

***Subcontractor Didn't Say "Simon Says Make the Improvements:"  
The Active Owner Consent Prerequisite to Lien Rights of Contractors Hired by Lessees***

by Dean R. Brackenridge



In a recent Indiana Court of Appeals decision, the court again found that a mechanic's lien failed to attach to real estate, where the landowner had not actively consented to the improvements upon which the mechanic's lien was based. Contractors and subcontractors who perform work for entities other than a landowner of real estate (such as strip mall lessees) must remain mindful of this major constraint on their potential lien rights.

In *R.T.B.H., Inc. v. Simon Property Group*, 849 N.E.2d 764 (Ind. Ct. App. 2006), Dick's Sporting Goods, Inc. (DSG) had entered into a lease with Simon Property Group (Simon) for the purpose of constructing a new DSG store at the Simon-owned Greenwood Park Mall. The lease was for an initial twenty year term, with options extending out a total of fifty years.

Simon reviewed and approved the DSG store plans prior to entering into the lease, but Simon indicated on these plans: "[L]andlord's review of contract documents is for design intent and criteria compliance only." *Id.* DSG agreed to surrender the building to Simon at the conclusion of its lease. In order to secure Simon's mortgage lender's consent to the lease, Simon agreed to complete construction if DSG failed to do so. *Id.* at 765.

DSG retained a general contractor, S.C. Nestel, Inc. (General Contractor), to build the store. The General Contractor in turn hired R.T.B.H., Inc. d/b/a McAndrews Windows and Glass Company (Subcontractor) to perform window and glass work. The new DSG store was completed without Simon's intervention. After General Contractor refused to pay Subcontractor, Subcontractor filed a mechanic's lien and litigation ensued.

In the litigation, Subcontractor sought to foreclose on its mechanic's lien. Simon sought partial summary judgment concerning the Subcontractor's lien foreclosure action, contending that no valid mechanic's lien existed as to Simon's fee interest in the real estate. The trial court ruled in favor of Simon, finding no valid mechanic's lien existed as to Simon's fee interest in the property.

In upholding the trial court's decision, the Court of Appeals explained that "[i]n order for a mechanic's lien to attach to real estate, it is imperative that improvements to the property be made under the authority and direction of the landowner and something more than inactive or passive consent is required." *Id.* at 766. A "lien claimant's burden to prove active consent to improvements is especially important when they are requested by someone other than the landowner." *Id.* "Without the landowner's active consent, a lien claimant can only maintain a lien to the extent of his customer's interest in the land." *Id.* "[A] person about to improve real estate must take notice of the extent of his customer's rights in the land and of the rights of those in possession." *Id.*

The *Simon* court found that Simon had no interaction with the

Subcontractor during construction and also had no significant interaction with the General Contractor. The *Simon* court noted it "also appears from the record that Simon's approval of the design plan for the DSG store was largely technical and perfunctory...as evidenced by the stamp placed on the design by Simon, 'landlord's review of contract documents is for design intent and criteria compliance only.'" *Id.* at 767.

Additionally, the *Simon* court reasoned that "evidence that Simon was aware of the construction of the DSG store and even [Subcontractor's] involvement in it, is not enough to establish 'the sort of active consent needed to maintain a mechanic's lien.'" *Id.* The court noted that "Simon did not receive a direct benefit from the construction of the DSG store." The mere fact that the building would revert to Simon at the lease's conclusion, twenty to fifty years in the future, "cannot be fairly construed as a primary bargained-for purpose of the lease or a direct benefit to Simon." *Id.*

Finally, although "Simon entered into an agreement with its mortgage lender to complete construction of the store if DSG did not do so," the court concluded that this contingency agreement (which contingency never came to pass) was "irrelevant to the question of whether Simon actively consented to the improvements provided by [Subcontractor]." *Id.* at 767-68.

The *Simon* decision comes on the heels of recent Indiana Court of Appeals decisions that have addressed mechanic's lien claims of contractors who have performed work for lessees. See generally *Cho d/b/a Ace Const. & Interior Design v.*

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## ***Be (Cautiously) Prepared to Open Your Books***

***Attorney General & Inspector General Gain Right to Search Out “False Claims” on State Funded Projects***

by Daniel P. King



Indiana has joined several other states in enacting a False Claim Act (Ind. Code § 5-11-5.5-1, *et seq.*), which could profoundly affect construction on State funded projects. This new Indiana statute, which is patterned after the Federal Civil False Claims Act, exposes recipients of state funds to the same scrutiny and potential liability which recipients of federal funds on federal projects have faced. Until this new law has been “tried and tested” in the field, you should be (cautiously) prepared to have to open your books at any given time when working on a project funded by the State.

Indiana’s statute prohibits the submission of a “false claim” for payment or approval and imposes liability on contractors, and others, who “knowingly or intentionally” submit a “request or demand for money or property” using false information. The statute provides that for each false claim submitted, the violator is potentially liable for a penalty of at least \$5,000 and for up to three times the amount of damages suffered by the State as a result of the “false claims.”

An important point to note at the onset is that the False Claims Act only extends to projects where the State “provides any part of the money or property that is requested or demanded” or “will reimburse the contractor for any part of the money or property that is requested or demanded.” State funded projects typically include Title 4 and Title 5 projects, as well as Indiana Department of Transportation (INDOT) projects. Title 4 governs State projects administered through the Indiana Department of Administration (INDOA); Title 5 governs State projects other than INDOA projects. However, the new statute will not likely apply to Title 36 projects solely funded by political subdivisions, such as counties, cities, or towns.

Under the False Claims Act, both the

Attorney General and the Inspector General have authority to investigate allegations of “false claims” on State funded projects. If the Attorney General or Inspector General discovers what he considers a “false claim” made by a contractor, a lawsuit may be initiated on behalf of the State against the contractor. In addition, the new law allows a private person to bring a civil action on behalf of the State against a person who has violated Indiana’s False Claims Act. The False Claims Act allows such a person who initiates a lawsuit on behalf of the State to receive up to 25 percent of the amount of any judgment or settlement obtained through the litigation if the Attorney General or Inspector General intervenes or up to 30 percent if the private person proceeds alone. Reasonable attorneys’ fees and an amount to cover the expenses and costs of bringing the action also may be recovered by the person initiating the action. This “private attorney general” provision creates an incentive for private individuals to pursue potential violations of the False Claims Act. Disgruntled former employees of contractors and terminated subcontractors may be likely candidates to pursue such an action.

Indiana’s False Claims Act also creates new investigative tools for the Attorney General and the Inspector General. The statute grants the Attorney General and the Inspector General the right to issue “civil investigative demands,” which are essentially subpoenas that compel the production of documents or command written or oral testimony. Civil investigative demands, like subpoenas, must not be ignored. Failure to comply with such demands can result in sanctions, including but not limited to the expenses and attorneys’ fees associated with seeking court intervention to compel the non-complying party to produce the information sought by the Attorney General or Inspector General.

While contractors on State funded projects should be prepared to open their

books and supply information specifically requested by a proper civil investigative demand, note that the new statute affords contractors protections from having to

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disclose certain information. Such a demand may not require the disclosure or production of information that is otherwise protected as privileged, such as attorney-client communications. The statute requires that responses to civil investigative demands must be made in accordance with the requirements of Indiana’s Rules of Trial Procedure. Contractors who are served with civil investigative demands would be well advised to consult legal counsel before responding to the State, to ensure that all objections to the request for information are preserved and that all responses are both substantively correct and technically proper.

However, careful review of applications for payment and change order requests before submission to the State funded owner is the best measure to avoid receiving a civil investigative demand from the Attorney General or Inspector General. The False Claims Act also provides that a contractor can violate the statute if he knowingly or intentionally “uses” a false record to obtain payment. As such, it is equally important to carefully review the information received from subcontractors and suppliers before incorporating that information into requests for payment. ♦

## Are You A Lobbyist? Are You Sure?

by Thomas F. Bedsole



The Indiana General Assembly recently passed a new law governing the conducting of business with the State of Indiana. In conjunction with new regulations that took effect January 1, 2006, contractors now face a new set of restrictions they must meet when dealing with State agencies. Beginning January 1, 2007, contractors who meet the broad definition of “executive branch lobbyists” must file an annual report. After June 30, 2007, substantial penalties may be assessed for noncompliance with these new registration and reporting requirements. As 2007 approaches, contractors must ask themselves whether they are in compliance with the new requirements or whether they are willing to risk the consequences of non-compliance.

An Executive Branch Lobbyist is defined broadly as “any individual who is employed and receives payment, or who contracts for financial consideration, exceeding one thousand dollars (\$1,000) in any ... year for the purpose of engaging in executive branch lobbying activity,” which in turn is any “action or communication made to delay, oppose, promote or otherwise influence the outcome of an executive branch action.” 25 IAC 6-1-1.

“Executive branch action” is defined to include decisions of any agency regarding: (1) the expenditure of state funds with respect to the award of a contract, lease or other financial arrangement (defined as the purchase or acquisition of any property, interest in property, service or other asset of an agency valued in excess of \$10,000); or (2) the proposal, drafting, development, consideration, promulgation, amendment, repeal or rejection of a rule by an agency. 25 IAC 6-1-1; *see* Indiana Code § 4-22-2-3(b).

Certain individuals are specifically excluded from the definition of an executive branch lobbyist -- government officials

or employees acting within the scope of their employment, attorneys representing clients in certain proceedings, anyone representing a religious organization for the purpose of protecting the organization’s constitutional rights, news publications that urge executive branch action in the course of regular business, one who communicates with an agency for the sole purpose of gathering information relating to a bid, procurement, or public work in compliance with statutory bidding requirements, and those acting on their own behalf or under Article 1, Section 31 of the Indiana Constitution. In addition, individuals convicted of a felony while an officer or employee of any agency or political subdivision, convicted of a felony relating to executive branch lobbying, or individuals in prison, on probation, or who have been in the last twelve months may not register as executive branch lobbyists.

Within 15 days of making any contact with an agency regarding an executive branch action, lobbyists must file a signed initial registration statement with the Department of Administration, which must include:

1. The name, address, telephone number, e-mail address, and occupation of the executive branch lobbyist;
2. The name, address, telephone number, and e-mail address of the executive branch lobbyist’s employer and other party on whose behalf the executive branch lobbyist is acting, if different from the employer;
3. A brief description of the subject matter to which the engagement(s) relates;
4. The identity of the agency to which the engagement relates; and
5. A verified statement certifying that in the course of engaging in any executive branch lobbying activity, the executive branch lobbyist will comply with state statutes governing ethics and conflicts of interest and

“state statutes governing the office of the inspector general and rules promulgated thereunder.” 25 IAC 6-2-1

Beginning in 2007, executive branch lobbyists are also required to file an annual report, which includes:

1. The name, address, telephone number, e-mail address, and occupation of the executive branch lobbyist;
2. The name, address, telephone number, and e-mail address of the executive branch lobbyist’s employer;
3. The name, address, and e-mail address of “each real party in interest represented by the executive branch lobbyist that has a continuing engagement described in the initial registration statement;”
4. “The total amount of payments received for each engagement during the past year;”
5. A brief description of the subject matter for the executive branch lobbying activities involving the executive branch lobbyist in the past year; and
6. The identity of the agency to which executive branch lobbying activities were directed.

25 IAC 6-2-2.

Executive branch lobbyists must also file an amended registration statement within 15 days after any material change occurs in the information contained in a registration statement. Additionally, a “notice of termination” must be filed within 15 days after an engagement ends (although termination does not relieve the executive branch lobbyist of any reporting requirements). 25 IAC 6-2-3.

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**Lobbyist** continued from page 3

The Act also creates substantial penalties applicable to executive branch lobbyists. The Commissioner of the Department of Administration is charged with “notifying [executive branch lobbyists] of deficiencies, inadequacies and delinquencies in registration statements, reports, and other documents filed or to be filed with the department.” 25 IAC 6-3-1(d). Where a required statement or report is “materially incorrect” and “the person filing the statement or report was requested to file a corrected statement or report; and...a corrected statement or report has not been filed,” the Department has two available options--conduct a hearing itself or refer the matter to the Inspector General. See I.C. § 4-2-6-2. Where the Department itself holds a hearing, it has the power to revoke the registration of the person who failed to file a corrected statement or report and, for a finding made after June 30, 2007, assess a civil penalty not exceeding \$500.

Where the Department of Administration instead refers the matter to the Inspector General, the Inspector General is authorized to file a Complaint with the State Ethics Commission. See I.C. § 4-2-6-2. The State Ethics Commission may then assess substantial penalties against the offending executive branch lobbyist, including:

- (1) Impose a civil penalty upon a respondent not to exceed three times the value of any benefit received from the violation.
- (2) Cancel a contract.
- (3) Bar a person from entering into a contract with an agency or a state officer for a period specified by the Commission.
- (4) Order restitution or disgorgement.
- (5) Reprimand, suspend, or terminate an employee or a special state appointee.
- (6) Reprimand or recommend the impeachment of a state officer.

(7) Bar a person from future state employment as an employee or future appointment of a special state appointee.

(8) Revoke a license or permit issued by an agency.

(9) Bar a person from obtaining a license or permit issued by an agency.

(10) Revoke the registration of a person registered as a lobbyist under I.C. 4-2-8.

(11) Bar a person from future lobbying activity with a state officer or agency.

Given the possible penalties for noncompliance, it is important to comply with the new rules on executive branch lobbying and remain aware of upcoming deadlines. Failure to do so could be a headache, or a catastrophe. As always, it's better to be safe than sorry when such high stakes are on the table. ♦

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*Purdue Research Foundation*, 803 N.E.2d 1161 (Ind. Ct. App. 2004) (holding a mechanic's lien for work done at a lessee's direction will not attach absent the owner's active participation or benefit therefrom).

Several mechanic's liens, including the lien of the Subcontractor in the *Simon* case, have been rendered worthless due to a failure of the contractor to establish the requisite owner approval of the improvements. Standing alone, a lease which calls for improvements will not provide the consent necessary for a

contractor hired by a lessee to enforce a mechanic's lien. A contractor will face the difficult task of establishing the owner's active participation in decisions related to construction, and the extent to which an owner received a direct benefit from the improvements constructed by the mechanic's lien claimant. ♦

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