

The Soto Law Group, P.A., Coastal Tower, Suite 400, 2400 East Commercial Boulevard, Fort Lauderdale, Florida 33308 (954) 567-1776
www.sotolawgroup.com oscar@sotolawgroup.com

SUPPLIERS BEWARE! NO LIEN/BOND RIGHTS IF MATERIALS NOT DELIVERED TO JOB SITE AND YOU CAN NOT PROVE INSTALLATION

Problem:

Your Customer orders material for a project on which you extended notice to owner/lien rights credit. The materials are to be delivered to the customer's shop and not the jobsite itself. The customer did not pay and you are now forced to lien the job. The owner/general contractor refuses to pay, arguing that the materials were not delivered to the job site, not installed and were not consistent with the project's requirements.

Law:

Florida Statutes §713.001 defines furnishing materials as the supply of materials which are incorporated into the improvement. In defining the term incorporation, Florida law holds that "delivery of materials to the site of the improvement is prima facie evidence of incorporation..." Without evidence of actual delivery, a supplier would carry the initial burden of proving its materials were actually used on the project (incorporated). However, where evidence exists of actual delivery, the supplier can enjoy the benefit of prima facie evidence. Prima facie evidence puts the burden on the other party (customer, General Contractor, etc.) to prove the supplier's materials were not used/incorporated.

Incorporation of materials into a project can be proved utilizing project documents such as:

1. Subcontract – Scope of Work
2. Drawings – Specifically those portions of the project drawings applicable to customer's trade
3. Shop Drawings of customer, when available
4. Change Orders
5. Correspondence
6. Jobsite Photos
7. Delivery Tickets/daily jobsite reports, etc.

An exception to the rule of incorporation worth noting applies to specially fabricated materials. Under Florida law, specially fabricated materials designed or manufactured for a specific project in mind are recoverable assuming your lien/bond rights were perfected despite never being used/incorporated on a project.



LEGAL INFORMATION FOR THE CONSTRUCTION INDUSTRY

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SUPPLIERS BEWARE

In general "Specially fabricated materials are materials which are not generally suited for nor readily adaptable to use in a like improvement." (Oolite Indus. Inc. v. Millma Const. Co., 501 So. 2d. 655 (Fla. 3d DCA 1987).

With respect to steel materials, for example, this means that the steel was fabricated for a specific building or structure in mind and could not easily be used elsewhere. In practical terms, this means the materials cannot be "stock items". It is important to note that the time within which to send a notice to owner/contractor for specially fabricated materials begins to run from the date of fabrication and not the date of delivery to the job site.

Application:

How can a supplier avoid having to prove after the fact incorporation and its associated risks? Here are some suggested preventative steps suppliers can take, in order of importance.

1. Seek to have a Joint Check Agreement from the General Contractor for a fixed sum of the materials to be supplied for the job.
2. Obtain written confirmation from the General Contractor that the type and quality of the materials are those necessary for the job.
3. Send monthly correspondence to the General Contractor advising them of the shipment totals to date.
4. Review the customer's Subcontract and scope of work for the project.
5. Ship directly to jobsite whenever possible and make sure delivery tickets are properly signed and electronically stored.

P.S. In the next issue we will discuss materialmen to materialmen issues.



By: Jose A. Rodriguez, Esq.
The Soto Law Group, P.A.
2400 E. Commercial Blvd. Suite 400
Fort Lauderdale, FL 33308
www.sotolawgroup.com
TEL: 954-567-1776