

PUBLICATION

Mississippi's "Stop Notice" Statute Declared an Unconstitutional Deprivation of Property

October 16, 2013

On October 10, 2013, the Fifth Circuit Court of Appeals, citing lack of procedural safeguards, affirmed a district court's determination that Mississippi's "Stop Notice" statute is unconstitutional because it deprives contractors of their property without due process. This holding effectively abrogates "lien rights" for first-tier subcontractors. Absent a challenge to this decision or a significant re-work of Mississippi's stop-payment law, only contractors with a direct contractual relationship with an owner will have lien rights.

Traditionally, upon a payment dispute with a prime contractor, first-tier subcontractors could provide written notice to an owner and claim the benefit of Miss. Code Ann. §85-7-181 as a mechanism to bind funds due the prime in the hands of the owner. Upon receipt of a notice under §85-7-181, assuming the owner was still holding funds due the prime, the owner was statutorily required to withhold payment of funds in an amount sufficient to satisfy the amount alleged to be due and payable to the first-tier subcontractor. This holding of funds due a prime based on statutory notice provided by a subcontractor has now been determined to be unconstitutional.

The constitutionality of Miss. Code Ann. §85-7-181 arose in a case filed in the Northern District of Mississippi when King Construction of Houston, LLC (King) sent a stop-payment notice to the owner of an auto parts manufacturing facility claiming that it was owed over \$260,000 by a prime contractor from California, Noatex Corporation (Noatex). Noatex challenged the stop-payment notice statute as facially invalid. Despite arguments presented by King and the state of Mississippi, as an intervening party, the district court determined that the "Stop Notice" statute was facially unconstitutional and violated the due process rights of Noatex.

The Fifth Circuit affirmed the district court's determination that binding the funds due Noatex in the hands of the owner is an unconstitutional deprivation of property without due process and that Mississippi's "Stop Notice" statute is facially unconstitutional. Specifically, the court noted that the "Stop Notice" statute is "profound" in its lack of procedural safeguards as it provides for no pre-deprivation notice or hearing and requires no posting of a bond or showing of exigent circumstances. The Fifth Circuit opinion is a short and interesting read and can be accessed [here](#).

Given this development, subcontractors should seek legal assistance in determining how to proceed with existing and future payment disputes with prime contractors. If you have questions about how this decision may affect your business or any other questions, please contact a member of the Firm's Construction Group.