

Notice of Contract and Notice of Subcontract
Pursuant to N.C.G.S. §44A-23

In North Carolina, a Notice of Contract and a Notice of Subcontract are not like “pre-lien” notices in other States. A Notice of Contract is filed and posted by a General Contractor to protect against possible double payment arising out of payment to a First Tier Subcontractor, then payment to a lower tier Subcontractor for lien liability pursuant to N.C.G.S. §44A-23. This protection was adopted by the North Carolina General Assembly in response to *Electric Supply Co. v. Swain Electrical Co., Inc.*, 328 N.C. 651, 403 S.E.2d 291 (1991). The Court found that a General Contractor could be required to pay twice for the same labor and materials furnished by a Second Tier Subcontractor. Double payment occurs when the Second Tier Subcontractor enforces a lien right pursuant to N.C.G.S. §44A-23, which provides subrogation “through the shoes of the General Contractor” against the improved real property after the General Contractor has already paid a First Tier Subcontractor for the same labor and materials. The lien is limited to the amount the Owner still owes the General Contractor, because it “leap frogs” over the First Tier Subcontractor and subrogates directly to the General Contractor’s lien.

In response to the Court’s recognition of the “Swain Lien”, the North Carolina General Assembly amended N.C.G.S. §44A-23 to provide a means to avoid double payment liability. Within 30 days of pulling the Building Permit, if the General Contractor files a Notice of Contract in the County where the Project is located, and posts the Notice “visibly adjacent to the building permit”, then the “Swain” lien rights are terminated. However, the terminated lower tier lien right can be revived by the lower tier Subcontractor sending a “Notice of Subcontract” to the General Contractor. However, once the Notice of Subcontract is received, the General Contractor can again terminate the revived lien right by sending out notice of any payment made to the first tier Subcontractor to the lower tier Subcontractor who furnished a Notice of Subcontract. This notice of payment must be sent within five days of the payment, must include the amount of the payment, the date the payment was made, and the period for which the payment was made. This notice of payment permanently terminates the “Swain” lien right and cannot be revived.

Service of the Notice of Subcontract and “posting” of the Notice of Contract should be documented for later proof. This is not legal advice; consult with an attorney. Most Pre-Lien Providers refer Clients to a North Carolina Attorney for consultation. General Contractors and Subcontractors should consult with an Attorney for complete review of the statutorily required procedures for Notices under N.C.G.S. §44A-23 and any case law requirements.

THIS IS NOT LEGAL ADVICE; ALWAYS CONSULT AN ATTORNEY!

NOTICE OF CONTRACT

- (1) Name and address of the Contractor:

- (2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:

- (3) General Description of the real property to be improved (Street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):

- (4) Name and address of the person, firm, corporation filing this Notice of Contract:

Date:

Contractor

Posted on (date):

Filed this ____ day of _____, 2006.

Clerk of Superior Court

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NOTICE OF SUBCONTRACT

- (1) Name and address of the subcontractor:

- (2) General Description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):

- (3)
 - (I) General Description of the subcontractor's contract, including the names of the parties thereto:

 - (ii) General Description of the labor and material performed and furnished thereunder:

- (4) Request is hereby made by the undersigned Subcontractor to be notified in writing by the Contractor of, and within five days following, each subsequent payment by the Contractor to the first tier subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.

Dated: _____

Subcontractor

Sent by:

Sent to: