

**“Pitfalls and Pratfalls, Deadlines and Deadfalls:
Running the Traps of Construction Liens and Arbitration”**

Brandon Jones
Baria-Jones, PLLC
601-948-6016
bjones@barialaw.com

I. Construction Liens

“Swift’s mortgage was confused and commingled. Swift’s liens attach to the whole confused mass.”¹

A. Deadlines

1. A claim of lien must be filed with the chancery court of the county where work was performed within **90 days** of the date claimant last worked on the site or supplied materials.²
 - a. With single family residences, a “Pre-Lien Notice” must be filed at least **10 days** before filing a claim of lien.³
2. Notice of lien must be given to the owner (if filed by prime contractor) or owner and prime contractor (if filed by subcontractor or materialman) within **2 business days** of filing claim of lien.⁴
3. In order to enforce an uncontested lien, a lawsuit must be filed within **180 days** of filing lien.⁵ If the lien is contested, a lawsuit must be filed sooner (within **90 days**).⁶

B. Other ways to screw up

1. Liens must include the following magic language in at least 12 point font: **“THIS CLAIM OF LIEN EXPIRES AND IS VOID ONE HUNDRED EIGHTY (180) DAYS FROM THE DATE OF FILING OF THE CLAIM OF LIEN IF A PAYMENT ACTION IS**

¹ *Swift v. Aberdeen Lumber Co.*, 172 Miss. 697 (Miss. 1935).

² Miss. Code Ann. § 85-7-405(1)(b).

³ Miss Code Ann. § 85-7-409.

⁴ Miss. Code Ann § 85-7-405.

⁵ Miss. Code Ann. § 85-7-421(1).

⁶ Miss. Code Ann. § 85-7-423.

NOT FILED IN THAT TIME PERIOD.” Failure to include this language invalidates the lien and prevents it from being filed.⁷

2. Primes or subs must pay their people or risk losing their lien.⁸ According to the statute, these non-payments create a defense for the owner.
3. No license, no lien. Rights are forfeited if a party does not have a current license from the Mississippi State Board of Contractors.⁹ You can search licensed contractors on the MSBOC website at <http://www.msbooc.us/ConsolidatedSearch.cfm>.
4. False filings mean major exposure. If a lien is falsely filed, the offending party is liable up to three (3) times the amount of the lien.¹⁰
5. Once paid, liens must be cancelled timely. Failure to cancel a lien within fifteen (15) days of being fully paid will result in a penalty of not less than Five Hundred Dollars (\$500) per day for the lienholder.¹¹

C. Subcontractors and material suppliers now included

1. Subcontractors and material suppliers in the commercial setting who have direct contract with the prime contractor are now able to file construction liens.¹²
 - a. On commercial jobs, subcontractors must let the general contractor know they are on the job (contact information; name and contact information of person who hired sub; name and location of the project; description of the labor, services or materials being provided) within 30 days of starting the job or delivering materials.¹³

⁷ Miss. Code Ann. § 85-7-421(1).

⁸ Miss Code Ann. § 85-7-413(2).

⁹ Miss Code Ann. § 85-7-403(5).

¹⁰ Miss Code Ann. § 85-7-413(1)(b).

¹¹ Miss Code Ann. § 85-7-421(1).

¹² Miss. Code Ann. § 85-7-401.

¹³ Miss. Code Ann. § 85-7-407(2).

II. Construction Arbitration

*“I can imagine no society which does not embody some method of arbitration.”*¹⁴

*“Never arbitrate. Arbitration allows a third party to determine your destiny. It is a resort of the weak.”*¹⁵

A. When arbitration applies (generally)

Mississippi law clearly holds that parties to a construction agreement, as a matter of right to contract, may in advance bind themselves to compulsory arbitration of disputes that arise between them¹⁶ and that arbitration provisions are now recognized to be valid even before a dispute arises.¹⁷ Where there is a right to arbitration, that right exists from the outset of the contract.¹⁸

However, with public contracts, even where there is a provision for binding arbitration, a bidder may refuse to accept. This refusal to submit to arbitration must be included on the bid document. “Such refusal shall not be cause to reject any bid on, or refuse the award of such public contract.”¹⁹

B. The Mississippi Construction Arbitration Act

The Mississippi Construction Arbitration Act can be found at Miss. Code Ann. §§ 11-15-101 through 11-15-143 and applies to agreements for the “planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility”— basically all of those tasks we associate with the construction of a residential or commercial property.

1. Getting started

Regarding methodology for initiating arbitration, follow the contract. If the contract is silent on this point, the party seeking to initiate should file a notice of intent to arbitrate with the other party including: a statement of the nature of the dispute, the amount involved and the remedy set.²⁰ An answer should be filed within 20 days of receipt of the initial demand.²¹

¹⁴ Herbert Read, poet.

¹⁵ Attila the Hun, not a poet.

¹⁶ *Craig v. Barber*, 524 So.2d 974 (Miss. 1988).

¹⁷ *IP Timberlands*, 726 So.2d 96, 105 (Miss. 1998).

¹⁸ *Scott Addison Constr. v. Lauderdale Co. Sch. Sys.*, 789 So.2d 771 (Miss. 2001).

¹⁹ Miss. Code Ann. § 11-15-103.

²⁰ Miss. Code Ann. § 11-15-107.

²¹ *Id.*

A party hoping to enforce arbitration may make an application to the court and the court will make a determination as to whether it is appropriate to proceed or, if it finds there is a “substantial issue” with the making of the provision, have a hearing.²² If the contract does not specify a county where the arbitration hearing should be held, the application should be made in the county where the adverse party resides or has a place of business.²³

2. Waiver

A party may waive the right to compel arbitration by actively participating in litigation or taking actions inconsistent with the right to compel arbitration which “substantially invoke the judicial process to the detriment or prejudice of the other party.”²⁴ In an interesting case, the Supreme Court was asked to consider whether a contractor waived arbitration by filing a motion to compel arbitration. The Court deemed this idea “illogical.”²⁵

3. Arbitrator

In the absence of an agreement or provision providing a method for appointing an arbitrator or if the agreed method fails or cannot be followed or the arbitrator appointed is unable to serve, a party may apply to the court for the appointment of one or more arbitrators.²⁶

4. Award

Award must be in writing, signed by the arbitrator(s) joining in the decision and provided to the parties by registered or certified mail, where an alternative method isn’t specified in the agreement. These awards are to be made within the time fixed in the agreement or within the time fixed by the court. Attorney’s fees and costs may be awarded to the prevailing party.²⁷

Arbitrators do not have to “explain and clarify” every matter under consideration.²⁸

²² Miss. Code Ann. § 11-15-105.

²³ Miss. Code Ann. § 11-15-131.

²⁴ *In re Tyco Int'l (US) Inc.*, 917 So.2d 773, 779-80 (¶¶27-28) (Miss. 2005); Miss. Code Ann. § 11-15-103.

²⁵ *Harrison Co. Commer. Lot, LLC v. H. Gordon Myrick, Inc.*, 107 So.3d 943 (Miss. 2013).

²⁶ Miss. Code Ann. § 11-15-109.

²⁷ Miss. Code Ann. § 11-15-119.

²⁸ *Century v. Barber*, 524 So.2d 974 (Miss. 1988).

5. Challenging an Award

Miss. Code Ann. § 11-15-133 identifies conduct that justifies vacating an arbitration award. Note that even if the award is predicated on fraud or another undue means, it must be brought within 90 days.²⁹

²⁹ *Johnson Land Co. v. C.E. Frazier Constr. Co.*, 925 So.2d 80 (Miss. 2006).