

STA HONORS DISTINGUISHED PROFESSIONALS FOR OUTSTANDING CONSTRUCTION CONTRIBUTIONS



Five industry leaders were honored at STA's 29th Annual Construction Awards Dinner and Casino Night on May 3, 2008 at Russo's on the Bay in Howard Beach. Shown from left to right are Ron Berger, Gary Segal, Henry Caso, Raquel Nuñez, Sharon Greenberger, Sabrina Kanner, Robert Samela, Pat Di Filippo, Gilbert Rivera Jr., Fred Levinson and W. Scott Rives. Kanner, Di Filippo, Nuñez and Greenberger received awards. Rivera accepted for his father. For details and more photos see page 12

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Governor and Legislative Leaders Embrace New Approach to Public Bidding

Wicks Threshold Increases

New York State's various public bidding statutes, including Section 101 of the General Municipal Law and Section 135 of the State Finance Law, have been amended to increase the Wicks Law threshold from the existing \$50,000 (cost of the project) to:

- Three million dollars (\$3,000,000) in the City of New York;
- One million five hundred thousand dollars (\$1,500,000) in the counties of Westchester, Nassau and Suffolk;
- Five hundred thousand dollars (\$500,000) in all other counties.

Whenever separate contracts are not required, the contractor will be required to submit with its bid a separate sealed list of the names and prices of the plumbing, HVAC and electrical subcontractors it intends to use. After the low bid is announced, the sealed list of such subcontractors will be announced. Any subsequent change of the plumbing, HVAC or electrical subcontractor to be used on the project, or in the agreed-upon price, shall require the approval of the public owner "upon a showing of legitimate construction need for such change". Legitimate construction need includes,

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LIEN LAW 76 DEMANDS

GETTING PAID WITHOUT LEGAL INTERVENTION



Jason Samuels, Esq.
President, Jason Samuels, P.C.

For more information contact Jason Samuels at 516.470.0782 or email him at jsamuels@samuelslaw.net

One of the most difficult aspects of operating a successful construction company is mastering the art of getting paid in a timely manner. In fact, late or non-payment is such a pervasive problem that some law firms do nothing but provide collection services for construction companies. Telephone calls to non-paying owners, general contractors or construction managers are often ineffective, so many contractors or material suppliers mistakenly believe that there is no other option but to resort to spending time and money having attorneys seek payment.

There is another option before resorting to legal counsel .

Article 3-A of the Lien Law provides protection to parties that provide labor and material to a construction project by creating certain "trusts" which ensure that funds allocated for a construction project are indeed paid to the parties entitled to those funds. Specifically, Section 70 of the Lien Law provides that "all funds received by an owner or contractor on a public or private improvement in New York constitute assets of a statutory trust for which the owner or contractor is designated as statutory trustee" *Trust Fund Rights Under Article 3-A of New York Lien Law, 4B N.Y.Prac., Com. Litig. In New York State Courts 86:10 (2d Ed.)*. Accordingly, Section 71 of the Lien Law defines which parties are deemed "beneficiaries" under the statute. "Beneficiaries" include "subcontractors, architects, engineers, surveyors, laborers and materialmen". Section 76 of the Lien Law then establishes the right of those "beneficiaries", upon thirty (30) days after payment is due, to either (a) examine the books and records of a "trustee" of the unpaid monies (including the owner of that project), or (b) receive a sworn-to itemized statement from any trustee setting forth a detailed "paper trail" of where the trust funds on that project were spent.

Section 76 of the Lien Law is powerful because it forces a non-paying party and any related trustees to open their books and records to a potential adversary. In addition, responding to a Section 76 Demand can be costly and risks exposing trustees to intense scrutiny which in the worst case scenario, may reveal even unintended discrepancies which could result in personal liability or other serious charges (i.e. trust fund diversion). The bottom line is that many non-paying parties would rather pay a subcontractor than risk opening their books, records and payment practices to the outside world.

While enforcement of a beneficiary's rights under Section 76 of the Lien Law most likely requires legal counsel, a Section 76 Demand can be served directly by a beneficiary. To the right is a sample of such a demand.

In addition to the above, Section 76 of the Lien Law requires that the above Demand be sent thirty (30) days after payment is due by certified mail. Also, while a Section 76 Demand works well in influencing some non-paying parties to pay, the Demand by itself is only the first step in an enforcement proceeding which should be handled by counsel. If a non-paying party is in financial distress or refuses to pay for fraudulent reasons, a Section 76 Demand will almost certainly not be effective. If a Section 76 Demand fails, make certain you speak with your attorney in a timely manner so as to avoid the possibility of waiving any lien rights or other rights you may have against the non-paying party.

DEMAND FOR VERIFIED STATEMENT FROM TRUSTEE

TO: (Owner's Name)
(Owner's Address)
New York, NY 10022

(Non-paying Contractor's Name)
(Non-paying Contractor's Address)
New York, NY 10022

PLEASE TAKE NOTICE that _____ (Subcontractor's Name) ("_____") having been entitled for more than thirty days last past to a payment as hereinafter set forth, on account of the improvement hereinafter mentioned, hereby demands that you deliver to it at the address set forth below, a verified statement setting forth the entries with respect to the books and records maintained for the Lien Law Trust established by law for such improvement herein within ten days after the service upon you of this demand pursuant to provisions of N.Y. Lien Law §76 and the names and addresses of the person or persons who on behalf of, or as Officer, Director or Agent of the Trustee made or consented to the making of any payment shown in such statement, and in connection with this demand the undersigned states:

- The name and address of the undersigned beneficiary is:
_____(Subcontractor's name)_____
_____(Subcontractor's address)_____
- The improvement on account of which the undersigned claims the right to payment is an improvement of real property commonly known as _____(Describe the Project, including address, and block and lot number if known)_____
- The amount due and unpaid to _____(Subcontractor's Name)_____ is \$ _____ which became due and payable to it on or before _____, for the supplying of labor and materials, including _____(Describe the labor and materials provided)_____ at the said premises.
- The monies due _____(Subcontractor's Name)_____, for the aforementioned work, labor and materials at the aforementioned site are due in accordance with a subcontract made between _____(Identify Subcontract)_____.

Dated: _____, New York

Signed: _____