much as deserved"). Contract price includes amounts not directly relating to the value added to the project, such as contractual attorneys' fees and contractual interest.

2. ***ADDITIONAL AMOUNTS:*** In addition to the contract price, the law allows recovery of interest at the legal rate, if no interest is provided in the contract, and the law otherwise allows the claimant the right to recover interest, costs of recording the lien, title report costs, and attorneys' fees for pursuing the lien. The lien claimant need not and should not include these sums in the amount specified in the Claim of Lien.

3. ***SPECIAL RULES FOR OWNER-OCCUPIED, SINGLE-FAMILY RESIDENTIAL REMODEL PROJECTS*:** The amounts recoverable in these liens are limited to the dollar amount of the general contract which the owner had not paid to the general contractor when the professional, subcontractor, or supplier served the owner with the Notice to Owner. A claimant should send the Notice to Owner form as soon as the work at the project is commenced to ensure the maximum recovery of its lien amount.

H. HOW LONG DOES A LIEN LAST?

1. ***GENERALLY:*** A properly perfected lien gives the claimant a security interest in the property effective on the date the claimant first provided professional services, labor, materials, or equipment. That lien continues in effect until it is paid, unless it is extinguished because the claimant has failed to timely commence a suit to foreclose the lien.

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2. ***LAWSUIT MUST BE FILED WITHIN EIGHT MONTHS:*** Once a Claim of Lien has been recorded with the County Auditor, a legal action to enforce the lien must be commenced within **eight months** after the filing date of the Claim of Lien, otherwise the lien expires. The cause of action must include, as necessary parties, all people claiming an interest in the property, not just the owner and general contractor. At least the owner and lender must be served within **90 days** of filing suit. The law requires that only one lawsuit can proceed on any project, so the lien claimant should either join in an existing lawsuit or join as parties in the legal action everyone else who has recorded a lien on the project (though this is no longer absolutely required). Commencing a legal action to properly foreclose a Claim of Lien is complicated. Therefore, it is strongly recommended that a lawyer be consulted long before the eight-month time limit expires to make sure the lien is not lost.

3. ***PAYMENT ON FORECLOSURE:*** In the unlikely event that a lawsuit results in an actual foreclosure sale, the money realized from the sale is distributed between lien claimants in the order of their priority under the law.

I. CAN THE OWNER "BOND AROUND" THE LIEN?

1. ***GENERALLY:*** The owner or contractor can "free" the property from a lien by recording, in the appropriate county office, a surety bond issued by an approved bonding company. The lien then attaches to the bond and not the property. The same rules about foreclosure apply.

2. ***AMOUNT OF BOND IN LIEU OF LIEN CLAIM:*** A separate bond is required for each lien made by separate claimants. If the Claim of Lien is $10,000 or less, the amount of the bond must be $5,000, or two times the amount of the lien claim, whichever is greater. If the lien claim is in excess of $10,000, the amount of the bond must be 1.5 times the amount of the lien claim.

J. DOES A CONTRACTOR HAVE SECURITY FOR PAYMENT OTHER THAN A LIEN?

1. ***PRIVATE PAYMENT AND PERFORMANCE BONDS:***

   a. ***Payment Bonds:*** Many larger private projects require the general contractor to post payment bonds. These bonds are written in favor of the owner, and in some cases, subcontractors and suppliers. A potential lien claimant should check with the owner of the project to determine whether there is a payment bond on the job. Even if a contractor has missed the time limitations for filing a lien on the property, a claim on the bond may still exist.

   Some payment bonds contain their own time limitations for suit which are different from the lien law. It is imperative that the potential lien claimant get a copy of the bond before commencing suit on the bond. This ensures

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that action will be timely, and that the claims are indeed covered within the terms of the bond. In some cases, a payment bond can be sued upon directly by the subcontractor or materials suppliers. In other cases it requires suit against the owner and/or general contractor.

b. ***Performance Bonds:*** An owner may require the general contractor to post a performance bond. This performance bond generally runs to the owner, and guarantees the owner that the general contractor will perform the contract in accordance with its terms. The primary purpose of the performance bond is for the protection of the owner. Unless specifically provided in this type of bond, it does not run in favor of third-party subcontractors and suppliers.

c. ***Contractor's Registration Bond:*** A subcontractor or supplier having a direct relationship with a contractor may also have the right to bring suit against the contractor's registration bond surety. Washington law requires the registration of general and specialty contractors. This statute provides security by way of either cash deposit or security bond in the amount of $12,000 for general contractors, and in the amount of $6,000 for specialty contractors. The bond runs to the benefit of all persons furnishing labor, including employee benefits, for that contractor, and guarantees the contractor will pay all persons furnishing labor and materials or renting or supplying equipment to that contractor. It also guarantees that the contractor will pay amounts that may be adjudged against the contractor by reason of negligent or improper work or breach of contract in the conduct of the contracting business.

i. Cause of Action: The lawsuit is brought against the contractor and the surety company in the Superior Court of the county in which the work was done or any county where the contractor is located. A subcontractor, supplier, or laborer directly below the defaulting contractor in the contract chain may make such a claim. A residential homeowner must file suit against the registration bond within **two years** from the date the work was substantially completed or abandoned, whichever occurred first. All other claimants must file suit within **one year** from the date the claimed labor was performed and benefits accrued, taxes and contributions owing to the State of Washington became due, materials and equipment were furnished, or the claimed contract work was substantially completed or abandoned, whichever occurred first.

ii. Recovery Limitations:

(a) *Homeowner Claimants:* Residential homeowners can recover the entire bond or deposit amount required of general

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contractors or specialty contractors (when working directly for a homeowner).

(b) *All Other Claimants:* All other claimants are limited to one-half of the general contractor's bond amount ($6,000), or one-half of the specialty contractor's bond amount ($3,000).

(c) *Recovery Down the Chain of Privity:* Subcontractors can recover from the general contractor's registration bond, however, general contractors may not recover from a subcontractor's registration bond. A claimant may assert a claim against an upper-tier contractor's registration bond, but not against a bond of a lower-tier subcontractor.

iii. Attorneys' Fees: The prevailing party in a lawsuit brought against a contractor's bond for breach of contract by a party to a construction contract involving a residential homeowner is entitled to its reasonable attorneys' fees and costs. Recovery against the bonding company is limited to the amount of the bond.

K. WHAT RIGHTS DOES A LIEN CLAIMANT HAVE TO BE PAID DIRECTLY FROM THE CONSTRUCTION LOAN?

1. ***GENERALLY:*** Anyone who may claim a lien on the property may serve a notice on the construction lender that the lien claimant is unpaid on the job. That notice does not mean the lender will pay the claimant. It creates a risk for the lender if it continues to make advances on the loan without being sure that the claimant has been paid. This procedure is not applicable if a payment bond of at least 50% of the construction financing has been posted by the general contractor or owner.

   The potential claimant must maintain its right to a mechanic's lien, and properly file the Notice to Real Property Lender. The lender is not precluded from foreclosing on the property by the filing of this Notice when the owner is in default on the loan. Thus, when faced with such a Notice, the lender may well exercise its rights to foreclose against the property, and depending upon the amount of equity in the property, the lien claimant may find itself without protection, if the project is seriously troubled.

2. ***PROCEDURE AND TIME LIMITATIONS:*** Any lien claimant who has not received payment within **five days** after the date required by the contract, may, within **35 days** after payment is due, give the lender a Notice of the sum due and unpaid.

3. ***CONTENTS OF THE NOTICE TO REAL PROPERTY LENDER:*** A form of Notice is included at **page 28**. The form is included in the law, and is the one that should be used. The law allows the use of forms "substantially" in this form, but the

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better practice would be to use the exact form provided. The form must be signed under penalty of perjury.

4. ***FILING REQUIREMENTS:*** The Notice to Real Property Lender must be sent to the lender, at the office which is administering the construction loan, with copies sent to the owner, and the general contractor by certified or registered mail, return receipt requested, or by personal delivery.

5. ***EFFECTS OF A VALID NOTICE TO REAL PROPERTY LENDER:*** If the lender fails to withhold from the next and all subsequent loan disbursements the full amount of the claim, then the lien will be given priority to the lender's security interest in the property to the full extent of the lien amount (including interest and attorneys' fees), or the funds left in the account at the time of the Notice, whichever is less.

L. DOES THE OWNER HAVE CLAIMS AGAINST A LIEN CLAIMANT FOR FILING A LIEN?

1. ***GENERALLY:*** The law provides a quick procedure to owners or general contractors who question the amount of a Claim of Lien or stop notice of a lower-tier lien claimant. The challenging party must show that the lien is "frivolous, made without reasonable cause or clearly excessive." If an owner or general contractor succeeds in such a procedure, the lien is dismissed (or reduced in the case of a "clearly excessive" lien).

2. ***PROCEDURE:*** The owner or any contractor who believes a lien claim is subject to dismissal or reduction under this law can file in Superior Court an application by motion, supported by sworn declarations, for an order requiring the lien claimant to appear in Court, and "show cause" why the lien claim should not be dismissed or reduced. If the lien claimant fails to appear, the relief sought will be granted. If the claimant does appear, then a hearing is held by the Court. Based on evidence of the claim amount and its basis, the Court decides whether the claim is frivolous or excessive. The party seeking to find the lien frivolous has the initial burden of proof, then the burden shifts to the lien claimant to present a *prima facie* (Latin meaning that on first examination, a matter appears to be self-evident from the facts) case that the lien was not frivolous. The lien is considered frivolous if it presents "no debatable issues" and is "so devoid of merit that it has no possibility of succeeding." Procedural defects in the lien filing process may not mean the filing was frivolous. The burden is very high on the party seeking to show that a lien is frivolous. The prevailing party at that hearing is awarded its costs and attorneys' fees. The same procedure applies to a contested Notice to Lender.

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M. DOES A LIEN CLAIMANT HAVE ADDITIONAL RIGHTS AGAINST SOMEONE WHO COERCES IT NOT TO FILE A CLAIM OF LIEN?

It is a violation of the Consumer Protection Act for a contractor or developer to attempt to discourage a contractor, subcontractor, or material or equipment supplier from filing a Notice to Owner or Claim of Lien by, among other things, threatening to withhold future contracts. Violations of the Consumer Protection Act carry with them not only actual damages, but also treble damages up to $25,000 and attorneys' fees.

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[*See* text, **pages 4 and 5**, for a discussion of the use of this form.]

CLAIM OF LIEN SIGNED BY ATTORNEY

Return Address:

_____
_____
_____
_____

Document Title: **Claim of Lien**

Reference Number: _____

Grantor: _____

Grantee: _____

Legal Description:

Assessor's Property Tax Parcel No.: _____

CLAIM OF LIEN

_____, claimant, vs. _____, name of persons indebted to claimant.

Notice is hereby given that the person named below claims a lien pursuant to Chapter 60.04 RCW. In support of this lien, the following information is submitted:

1. NAME OF LIEN CLAIMANT: _____

   TELEPHONE NUMBER: _____

   ADDRESS: _____
   _____

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT, OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECOMES DUE: _____

3. NAME OF PERSON INDEBTED TO THE CLAIMANT: _____

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4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED: **All fee, leasehold, and other interests of _____, and any other owner, person, or entity in the property commonly known as _____ located at _____, _____, _____ County, Washington _____, the legal description of which is believed to be as follows:**

[Legal Description – and/or – The legal description of the underlying real property is described on the attached Exhibit A.]

5. NAME OF THE OWNER OR REPUTED OWNER (if not known, state "unknown"): _____

_____

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL OR EQUIPMENT WAS FURNISHED: _____

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: **$**_____

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM, SO STATE HERE: _____

_____, **Claimant**
_____
_____
(___) ___-____

By:____/s/_____
Print Name:_____
Its: Attorney

STATE OF WASHINGTON)
: SS
COUNTY OF _____)

_____, being sworn, says: I am the attorney of the claimant above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

_____
Print Name:_____

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SUBSCRIBED and SWORN to before me this _____ day of _____, 20__.

[Seal or Stamp]

_____
Print Name:_____
Notary Public in and for the State of Washington,
residing at _____
My Commission Expires:_____

STATE OF WASHINGTON)
: SS
COUNTY OF _____)

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that [he/she] signed this instrument, on oath stated that [he/she] was authorized to execute this instrument, and acknowledged it as the attorney of _____, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: This _____ day of _____, 20__.

[Seal or Stamp]

_____
Print Name:_____
Notary Public in and for the State of Washington,
residing at _____
My Commission Expires:_____

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[*See* text, **pages 4 and 5**, for a discussion of the use of this form.]

CLAIM OF LIEN FOR USE BY A LIEN CLAIMANT WHO IS A CORPORATION, PARTNERSHIP, LIMITED PARTNERSHIP, LIMITED LIABILITY COMPANY, OR OTHER SEPARATE LEGAL ENTITY, OTHER THAN A SOLE PROPRIETORSHIP

Return Address:

_____
_____
_____
_____

Document Title: **Claim of Lien**

Reference Number: _____

Grantor: _____

Grantee: _____

Legal Description: _____

Assessor's Property Tax Parcel No.: _____

CLAIM OF LIEN

_____, claimant, vs. _____, name of persons indebted to claimant.

Notice is hereby given that the person named below claims a lien pursuant to Chapter 60.04 RCW. In support of this lien, the following information is submitted:

1. NAME OF LIEN CLAIMANT: _____

   TELEPHONE NUMBER: _____

   ADDRESS: _____
   _____

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT, OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECOMES DUE: _____

3. NAME OF PERSON INDEBTED TO THE CLAIMANT: _____

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4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED: **All fee, leasehold, and other interests of _____, and any other owner, person, or entity in the property commonly known as _____ located at _____, _____, _____ County, Washington _____, the legal description of which is believed to be as follows:**

[Legal Description – and/or – The legal description of the underlying real property is described on the attached Exhibit A.]

5. NAME OF THE OWNER OR REPUTED OWNER (if not known, state "unknown"): _____

_____

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL OR EQUIPMENT WAS FURNISHED: _____

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: $_____

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM, SO STATE HERE: _____

_____, **Claimant**
_____
_____
(___) ___-____

By: /s/ _____
Print Name: _____
Its: _____

STATE OF WASHINGTON)
: SS
COUNTY OF _____)

_____, being sworn, says: I am the _____ [President, Vice President, Managing Member, or other basis for signing in a representative capacity] of the Claimant above-named; I have read or heard the foregoing Claim of Lien, read and know the contents thereof, and believe the same to be true and correct, and that the Claim of Lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

_____
Print Name: _____

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SUBSCRIBED and SWORN to before me this _____ day of _____, 20__.

[Seal or Stamp]

_____
Print Name:_____
Notary Public in and for the State of Washington,
residing at _____
My Commission Expires:_____

STATE OF WASHINGTON)
: SS
COUNTY OF _____)

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that [he/she] signed this instrument, and on oath stated that [he/she] was authorized to execute the instrument, and acknowledged it as the _____ [President, Vice President, Officer, Managing Member, or other basis for authority and agency] of _____ [Claimant] to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: This _____ day of _____, 20__.

[Seal or Stamp]

_____
Print Name:_____
Notary Public in and for the State of Washington,
residing at _____
My Commission Expires:_____

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[*See* text, **pages 4 and 5**, for a discussion of the use of this form.]

CLAIM OF LIEN FOR USE BY A LIEN CLAIMANT WHO IS AN INDIVIDUAL OR SOLE PROPRIETORSHIP

Return Address:

_____
_____
_____
_____

Document Title: **Claim of Lien**

Reference Number: _____

Grantor: _____

Grantee: _____

Legal Description: _____

Assessor's Property Tax Parcel No.: _____

CLAIM OF LIEN

_____, claimant, vs. _____, name of persons indebted to claimant.

Notice is hereby given that the person named below claims a lien pursuant to Chapter 60.04 RCW. In support of this lien, the following information is submitted:

1. NAME OF LIEN CLAIMANT: _____

   TELEPHONE NUMBER: _____

   ADDRESS: _____
   _____

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT, OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECOMES DUE: _____

3. NAME OF PERSON INDEBTED TO THE CLAIMANT: _____

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4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED: **All fee, leasehold, and other interests of _____, and any other owner, person, or entity in the property commonly known as _____ located at _____, _____, _____ County, Washington _____, the legal description of which is believed to be as follows:**

[Legal Description – and/or – The legal description of the underlying real property is described on the attached Exhibit A.]

5. NAME OF THE OWNER OR REPUTED OWNER (if not known, state "unknown"): _____

_____

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL OR EQUIPMENT WAS FURNISHED: _____

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: $_____

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM, SO STATE HERE: _____

_____, **Claimant**
_____
_____
(___) ___-____

By:____/s/_____
Print Name:_____
Its:_____

STATE OF WASHINGTON)
: SS
COUNTY OF _____)

_____, being sworn, says: I am the Claimant above-named; I have read or heard the foregoing Claim of Lien, read and know the contents thereof, and believe the same to be true and correct, and that the Claim of Lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

_____
Print Name:_____

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SUBSCRIBED and SWORN to before me this _____ day of _____, 20__.

[Seal or Stamp]

_____
Print Name:_____
Notary Public in and for the State of Washington,
residing at _____
My Commission Expires:_____

STATE OF WASHINGTON)
: SS
COUNTY OF _____)

I certify that I know or have satisfactory evidence that _____ [Name of Individual Claimant] is the person who appeared before me, and said person acknowledged that [he/she] signed this instrument, and acknowledged it to be [his/her] free and voluntary act for the uses and purposes mentioned in the instrument.

DATED: This _____ day of _____, 20__.

[Seal or Stamp]

_____
Print Name:_____
Notary Public in and for the State of Washington,
residing at _____
My Commission Expires:_____

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[*See* text, **pages 5 through 7 and 9,** for a discussion of the use of this form.]

NOTICE TO OWNER

IMPORTANT: READ BOTH SIDES OF THIS NOTICE CAREFULLY.
PROTECT YOURSELF FROM PAYING TWICE.

To: _____
Date: _____
Re: _____ [Description of property: street address or general location.]

From: _____

AT THE REQUEST OF: _____

THIS IS NOT A LIEN: This notice is sent to you to tell you who is providing professional services, materials, or equipment for the improvements of your property and to advise you of the rights of these persons and your responsibilities. Also take note that laborers on your project may claim a lien without sending you a notice.

OWNER/OCCUPIER OF EXISTING RESIDENT PROPERTY

Under Washington law, those who furnish labor, professional services, materials, or equipment for the repair, remodel, or alteration of your owner-occupied principal residence and who are not paid, have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

The law limits the amount that a lien claimant can claim against your property. Claims may only be made against that portion of the contract price you have not yet paid to your general contractor as of the time this notice was given to you or three days after this notice was mailed to you. Review the back of this notice for more information and ways to avoid lien claims.

COMMERCIAL AND/OR NEW RESIDENTIAL PROPERTY

We have or will be providing professional services, materials, or equipment for the improvement of your commercial or new residential project. In the event you or your contractor fails to pay us, we may file a lien against your property. A lien may be claimed for all professional services, materials, or equipment furnished after a date that is sixty days before this notice was given to you or mailed to you, unless the improvement to your property is the construction of a new single-family residence, then ten days before this notice was given to you or mailed to you.

Sender: _____

Address: _____
_____

Telephone: _____

Brief description of professional services, materials or equipment provided or to be provided: _____
_____
_____

IMPORTANT INFORMATION ON REVERSE SIDE

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IMPORTANT INFORMATION FOR YOUR PROTECTION

This notice is sent to inform you that we have or will provide professional services, materials, or equipment for the repair, remodel, or alteration of your property. We expect to be paid by the person who ordered our services, but if we are not paid, we have the right to enforce our claim by filing a construction lien against your property.

LEARN more about the lien laws and the meaning of this notice by discussing them with your contractor, suppliers, Department of Labor and Industries, the firm sending you this notice, your lender, or your attorney.

COMMON METHODS TO AVOID CONSTRUCTION LIENS: There are several methods available to protect your property from construction liens. The following are two of the more commonly used methods.

> DUAL PAYCHECKS (Joint Checks): When paying your contractor for services or materials, you may make checks payable jointly to the contractor and the firms furnishing you this notice.
>
> LIEN RELEASES: You may require your contractor to provide lien releases signed by all the suppliers and subcontractors from whom you have received this notice. If they cannot obtain lien releases because you have not paid them, you may use the dual payee check method to protect yourself.

YOU SHOULD TAKE APPROPRIATE STEPS TO PROTECT YOU PROPERTY FROM LIENS.

YOUR GENERAL CONTRACTOR AND YOUR CONSTRUCTION LENDER ARE REQUIRED BY LAW TO GIVE YOU WRITTEN INFORMATION ABOUT LIEN CLAIMS. IF YOU HAVE NOT RECEIVED IT, ASK THEM FOR IT.

Practice Pointer: RCW 60.04.031 requires that the Notice to Owner be typed using lower and upper case 10-point type where appropriate. You should be sure that the form that you are using has the appropriate type face size and has not been altered for publication purposes.

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[*See* text, **pages 6 and 7**, for a discussion of the use of this form.]

NOTICE OF FURNISHING PROFESSIONAL SERVICES

That on the _(day)_ day of _(month and year)_, 20__, ___(name of provider)___ began providing professional services upon or for the improvement of real property legally described as follows:

[**Legal Description is Mandatory**]

The general nature of the professional services provided is:

_____

_____

_____

The owner or reputed owner of the real property is:

_____

_____
Signature of Claimant

_____
Print or Type Name

_____
Street Address

_____
City, State, Zip Code

_____
Telephone Number

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[*See* text, **pages 7 and 8**, for a discussion of the use of this form.]

NOTICE TO CUSTOMER
(RCW 18.27.114)

(For use by contractors contracting directly with an owner.)

This contractor is registered with the state of Washington, Registration No. _____, and has posted with the state a bond or deposit of $12,000 for the purpose of satisfying claims against the contractor for breach of contract including negligent or improper work in the conduct of the contractor's business. The expiration date of this contractor's registration is_____.

THIS BOND OR DEPOSIT MIGHT NOT BE SUFFICIENT TO COVER A CLAIM THAT MIGHT ARISE FROM THE WORK DONE UNDER YOUR CONTRACT.

This bond or deposit is not for your exclusive use because it covers all work performed by this contractor. The bond or deposit is intended to pay valid claims up to $_____ that you and other customers, suppliers, subcontractors, or taxing authorities may have.

FOR GREATER PROTECTION YOU MAY WITHHOLD A PERCENTAGE OF YOUR CONTRACT.

You may withhold a contractually defined percentage of your construction contract as retainage for a stated period of time to provide protection to you and help insure that your project will be completed as required by your contract.

YOUR PROPERTY MAY BE LIENED.

If a supplier of materials used in your construction project or an employee or subcontractor of your contractor or subcontractors is not paid, your property may be liened to force payment and you could pay twice for the same work.

FOR ADDITIONAL PROTECTION, YOU MAY REQUEST THE CONTRACTOR TO PROVIDE YOU WITH ORIGINAL "LIEN RELEASE" DOCUMENTS FROM EACH SUPPLIER OR SUBCONTRACTOR ON YOUR PROJECT.

The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the State Department of Labor and Industries.

I have received a copy of this disclosure statement.

Date:_____ Signature of Customer:_____

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[*See* text, **pages 12 and 13**, for a discussion of the use of this form.]

NOTICE TO REAL PROPERTY LENDER
(Authorized by RCW 60.04.221)

TO: _____
(Name of Lender)

_____
(Administrative Office — Street Address)

_____
(City) (State) (Zip)

AND TO: _____
(Owner)

AND TO: _____
(General Contractor — If Different Than Owner)

_____
(Name of Laborer, Professional, Materials or Equipment Supplier)

whose business address is _____, did at the property located at _____
(check appropriate box) ☐ perform labor ☐ furnish professional services ☐ provide materials ☐ supply equipment as follows:

_____
_____
_____

which was ordered by _____
(Name of Person)
whose address was stated to be _____
_____

The amount owing to the undersigned according to contract or purchase order for labor, supplies, or equipment (as above mentioned) is the sum of _____ Dollars ($_____). Said sums became due and owing as of _____ (state date).

You are hereby required to withhold from any future draws on existing construction financing which has been made on the subject property (to the extent there remain undisbursed funds) the sum of _____ Dollars ($_____).

IMPORTANT

Failure to comply with the requirements of this notice may subject the lender to a whole or partial compromise of any priority lien interest it may have pursuant to RCW 60.04.226.

DATE:_____ By:_____

Its:_____

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II. WASHINGTON PUBLIC WORKS BOND AND RETAINAGE CLAIMS

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II. WASHINGTON PUBLIC WORKS BOND AND RETAINAGE CLAIMS

A. IS THE PROJECT A STATE OR FEDERAL PUBLIC WORKS PROJECT?

1. ***GENERALLY:*** On public works projects, a subcontractor or material supplier does not have the right to file a lien against the public property to secure payment for its work on the improvement. In lieu of the construction lien, federal and Washington State laws provide for a right of action against the general contractor's payment bond. The payment bond is provided by the general contractor as a condition of performing public work.

2. ***WASHINGTON PUBLIC WORKS:*** On Washington State public works projects (e.g., Washington State Department of Transportation and public schools), in addition to the right to claim against the general contractor's bond, claimants also have the right to file a claim against contract funds retained by the public works owner (the retainage is an additional source of payment protection for subcontractors and suppliers). Though the claim is against the bond and retainage funds, they are independent sources of payment protection, and should be pursued together.

3. ***FEDERAL PUBLIC WORKS:*** On federal projects (e.g., projects on military bases), subcontractors and material suppliers by law are given payment protection under the general contractor's payment bond. A payment bond is required on any federal contract in excess of $25,000.

4. ***GENERAL CONTRACTORS:*** On private projects, general contractors have a lien right against the improved property. No comparable payment protection is provided general contractors under state or federal statutes when performing public work. The general contractor's only remedy for non-payment on a public works project is an action against the project owner for breach of contract.

B. WASHINGTON STATE RETAINAGE AND BOND CLAIMS

As indicated, Washington State provides two sources of protection of payment for subcontractors and material suppliers – one against the general contractor's bond, and the other against the general contractor's retained funds held by the owner for potential subcontractor and supplier claimants.

1. ***RETAINAGE CLAIMS:***

   a. ***General Retainage:*** Under Washington statutes, a public works owner which contracts for a public works improvement project must retain 5% from all of the general contractor's total job progress payments as a "fund" for

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potential subcontractor and material supplier claimants. This fund continues to grow with each progress payment made to the general contractor.

b. ***General Contractors and Subcontractors May Retain Funds or Post Retainage Bonds:*** Generally, the funds retained by the owner are deposited in interest-bearing accounts. General contractors and subcontractors may withhold funds from their subcontractors and sub-tier subcontractors or material suppliers, but not more than 5% of such progress payments. When funds are retained by general contractors and subcontractors, the general contractors or subcontractors withholding such funds must pay interest to their subcontractors and sub-tier subcontractors and suppliers at the interest rate equal to that which they receive from the public body.

Alternatively, a general contractor may post a retainage bond, and no retainage is withheld by the public works owner. If the general contractor does post a bond, the retainage claim is satisfied by the bond rather than the retainage fund. All the same rules apply to making claims against the retainage bond as are applicable to retainage claims.

i. Who Has the Right to a Claim Against Retainage?

(a) *Generally*: All persons who furnish labor, materials, or equipment for use in the performance of public works projects have a right to make a claim against retainage.

(b) *Examples:* Trustees of employment benefit plans (ERISA statutes may have preempted this right) and the Washington State Department of Revenue are given priority claims.

(c) Although the statute would appear to protect virtually any tier of subcontractor or supplier who has filed proper notice, Washington Courts have held that suppliers who supply materials to other material suppliers are not entitled to a lien upon retainage funds.

ii. How Does a Claimant Go About Making a Claim Against Retainage?

(a) *Preclaim Notice / Suppliers of Material and Equipment – Relation Back:* **Sub-tier subcontractors (other than first-tier subcontractors) and suppliers to subcontractors must give this Notice within 60 days of providing supplies, materials, or equipment to the project.** The Notice is effective for supplies, materials, and equipment furnished during **60 days** preceding the giving of the Notice, as well as all subsequently provided supplies, materials, and equipment.

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An illustrative example of how the Notice relates back **60 days** is set forth on **page 47**. *See* sample of the form on **page 36**. The Notice must be served on the general contractor personally or by certified or registered mail, return receipt requested.

(b) *Notice of Claim.* All retainage fund **claimants must provide the public works owner with a Notice of Claim within 45 days after "completion of the contract work" (different than "acceptance" under the bond statute) synonymous with completion of the project**. This Notice must be filed with the public owner by personal service or certified mail, return receipt requested. *See* sample form on **page 37** for contents.

iii. How Long Does a Claim Last? A claim against the retainage must be foreclosed (a lawsuit must be commenced) within **four months** of the date claimant filed the Notice of Claim with the public owner.

iv. How is the Claim Against the Retainage Enforced? The retainage claim is enforced (foreclosed) by commencing a lawsuit in the Superior Court. The prevailing claimant is entitled to recovery of attorneys' fees and interest. **Recovery is limited to the amount of money contained in the retainage fund (or the retainage bond amount).**

v. Retainage Bond. If a retainage bond has been posted, a claim against the bond is made in the same manner as against the retainage fund. The same forms are used, and the same deadlines apply.

c. ***Prompt Payment Act:*** The general contractor in Washington still does not enjoy the secured position that a private lien would provide. However, the Prompt Payment Act requires that the public body make prompt progress payments and retainage payments, or at least inform the general contractor promptly if all or part of any payment is not forthcoming. Similarly, general contractors who decide to withhold progress payments from subcontractors and suppliers are required to give written notice to those subcontractors and suppliers of the reasons for such withholding and the remedial action necessary to receive payment.

i. General Contractor Payment Rights: General contractors are entitled to be paid within **30 calendar days** after receipt of an invoice by the public body. If the public body intends to withhold payment for unsatisfactory performance or a defective payment application, the public body must notify the contractor, **in writing, within eight days**

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after receipt of the invoice stating (1) specifically why part or all of the payment request is being withheld, and (2) what remedial actions must be taken by the general contractor to receive the withheld amount. The public body may not withhold an amount greater than 150% of the amount in dispute (the cost of correction of the disputed work or material). Failure to comply with these requirements will entitle the contractor to interest at 1% per month until payment is received.

(a) *Payment of Retainage:* The retainage statute requires an unpaid subcontractor or material supplier to file a claim within **45 days** after completion of the contract work. If no claims are filed, the public body must pay retainage (or the balance of retainage not covered by claims against the retainage) within **60 days** following completion of the contract work, so long as all the releases are obtained.

(b) *Attorneys' Fees*: Attorneys' fees are to be awarded to the prevailing party if there is a dispute between the general contractor and the public body over payment of the required interest.

ii. Subcontractor and Supplier Payment Rights:

(a) *Progress Payments*: The Prompt Payment Act requires that contractors make payments to subcontractors not later than **10 working days after payment is received** by the contractor. The maximum amount that can be withheld in case of a good faith dispute is 150% of the amount in dispute. General contractors who decide to withhold progress payments from subcontractors and suppliers must give written notice to those subcontractors and suppliers of the reasons for such withholding and the remedial action necessary to receive payment (a copy of this notice must be given to the public body). The general contractor must pay withheld sums **within eight working days** once the subcontractor or supplier has remedied the defective work contained in the general contractor's notice. If the general contractor fails to pay within the required time, it must pay the subcontractor interest at 1% per month on the withheld sums. This is little solace to the subcontractor and material supplier who are already entitled to interest under the bond claim and retainage statutes.

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(b) *Retainage:* The contractor or subcontractor may withhold payment of not more than 5% of the sums earned by a subcontractor or sub-tier subcontractor. If such retainage is withheld, the contractor or subcontractor must pay interest on those sums at an interest rate equal to the rate it is making on the sums retained from it. If the general contractor is permitted by the public body to submit a bond to gain release of retainage, the general contractor in turn must accept a bond from subcontractors and release retainage.

iii. Owners Must Issue Change Orders for Undisputed Amounts Due and Owing: Public entities must, no later than **30 days** after satisfactory completion of additional work, issue a change order to the contract for the full dollar amount of the work not in dispute between the public entity and the contractor. If the public entity fails to issue such a change order within **30 days**, it must pay interest at 1% per month.

iv. Date Stamp / Invoice Date Presumption: An invoice received by a public body or general contractor is considered received when it is marked as delivered or date stamped. If an invoice is not date stamped or otherwise marked as delivered, the date of the invoice is considered to be the date the invoice was received. **Therefore, it is important for general contractors and subcontractors to date stamp invoices upon their receipt since an invoice may be dated several days before it is actually sent or received.**

2. *BOND CLAIMS:*

On Washington public works projects in excess of $25,000, general contractors must post a payment bond generally in an amount equal to the contract price. If a public body fails to require posting of such a payment bond, the public body may be liable directly to unpaid laborers, suppliers, or subcontractors.

a. ***Who Has the Right to Make a Claim Against the Payment Bond?*** Persons or entities which supply labor, equipment, materials, or supplies in furtherance of the contract have a right to make a claim against the bond (not necessarily incorporated into the project or consumed in the work). Claimants are not limited to first- and second-tier contractors as in federal projects.

b. ***How Does the Claimant Make a Claim Against the Bond?***

i. Preclaim Notice / Suppliers of Materials and Equipment: **Sub-tier subcontractors (but not first-tier subcontractors) and suppliers of materials and equipment to subcontractors must give a Preclaim**

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Notice within 10 days of first providing supplies or equipment to the project. The Notice is effective for suppliers of materials and equipment furnished during **10 days** preceding giving the Notice, as well as all subsequently provided supplies, materials, and equipment (*see* sample form **page 36** and illustration on **page 50**). The Notice must be delivered or transmitted via certified or registered mail to the general contractor. Failure to provide a Preclaim Notice within **10 days** of the first delivery is fatal to maintaining a claim against the bond (*see* illustration on **page 51**).

ii. Notice of Claim: **All claimants must, within 30 days of the acceptance (an affirmative act of the public body) of the work, file with the public works owner a Notice of Claim** (*see* sample form for contents on **page 37).** The Notice of Claim must be filed by personal service or by certified mail, return receipt requested. Attorneys' fees are only recoverable if at least **30 days** pass after the filing of the Notice of Claim and before commencement of the lawsuit.

c. ***How Long Does a Bond Claim Last?*** There is no statutory limit on the duration of a bond claim. Therefore, the six-year statute of limitations for written contracts applies (three years for oral contracts), absent time limitations in the bond. It is extremely important to have an attorney review the bond as soon as possible after the non-payment situation arises to ensure timely filing.

d. ***How is the Bond Claim Enforced?*** The bond claim is enforced by bringing a lawsuit in Superior Court. The claimant is entitled to the recovery of attorneys' fees, if it prevails.

e. ***Practical Advice:*** Exercise of a subcontractor's or supplier's rights against a public works bond should be coordinated with protection of lien rights against the statutory retainage held by the public body. The time limits for the Preclaim Notice are, under the Retainage Act – **60 days**, and the Bond Claim Act – **10 days**. Thus, to protect the claimant's rights under both Acts, the Preclaim Notice should be filed within **10 days** of first delivery of supplies or equipment to the project. Similarly, the Notice of Claim should be filed within **30 days** after completion of the contract work to absolutely ensure compliance under both the Retainage and Bond Claim Acts.

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[*See* text, **pages 31 through 35**, for a discussion of the use of this form.]

(Washington Public Works)

PRECLAIM NOTICE TO CONTRACTOR BY SUBCONTRACTORS, MATERIALMEN, OR SUPPLIERS FOR CLAIM AGAINST BOND AND RETAINED PERCENTAGE

VIA CERTIFIED OR REGISTERED MAIL – RETURN RECEIPT REQUESTED

TO: [Name of General Contractor]
[Address]

YOU ARE HEREBY NOTIFIED that the undersigned, _____, at the request of _____, commenced to deliver or furnish materials, supplies, and/or equipment for the use in the construction, alteration, and/or repair of that certain project known as _____ [project name] which is located at _____ [address or description]. If the undersigned is not paid for these materials, supplies, and/or equipment, it will file a claim against you and your bond and/or retainage, pursuant to RCW 39.08 and/or 60.28, *et seq.*, for payment of any sum that is due and owing to the undersigned.

DATED: This _____ day of _____, 20____.

_____
Name of Claimant

By:_____

Its:_____

Address:_____

_____

_____
Contractor's Registration No., if applicable

(Mail via certified mail, return receipt requested, or hand deliver and obtain receipt.)

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[*See* text, **pages 32 and 35**, for a discussion of the use of this form.]

NOTICE OF CLAIM AGAINST BOND AND RETAINED PERCENTAGE

RCW 39.08.030, RCW 60.28.010

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

TO: [Name of State, County, Municipality or Other Public Body, City, Town, or District]
[Address]

NOTICE IS HEREBY GIVEN that the undersigned, _____ _____ (claimant), _____ (address), has a claim in the amount of _____ and __/100 Dollars ($_____) (not including attorneys' fees or costs), together with interest at twelve percent (12%), against the statutory retained percentage held by _____ (Owner) pursuant to RCW 60.28 and the payment bond taken from _____ _____ (contractor), _____ (address), as principal, and _____ (surety), _____ (address), as surety, Bond No. _____, pursuant to RCW 39.08, for _____ _____ (brief description of the work).

This Notice of Claim Against Bond and Retained Percentage supersedes and replaces previous Notices.

DATED: This _____ day of _____, 20____.

_____
Name of Claimant

By:_____

Its:_____

Address:_____

_____

_____
Contractor's Registration No., if applicable

(Copies Furnished to: General Contractor and General Contractor's Bonding Company)

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III. FEDERAL MILLER ACT BOND CLAIMS

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III. FEDERAL MILLER ACT BOND CLAIMS

A. FEDERAL PROJECTS – MILLER ACT PAYMENT BOND

Since subcontractors, laborers, and suppliers do not have the right to create a lien on federal government property, the federal government requires all general contractors to post payment bonds on contracts in excess of $25,000. Unlike under Washington law, the amount of the payment bond is not necessarily equal to the value of the public works contract, but can vary and is generally 50% or less than the contract value.

1. ***IS THE PROJECT A FEDERAL PROJECT?*** Construction of a post office or federal office buildings may be private projects leased to the federal government. A claimant may well lose its lien rights against a property where it mistakenly proceeds to perfect its claim against a non-existent bond instead of following the essential steps for perfecting a construction lien or state bond or retainage claim. Mere federal funding of a project does not bring the job within the scope of the Miller Act. Generally, the project manual will provide guidance as to whether the particular project is a federal project within the purview of the Miller Act or not. To resolve any doubt, legal counsel should be consulted.

2. ***WHAT WORK IS COVERED BY THE PAYMENT BOND?***

   a. ***Use On Job:*** The materials supplied, equipment furnished, or labor performed must be used in or incorporated into the project. Generally, anything indispensable to the work contracted for falls within the meaning of "labor and material," and can be recovered under a Miller Act claim. Labor, material, and equipment are covered by the payment bond, if the claimant has delivered the items, charged them to the job, and reasonably believes they will be put to use on the project.

   b. ***Labor, Material, and Equipment Included:*** Social security and withholding tax, leased equipment and repairs (costs of major repairs or overhaul not included), costs of direct changes, and interest are all covered. Attorneys' fees are not awarded under the Miller Act. Delay damages may be recoverable.

3. ***WHO IS COVERED BY THE PAYMENT BOND?*** The payment bond on federal projects covers only those claimants who: (1) supply labor or material directly to the general contractor, or (2) supply labor or material directly to a first-tier subcontractor of the general contractor. (*See* Chart on **page 52** for an illustration of First- and Second-Tier Claimants).

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a. ***First-Tier General Contractors and Suppliers:*** Employees of the general contractor, all first-tier subcontractors to the general contractor, and all suppliers of the general contractor are covered under the payment bond regardless of the amount of wages, size of order, or subcontract volume.

b. ***Second-Tier Subcontractors, Sub-Tier Subcontractors, and Suppliers:*** Only those claimants who furnished labor and materials to a first-tier subcontractor are covered.

i. Suppliers to Suppliers Not Protected: If a claimant supplies material or equipment to a supplier, though that entity may be working for the general contractor, the claimant is not protected by the bond.

ii. Subcontractor Defined: An entity to whom the general contractor has delegated a specific portion of the general contract performance is a subcontractor.

iii. Distinction Between Subcontractor and Supplier: Drawing a distinction between a subcontractor and supplier of material or equipment is frequently the subject of dispute on Miller Act claims. A subcontractor is defined for this purpose as "one who performs for or takes from the general contractor a specific part of the labor or material requirements of the original contract." The scope of the general contract determines whether a claimant is a subcontractor or supplier. In a well-known federal case, the general contract required the construction of a gravel embankment. The entity furnishing the gravel to the general contractor's plant was held to be a subcontractor and not a supplier, because it supplied a specific part of the general contract. Thus, the entity supplying trucks to the gravel company had standing to sue under the Miller Act. If the gravel company had been classified as a supplier, the trucker would have had no right to make a claim on the general contractor's Miller Act bond.

c. ***Exclusion of Lower Tiers:*** Although a second-tier subcontractor or supplier to a direct, first-tier subcontractor of the general contractor is covered, all lower-tier subcontractors and suppliers are **not** covered. The rationale is that the general contractor has no practical way of assuring payments by (or to) a party that is so far removed from its control.

4. ***WHAT ARE THE NOTICE REQUIREMENTS?*** The Miller Act has strict notice requirements with which claimants must precisely comply to ensure protection.

a. ***First Tier – No Notice Required:*** A supplier to the general contractor, or subcontractor to the general contractor, need not provide any notice to the general contractor who has provided the payment bond.

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b. ***Second Tier – 90-Day Notice:*** A second-tier subcontractor or supplier to a subcontractor who has no direct contractual relationship with the general contractor must notify the general contractor within **90 days after the date on which the claimant performed the <u>last</u> of its labor or supplied the <u>last</u> material for which the claim is being made**. Repair work does not extend the notice deadline. A sample of the Miller Act Notice to the general contractor is attached at **page 43,** and should be served by personal service or sent by certified mail, return receipt requested.

5. *HOW IS THE CLAIM AGAINST THE PAYMENT BOND ENFORCED?*

a. ***Generally:*** To enforce the payment bond claim, the claimant must commence a lawsuit in Federal District Court where the federal project is located.

b. ***Duration One Year:*** The suit on the bond must be commenced within **one year** of the last day of furnishing labor or materials, and no sooner than **90 days** after the work was performed.

c. ***Arbitration / Stay:*** A general contractor may seek to stay the subcontractor's or supplier's Miller Act lawsuit. The subcontractor or supplier may not want to become involved in what oftentimes is protracted litigation between the general contractor and the owner.

i. <u>Arbitration</u>: If there is a valid arbitration clause in claimant's subcontract, suit on the bond may be stayed until arbitration is completed.

ii. <u>Flow Down of Alternative Dispute Resolution Provisions</u>: Where the alternative dispute resolution provision (including arbitration) is not part of the claimant's contract, but the general contractor seeks to enforce it under the flow-down provision, unless the subcontract specifically refers to staying of Miller Act rights, Courts may not stay the Miller Act lawsuit.

6. *FEDERAL PROMPT PAYMENT ACT APPLICABLE TO GENERAL CONTRACTORS, SUBCONTRACTORS, AND SUPPLIERS*

a. ***Generally:*** General contractors who perform federal projects do not enjoy the secured position a private lien provides. The Prompt Payment Act ("PPA") requires that the government make progress payments within **30 days** of submission of the progress payment application. The PPA mandates that each payment application to the government from the general contractor include a substantiation of the work performed, and a certification that the work for which payment is requested has been performed in

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accordance with the terms and conditions of the contract. The work of a subcontractor or supplier must be included in such certification. In addition, the general contractor must certify subcontractors and suppliers have been paid from previous payments, and must certify that subcontractors will be paid from the proceeds of the current payment.

b. ***Payment Withholding:*** General contractors are entitled to withhold retainage, if authorized by the subcontract or purchase order to withhold funds in accordance with subcontract / purchase order provisions. A general contractor's payment application to the government, however, may not include any amount the general contractor intends to retain or withhold from the subcontractor.

c. ***Payment Obligations of General Contractors and Subcontractors:*** The PPA requires that general contractors pay subcontractors within **seven days** of the date the general contractor is paid by the government. If the general contractor fails to pay its subcontractors in a timely manner, it must pay interest on the amounts not paid at a prescribed rate which fluctuates and is typically below the 1% per month provided for under the Washington Prompt Payment Act. Subcontractors and suppliers must pay their respective sub-tier subcontractors and suppliers within **seven days** of payment to them.

d. ***Notice of Withholding:*** A general contractor, after submitting a payment application to the government, but before making payment to a subcontractor, who discovers a basis for withholding payments otherwise due the subcontractor, may withhold such payments in accordance with the terms of the subcontract. The general contractor is allowed to withhold payments from the subcontractor without incurring an obligation to pay interest <u>if</u> it furnishes a notice to the subcontractor with a copy to the government specifying: (1) the amount to be withheld; (2) the specific causes for withholding; and (3) the remedial measures to be taken by the subcontractor to receive payment of the withheld funds. If the general contractor provides notice to the subcontractor, then the general contractor is obligated to pay the subcontractor within **seven days** after the correction of the identified performance deficiency. If the general contractor does not pay within such **seven-day period**, the general contractor is again obligated to pay the subcontractor interest at the specified rate. In addition, the general contractor is obligated to notify the government upon payment to the subcontractor of any withheld amounts, specifying the amounts of the progress payments withheld from the subcontractor, and the dates that such withholding began and ended.

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[*See* text, **pages 39 through 41**, for a discussion of the use of this form.]

MILLER ACT NOTICE
(For Second-Tier Subcontractors or Suppliers to First-Tier Subcontractors)

[Date]

VIA CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

_____ [General Contractor]
_____ [Address]
_____

Dear Sir or Madam:

This letter is written pursuant to Title 40 U.S.C. § 3133, and serves as notice that the undersigned, _____, has performed labor or has furnished materials, equipment, or supplies in the amount of $_____ required in prosecution of the work provided for in your contract with the United States. That contract, designated as _____ [Contract Number, if known] is for the construction of: _____ _____ [description of project and location].

The undersigned supplied materials or performed labor pursuant to a [written] [oral] contract with _____ [Subcontractor]. In consideration therefor, there became due, owing and payable to the undersigned the sum of $_____. The undersigned has been paid an aggregate sum of $_____, leaving due, owing and payable a balance of $_____, plus interest.

Demand is hereby made upon you for the payment of this indebtedness in the amount of $_____ with lawful interest. Unless the amount due and owing is promptly paid, suit will be instituted against you and your surety upon the bond.

Very truly yours,

_____

By:_____

Title:_____

[The Notice may be served by any means which provides written third-party verification of delivery to the Contractor at any place he maintains an office or conducts business, or his residence, or in any manner in which the United States Marshal of the district I which the public improvement is situated is authorized by law to serve Summons. It is suggested that the Notice be sent by registered or certified mail.]

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IV. CHARTS

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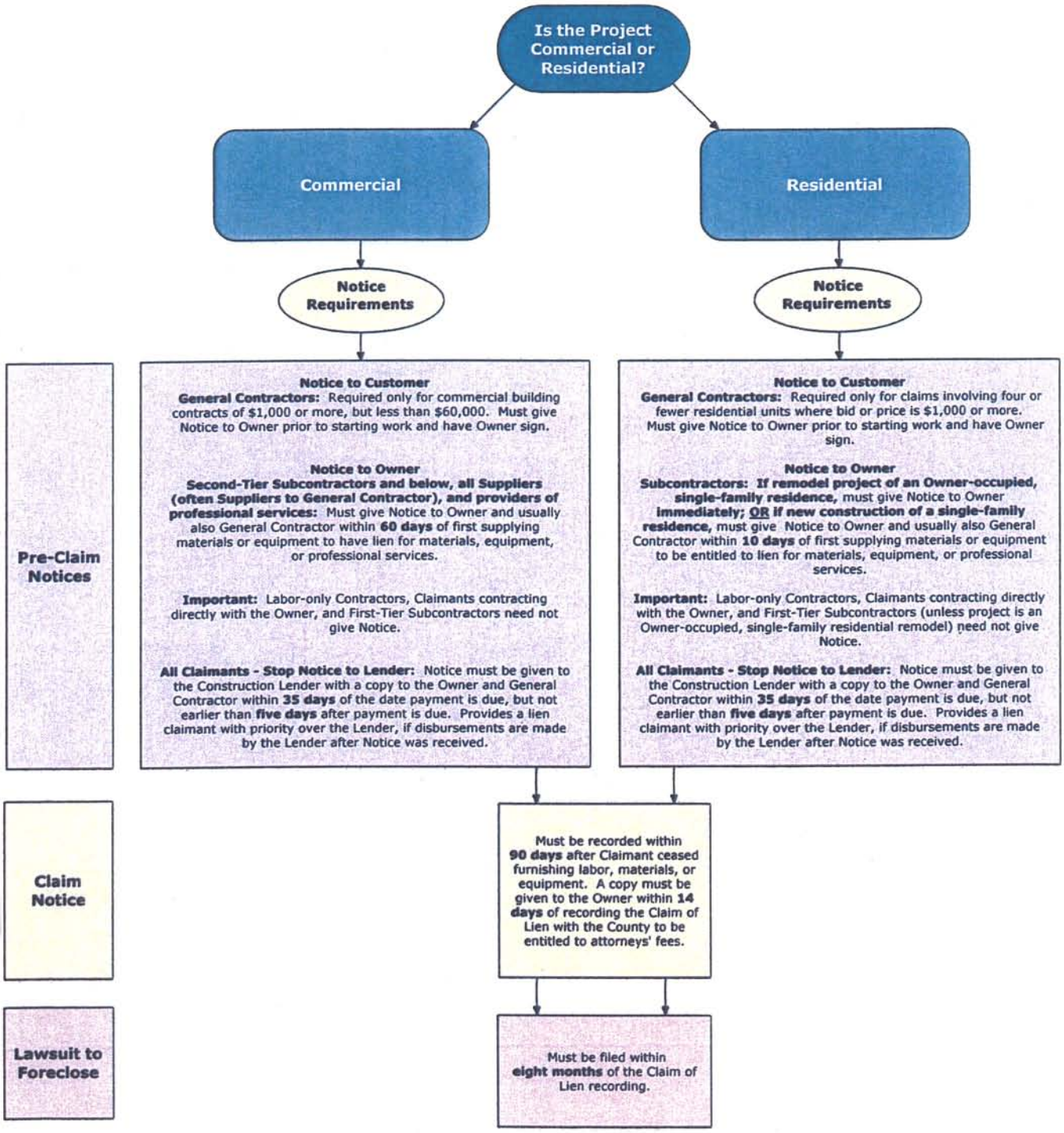
WASHINGTON PRIVATE PROJECTS



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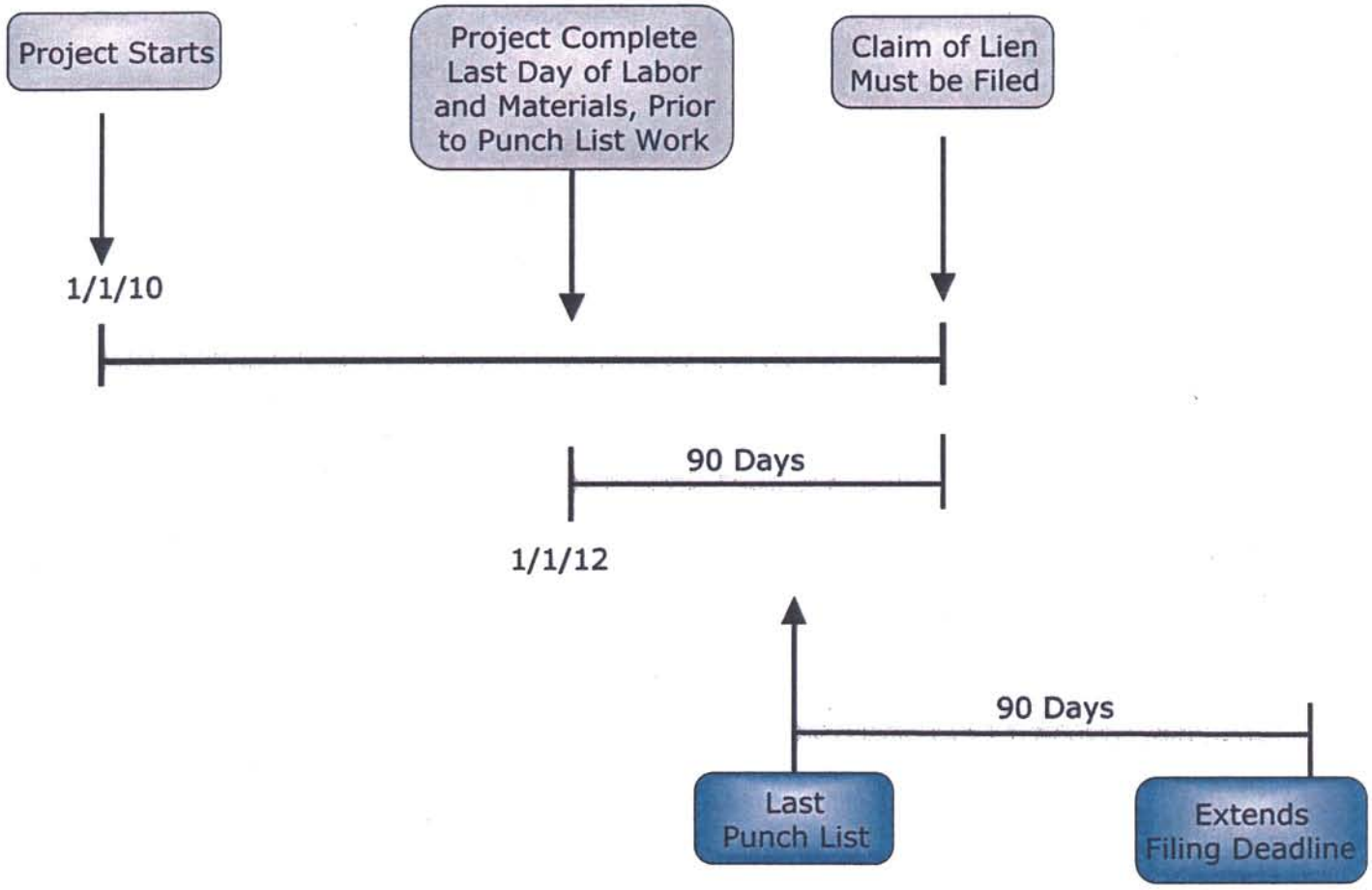
[*See* text, **page 4**, for a discussion of this chart.]

EXTENDING LIEN FILING REQUIREMENTS



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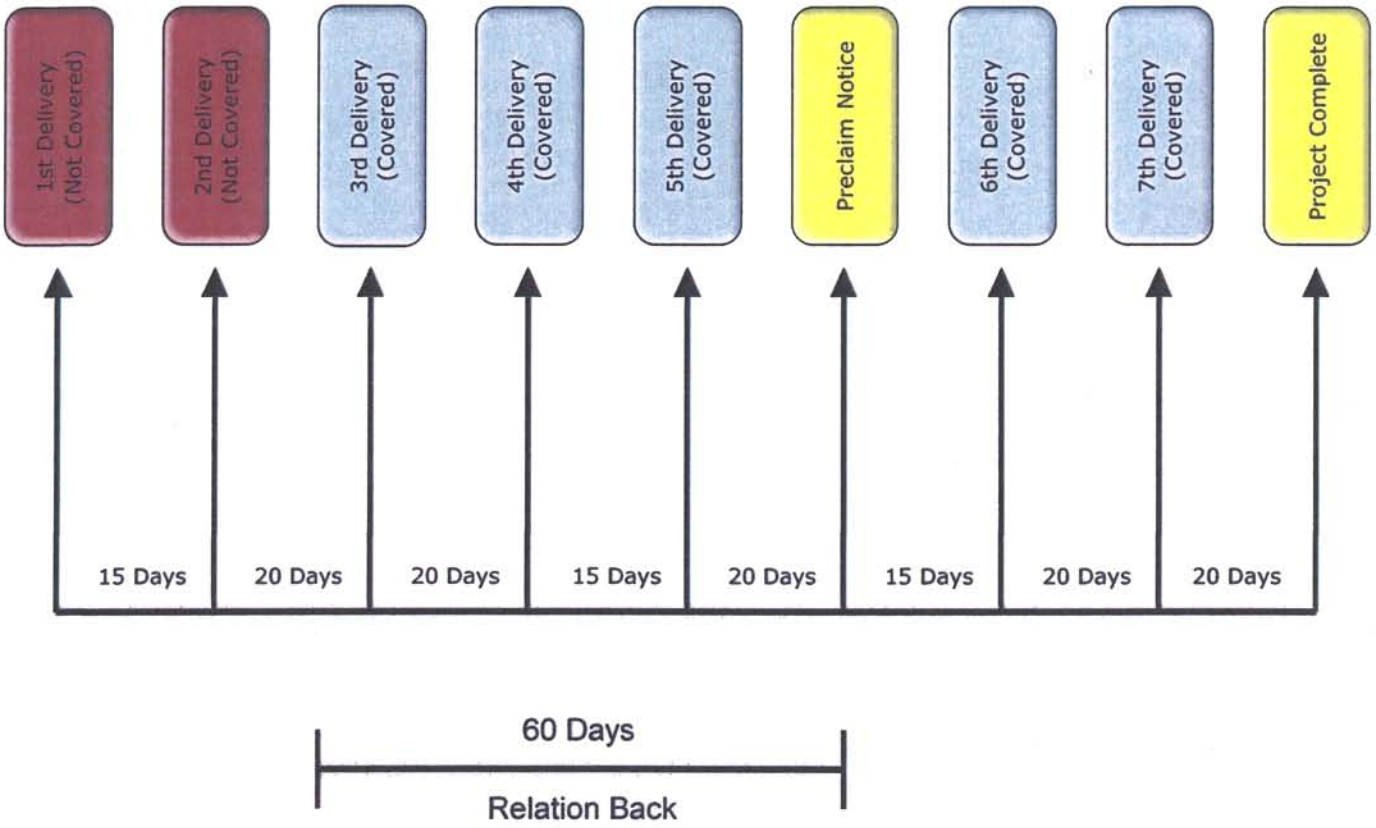
[*See* text, **pages 5, 6, 31, and 32**, for a discussion of this chart.]

COMMERCIAL PROJECT



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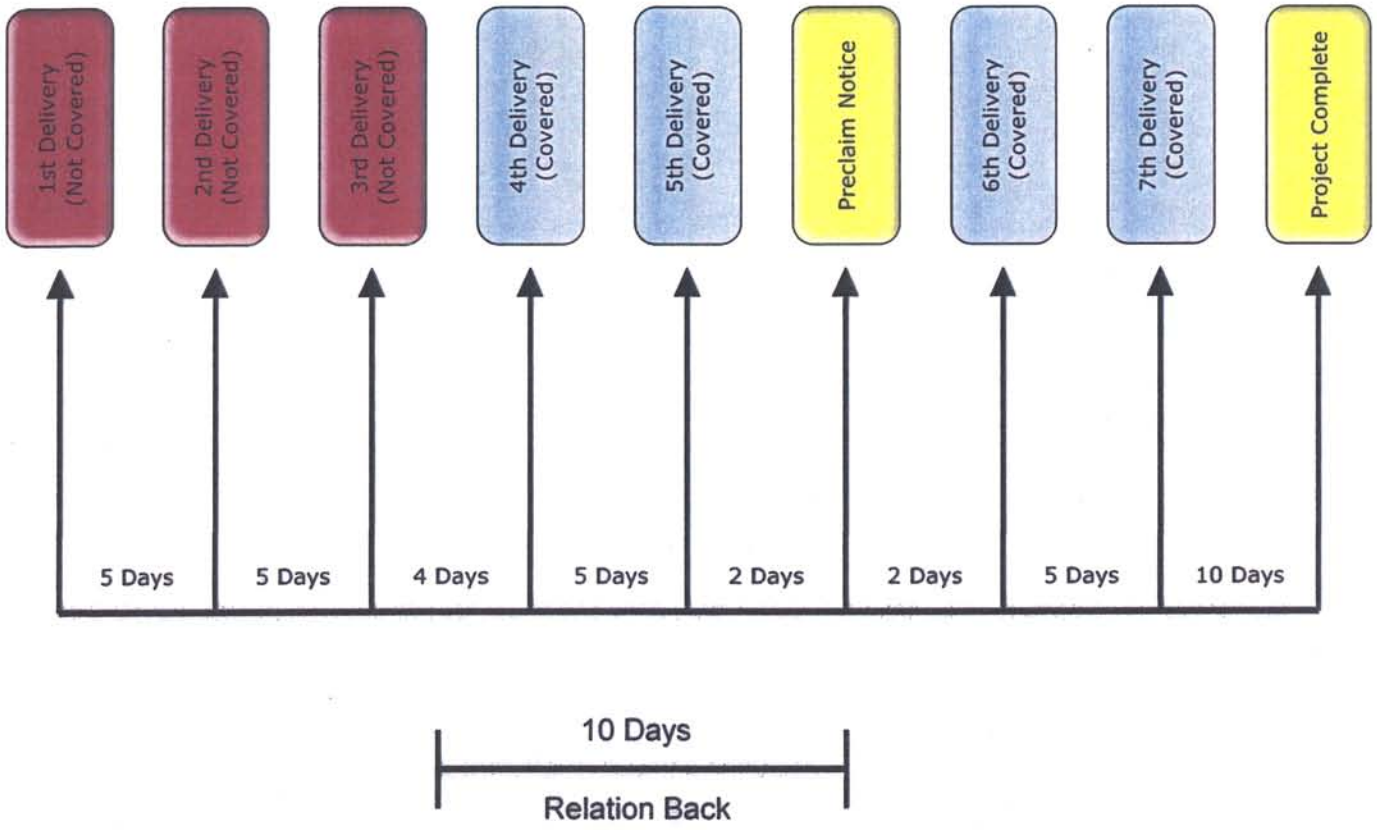
[*See* text, **page 6,** for a discussion of this chart.]

RESIDENTIAL PROJECT



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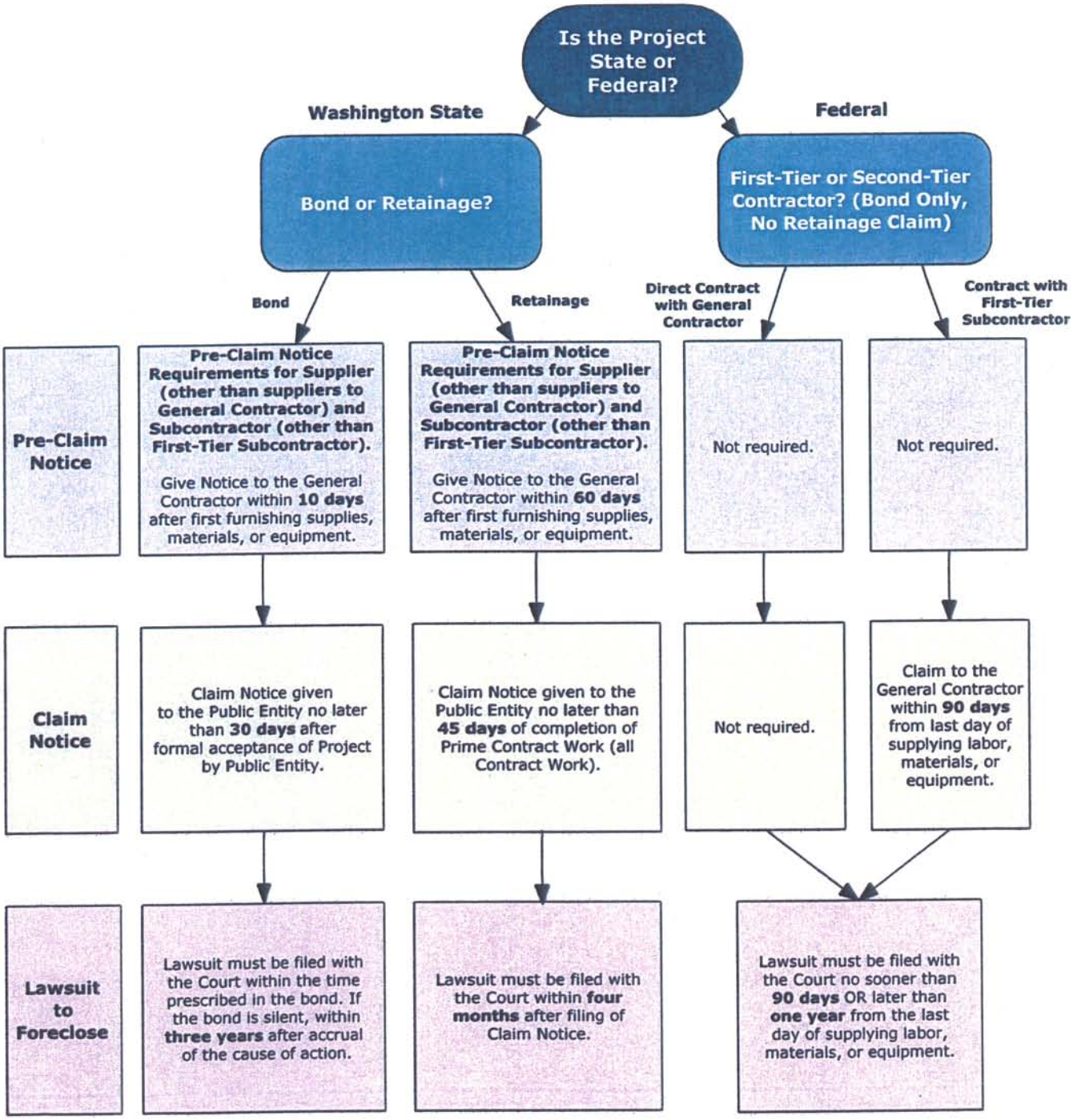
PUBLIC PROJECTS



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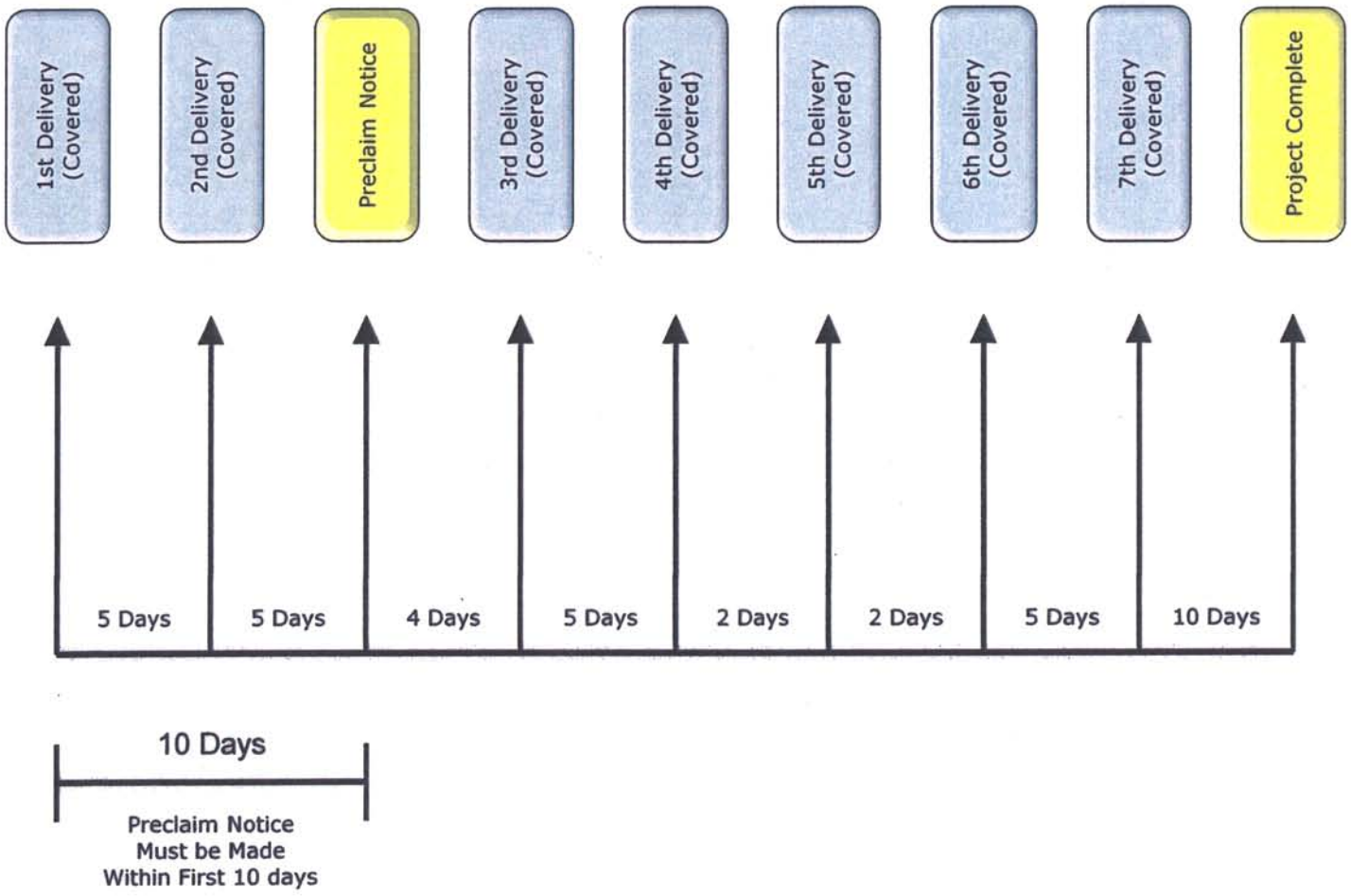
[*See* text, **pages 34 and 35**, for a discussion of this chart.]

PUBLIC WORKS BOND PRECLAIM NOTICE



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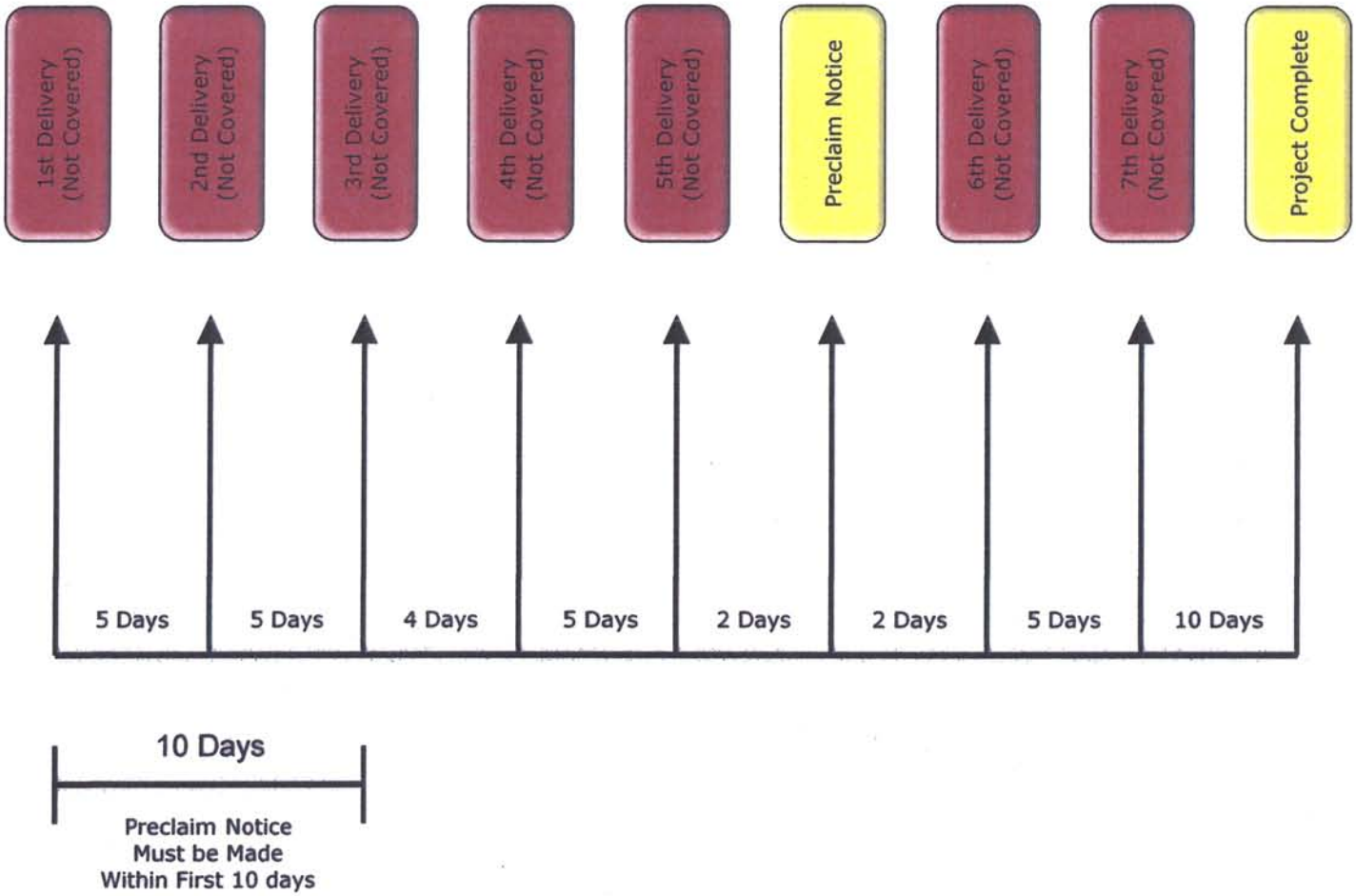
[*See* text, **pages 34 and 35**, for a discussion of this chart.]

FATAL PUBLIC WORKS BOND PRECLAIM NOTICE



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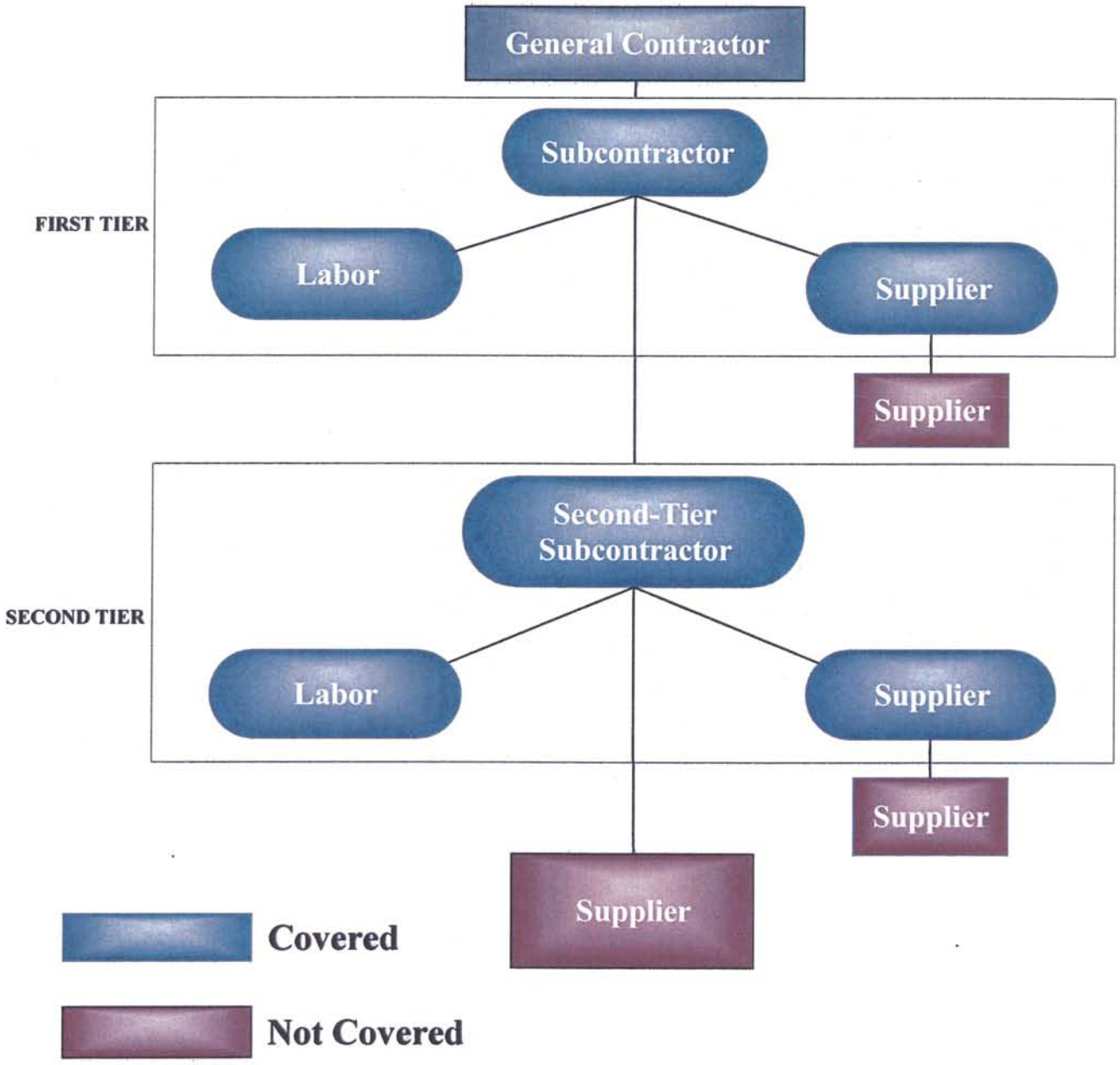
[*See* text, **pages 39 and 40**, for a discussion of this chart.]

COVERAGE UNDER THE FEDERAL MILLER ACT



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