

*****LEGAL ALERT*****
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**Arizona Court Declares That Preliminary 20-Day Notices
Must be Served by Certified or Registered Mail to Preserve a Bond Claim**

On April 30, 2015, Division 2 of the Arizona Court of Appeals issued an opinion affecting common practices in service of preliminary 20-day notices on projects subject to a public works payment bond. In *Cemex v. Falcone Brothers & Associates, Inc.*, the Court found that a material supplier's preliminary 20-day notice served by first-class mail with a certificate of mailing was insufficient to protect its bond claims under the Arizona Little Miller Act.

FACTS:

The facts of the case are reasonably simple and commonplace on construction projects. Falcone was the general contractor for a City of Tucson public works improvement project. In accordance with the provisions of the Little Miller Act (A.R.S. § 34-222 through 223), Falcone provided a statutory payment bond to protect unpaid subcontractors and vendors who had perfected their bond claims. Cemex provided materials to J&S Commercial Concrete Contractors, a subcontractor to Falcone. Cemex alleged that it was unpaid for the materials supplied and sued Falcone and its bonding company.

Falcone defended the lawsuit claiming that it had not received any of the four preliminary 20-day lien notices Cemex claimed to have served upon Falcone. Cemex had served its preliminary 20-day notices by first-class mail and had received a Certificate of Mailing from the post office. Service of a preliminary 20-day notice by first class mail with a certificate of service is expressly authorized by the provisions of A.R.S. § 33-992.01(F). Service is complete upon mailing.

Falcone successfully argued that the provisions of A.R.S. § 34-223(A) required the preliminary 20-day notice to be served by registered or certified mail.

THE COURT'S REASONING:

In order to perfect a bond claim on a public works project, a subcontractor or material supplier who does not have a direct contract with a general contractor must serve a preliminary 20-day notice in accordance with the provisions of A.R.S. § 33-992.01, subsections C, E and H, and must also provide written notice of non-payment to the general contractor within 90 days after having last provided labor, equipment, materials and supplies to the project. The statute requires that "this notice" be served by registered or certified mail. It had been largely assumed that "this notice" meant the 90-day notice of non-payment. It was also commonly understood that service of the preliminary 20-day notice could be accomplished by ordinary mail with a certificate of mailing in accordance with the provisions of A.R.S. § 33-992.01(F).

The Court reviewed the pre-lien requirements of A.R.S. § 33-992.01 and noted that subsection (F) permitting service by first-class mail with a certificate of mailing had not been incorporated in to the Little Miller Act provisions of A.R.S. § 34-223(A) when the Little Miller Act was last amended in 1992. The Court concluded that the requirement that the notice be served by certified or registered mail applied, to both the preliminary 20-day

notice and the 90-day notice of non-payment based upon its statutory construction analysis.

The Court expressly acknowledged that its opinion “may have a negative impact on an apparently long-standing industry practice.” The Court sent the issue back to the trial court for trial on the issue of whether Falcone had actually received any of the preliminary 20-day lien notices mailed by Cemex.

The provisions of the Arizona Little Miller Act are incorporated by reference in the State Procurement Code (A.R.S. § 41-2574). The form of bond used as a payment bond in lieu of lien under the provisions of A.R.S. § 33-1003 is also governed by the provisions of the Little Miller Act. Accordingly, until and unless the Arizona Supreme Court reviews the decision of the Court of Appeals, or the legislature amends A.R.S. § 34-223(A), the best practice is to begin serving preliminary 20-day notices by certified or registered mail on all bonded projects.

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