

# ConsensusDocs 750 vs. AIA A401-2007: Which is Best For You?

Presented for the AGC-NE Building Chapter  
by

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# Objectives

- The Role of Standard Form Contracts
- Background of Newest Major Forms on the Market
- Key Differences in AIA and ConsensusDocs Subcontracts and General Conditions

# Overview of CD 750

- Standard Form of Agreement Between Contractor and Subcontractor
- Resulted from industry-wide input
- Modification of AGC 650
- Complete agreement that includes general conditions
- Incorporation by reference of actual prime contract terms to extent they apply to Subcontract Work

# Overview of AIA A401

- Latest revision in 2007
- Less comprehensive than CD 750
- Incorporates by reference terms and conditions in prime contract and non-conflicting terms of AIA A201

# CD 750 vs. AIA A401: Payment



# CD 750 vs. AIA A401: Payment

- Pay-if-Paid vs. Pay-when-Paid
- CD 750 and A401 both entitle subcontractor to payment even if contractor not paid unless due to subcontractor fault
  - CD 750 ¶ 8.2.5; A401 § 11.3

# CD 750 vs. AIA A401: Payment

- CD 750 (¶¶ 8.2.5, 8.3.4):
  - Payment due to subcontractor within seven (7) days after contractor receives payment from owner
  - If no payment to contractor, contractor is to pay subcontractor for satisfactory work within a “reasonable time”
  - Possible problems with “reasonable time”

# CD 750 vs. AIA A401: Payment

- AIA A401 ( § § 11.3, 12.1):
  - Generally favorable for subcontractors
  - Payments to subcontractors are due within seven (7) days after contractor is paid
  - If no payment from owner and contractor, subcontractor is entitled to payment “on demand”



# CD 750 vs. AIA A401: Retainage



# CD 750 vs. AIA A401: Retainage

- CD 750/200:
  - CD 200 ¶ 9.2.4.3 – Early finishing subcontractors can receive retainage prior to substantial completion
  - CD 750 ¶ 8.3 – Defers release of final payment until final completion and acceptance of work
- A201/A401
  - A401 § 11.9 – Subcontractor may be entitled to release of unpaid balance and/or retainage upon substantial completion; see also A201 § 9.8.5

# CD 750 vs. AIA A401: Remedies for Non-Payment

- CD 750 & AIA A401:
  - Right to Stop Work (CD 750 ¶ 8.2.6; A401 § 4.7)
  - Interest on late payments (CD 750 ¶ 8.4; A401 § 15.2)
    - CDS – Interest only accrues after payment became due and it is limited to subcontractor's proportionate share of interest contractor actually receives

Show  
Me  
The  
Money!



# CD 750 vs. AIA A401: Financial Assurances

CD 200 ¶ 4.2 – Contractor can request Owner's financial information throughout the project

CD 750 ¶¶ 4.2.1, 4.2.2 – Right to request and receive from contractor information contractor obtained regarding the Owner's ability to pay

- Subcontractor can also request the information from the Owner's lender

# CD 750 vs. AIA A401: Financial Assurances

- A401 § 3.2.1 – Contractor only required to make the information available
  - No right to stop work if not provided
- A201 § 2.2.1 – Absolute right to request financial information before work commences – after that only:
  - If Owner fails to pay
  - Change in the work materially changes contract sum
  - Contractor identifies reasonable concern regarding Owner's ability to pay

# CD 750 vs. AIA A401: Owner Involvement In Payment

- A201 – Allows Owner to:
  - Issue joint checks ( § 9.5.3)
  - Request evidence from contractors that subcontractors were paid ( § 9.6.4)
  - Contact subcontractors directly if contractors fail to provide requested information within 7 days ( § 9.6.4)

# CD 750 vs. AIA A401: Owner Involvement In Payment

- CD 750
  - Contractor has right to pay lower tier subs by joint checks (§ 8.9)
  - Subcontractor can request copy of current application for payment (§ 4.3)



# CD 750 vs. AIA A401: Scope of the Work and Changes



# CD 750 vs. AIA A401: Scope of the Work and Changes

- Work Not Expressly Shown on Plans & Specs
  - Both CD 750 (§ 2.1) and A401/A201 (§ 1.2.1) include work “reasonably inferable” from the contract documents
  - A201— suggests that design “intent” is relevant – becomes part of A401 through incorporation by reference

# CD 750 vs. AIA A401: Scope of the Work and Changes

- Design Responsibility & Verification
  - CD 750
    - Expressly addresses requirements (§ 3.8)
    - Careful analysis and comparison of drawings, specs, etc. solely for purpose of facilitating Subcontract Work not for discovery of errors (§ 3.3)
    - Subcontractor required to comply with laws and regulations applicable to the Subcontract Work (§ 3.28)
  - A401
    - No duty to review and study plans and specs
    - Incorporation of A201 results in requirement similar to CD 750 (A201 § 3.2)

# CD 750 vs. AIA A401: Scope of the Work and Changes

- Disputed Changes & Construction Change Directives
  - CD 750
    - If prime contract does not provide for CCDs, CD 750 may not provide contractor authority to direct subcontractor's performance of disputed changes (§§ 7.1, 7.2, 7.7, 7.9)
    - 50% financing (CD 200 §§ 8.2.3, 8.3.3)
  - A201 ( § 7.3)
    - CCD can be issued by owner and architect requiring contractor to proceed with work at own expense

# CD 750 vs. AIA A401: Termination



# CD 750 vs. AIA A401: Termination

- Termination for Convenience
  - CD 200 ¶ 11.4.2
    - Parties agree in advance to premium to be paid to contractor
  - A201 § 14.4.3
    - Reasonable overhead and profit on Work not executed
  - Both provide for suspension of subcontract work by contractor (CD 750 ¶ 10.6; A401 § 7.3)
  - Subcontractor's recourse limited to relief and remedy allowed under prime contract

# CD 750 vs. AIA A401: Termination

- Termination for Default
  - Both provide fair approach to termination process (CD ¶ 10.1; A401 § 7.2)
  - CD 750 has advantage of requiring three separate written notices over ten day period before termination
  - A401 requires only two notices over ten day period with second notice being actual termination

# CD 750 vs. AIA A401: Indemnification

- Both documents provide for limited-form or proportionate-form indemnification
  - CD 750 ¶ 9.1; A401 § 4.6
- No express duty to defend



# CD 750 vs. AIA A401: Damages



# CD 750 vs. AIA A401: Damages

- Delay Damages
  - Both forms contemplate time and/or money adjustments for delays
    - CD 750 ¶¶ 5.2, 5.3; A401 § § 5.2, 5.3
  - CD 750 ¶ 5.2 allows for adjustments when contractor's exercise of control impacts the subcontractor's time and cost to perform

# CD 750 vs. AIA A401: Damages

- Liquidated Damages
  - CD 750 ¶ 5.5 allows contractor to impose liquidated damages if owner assesses, to the extent subcontractor is responsible; Contractor can still recover other actual damages
  - A401 § 3.3.1 does not directly address other than to limit assessment to delay caused by Subcontractor (or others for which Subcontractor is liable)

# CD 750 vs. AIA A401: Damages

- Consequential Damages
  - CD 750 ¶ 5.4
    - Limited mutual waiver conditioned on waiver in contractor's agreement with owner
    - Excludes losses covered by insurance
  - A401 § 15.4
    - Broader than CD 750
    - Not conditioned on waiver in general contract
    - A201 waiver is incorporated by reference

# CD 750 vs. AIA A401: Dispute Resolution



# CD 750 vs. AIA A401: Dispute Resolution

- CD 750 ¶ 11.5
  - Joinder and consolidation allowed unless agreement between owner and contractor precludes it
  - Step resolution process
    - Party representatives
    - Mediation
    - Binding dispute resolution
  - Check box for binding dispute resolution with litigation as default

# CD 750 vs. AIA A401: Dispute Resolution

- A401 § § 6.1, 6.2, 6.3
  - Joinder and consolidation allowed
  - Mediation is precondition to binding dispute resolution
  - Arbitration no longer required
  - Litigation is default

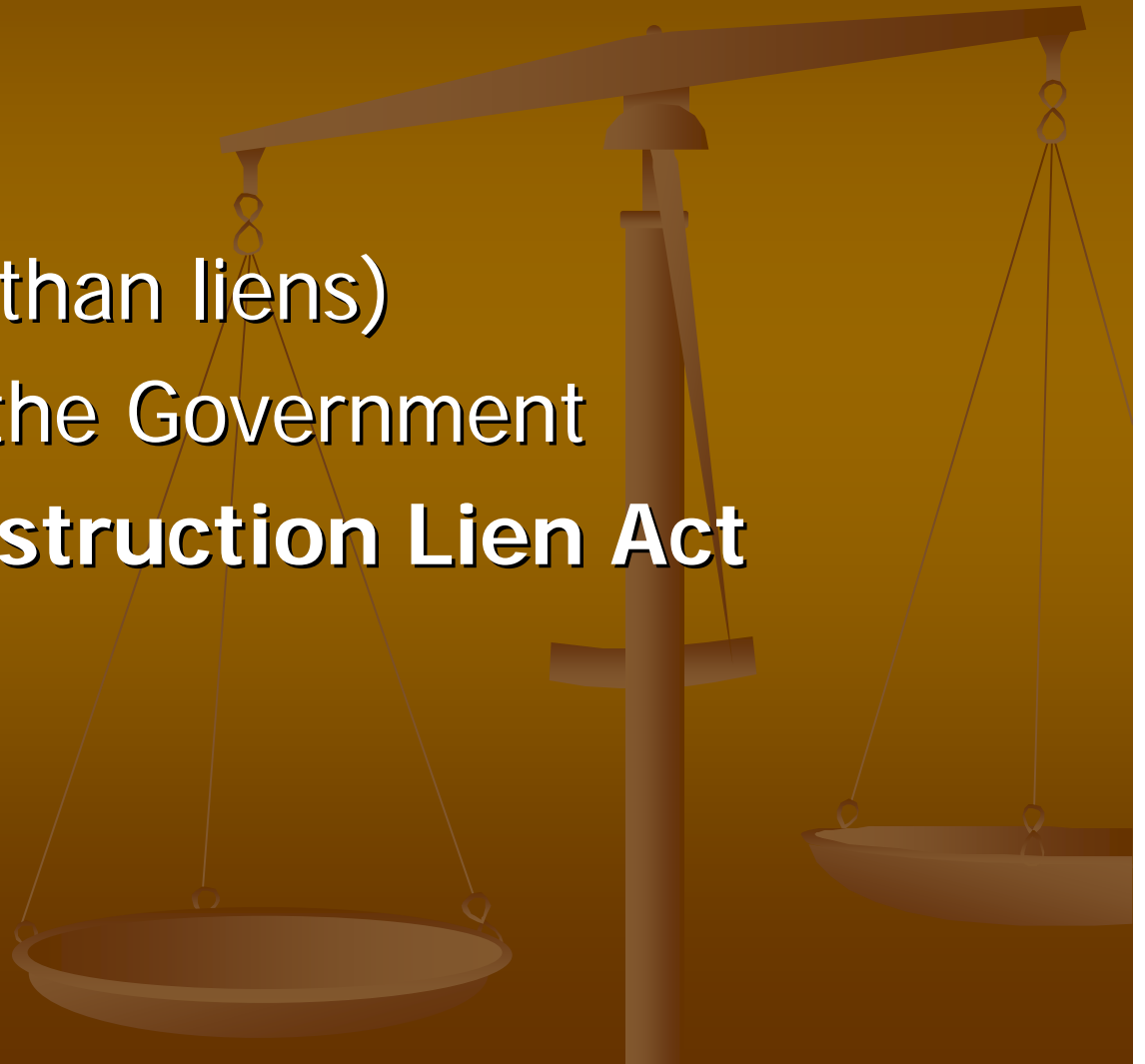
# Conclusions

- Standard forms are a place to start
- Each form family comes with baggage
- Every project is different
- Read and adjust terms to match project and needs



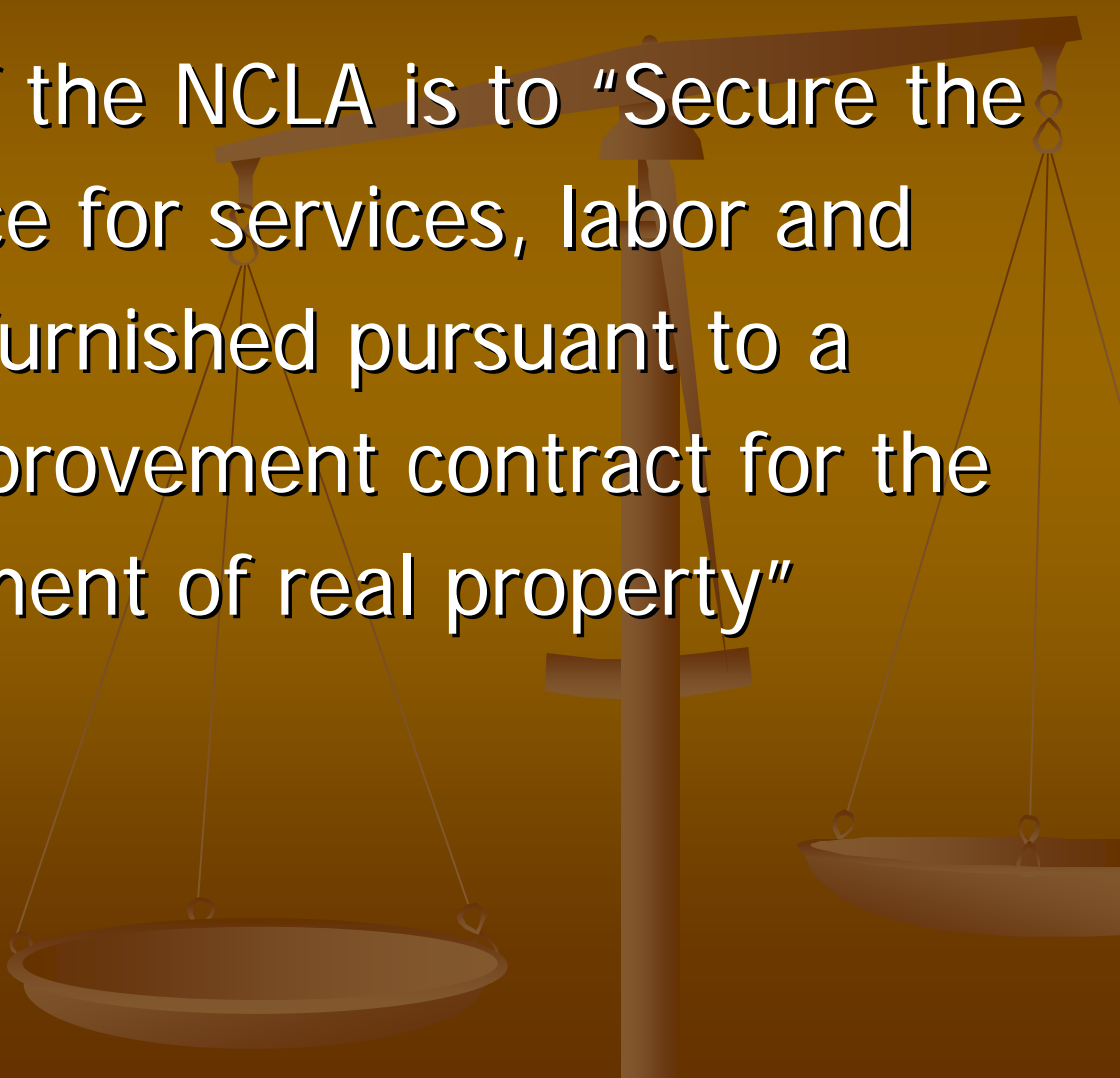
# PROTECTING YOUR RIGHT TO PAYMENT

- Contract
- Statutes (other than liens)
- Claims Against the Government
- **Nebraska Construction Lien Act**

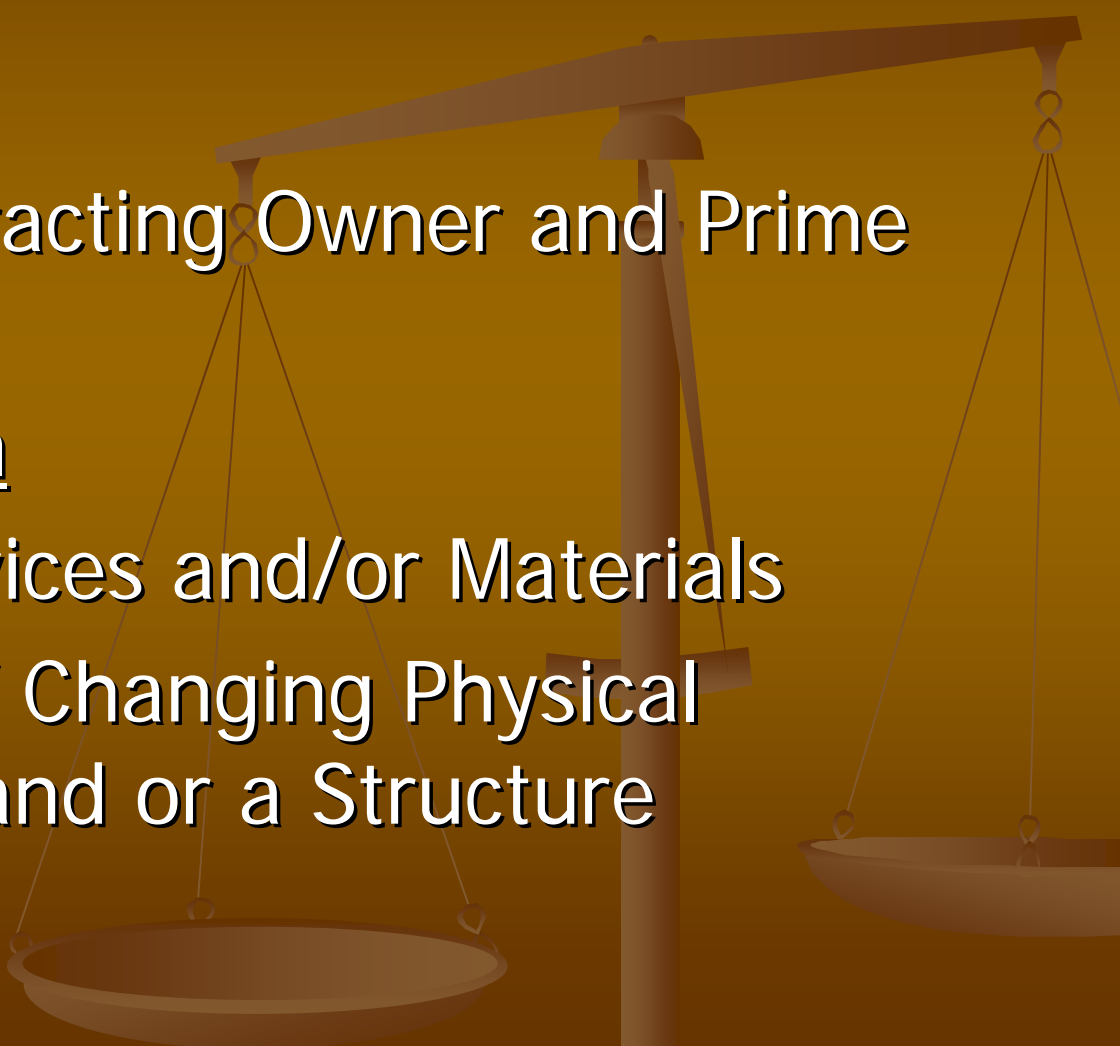


# Nebraska Construction Lien Act (NCLA)

The purpose of the NCLA is to “Secure the contract price for services, labor and materials furnished pursuant to a real estate improvement contract for the improvement of real property”



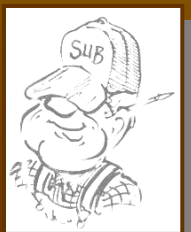
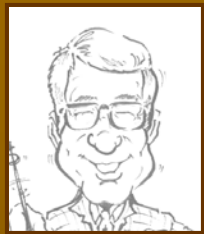
# Real Estate Improvement Contract

- Between Contracting Owner and Prime Contractor
  - Oral or Written
  - For Labor/Services and/or Materials
  - For Purpose of Changing Physical Condition of Land or a Structure
- 

# Who has lien rights in Nebraska?



Anyone Who:  
Furnishes Labor or Materials  
For Improvement of Real Estate  
Pursuant to a Contract  
With the Owner or Agent



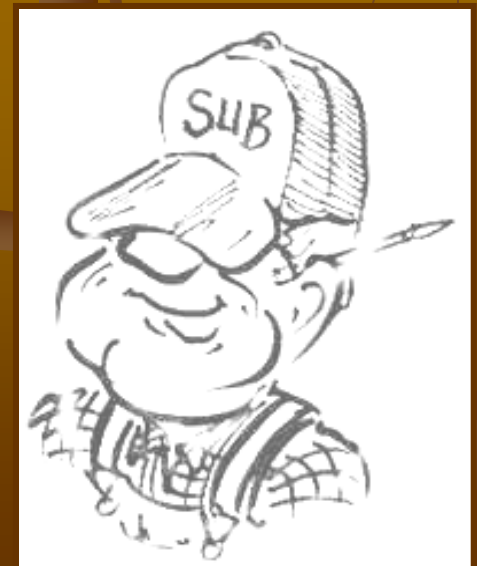
# Prime Contractor

- Direct Contract with Owner to improve owner's real estate
- Oral or Written Contract
- Election of Remedies:
  - Sue on Contract vs. Owner
  - Enforce Lien vs. Owner



# Subcontractor

- No Contract with Owner
- Contract with Prime Contractor
- Performs substantial portion of Prime Contractor's Work
- Election of Remedies:
  - Sue on Contract vs. Prime
  - Enforce Lien vs. Owner



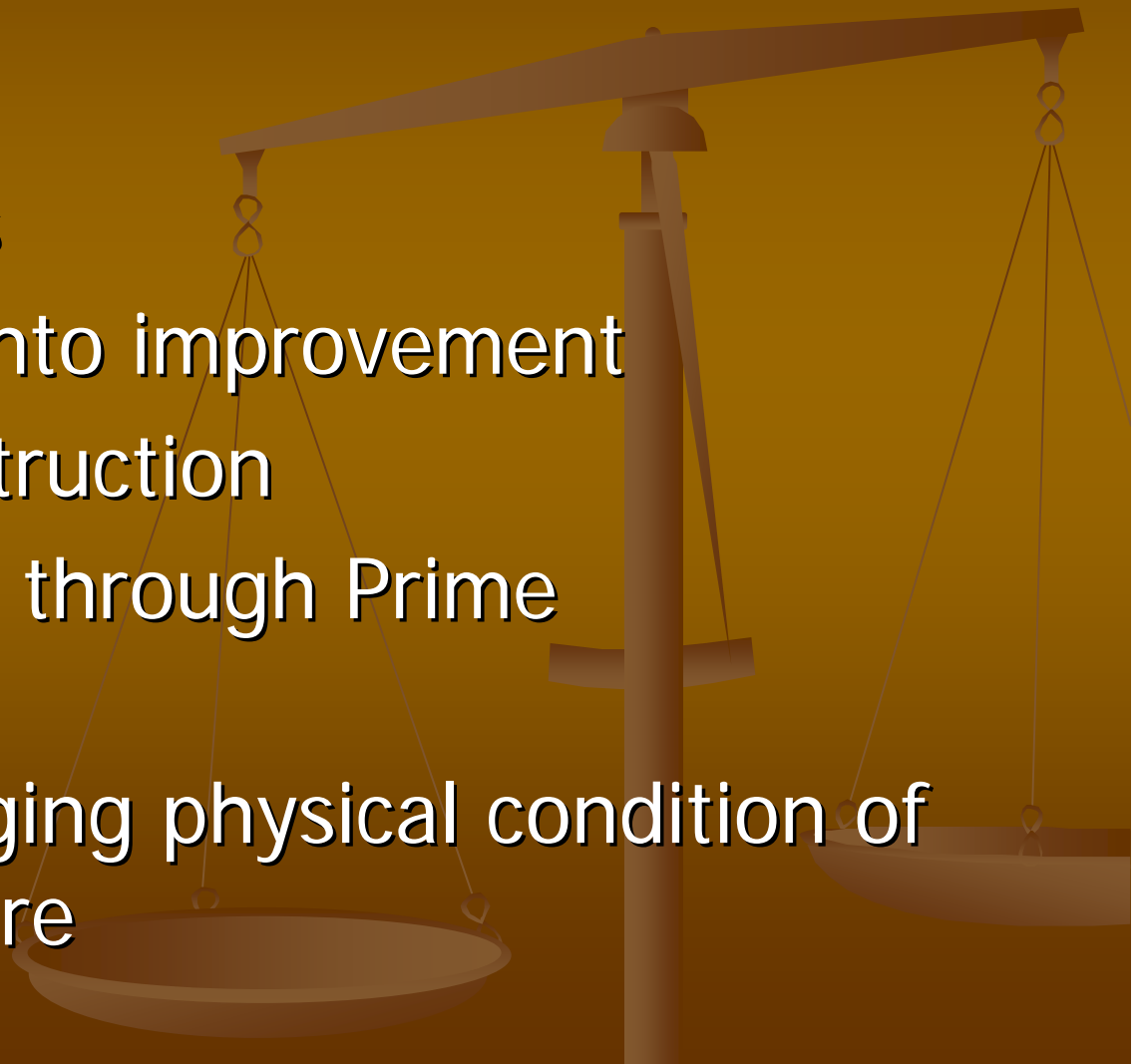
# Materialman/Supplier

- No Contract with Owner
- Provides materials to prime contractor or subcontractor
- Election of Remedies
  - Sue on contract vs. Prime or Sub-contractor
  - Enforce Lien vs. Owner



# Goods and Services Secured by a Lien

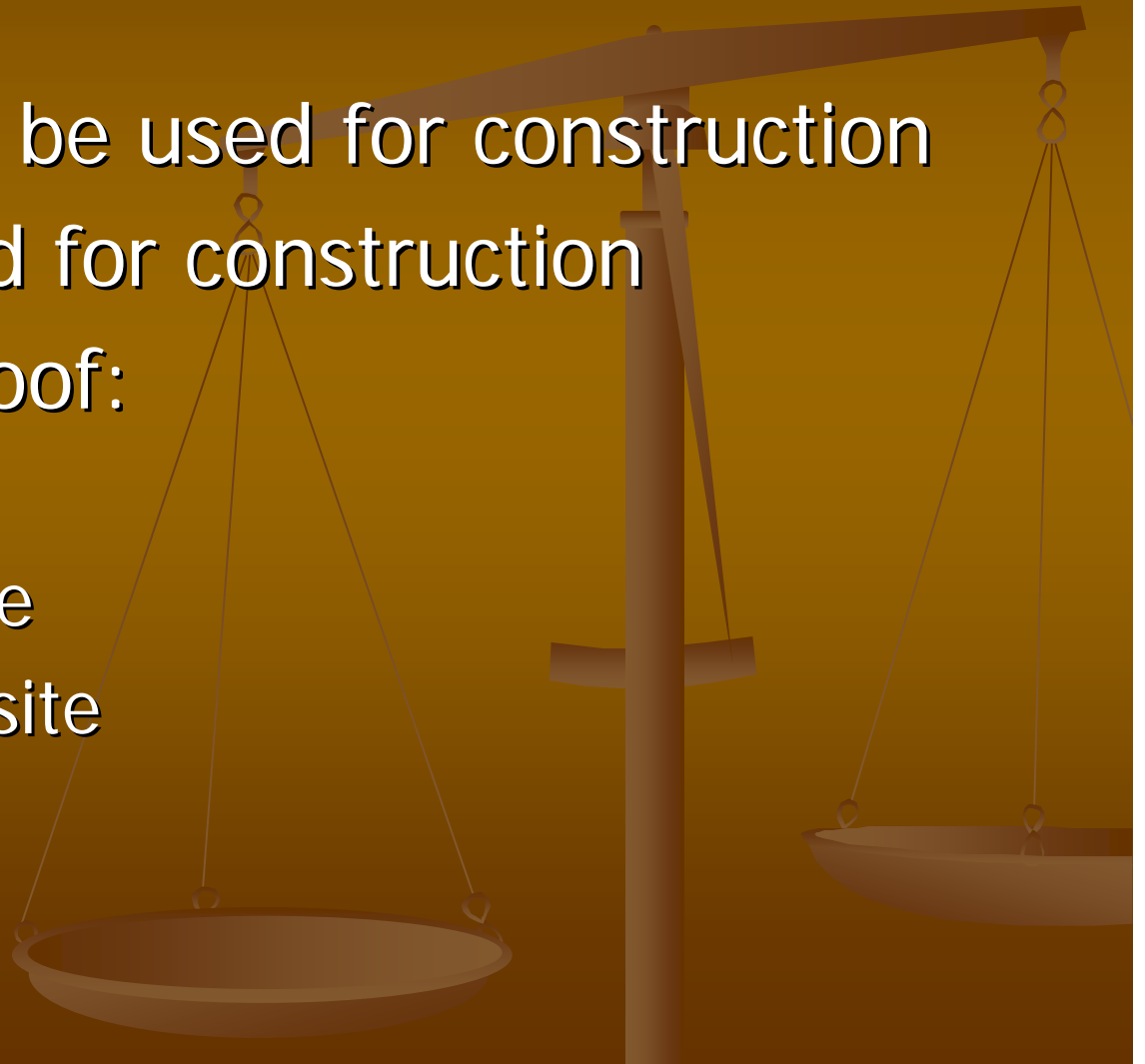
- Material
- Labor/Services
- Incorporated into improvement
- Relate to construction
- Provided by or through Prime Contractor
- Used for changing physical condition of land or structure





# Materials Secured by Lien

- 1. Intent is to be used for construction
- 2. In fact used for construction
- 3. Issue of Proof:
  - Contract
  - Delivery to Site
  - Inspection of site



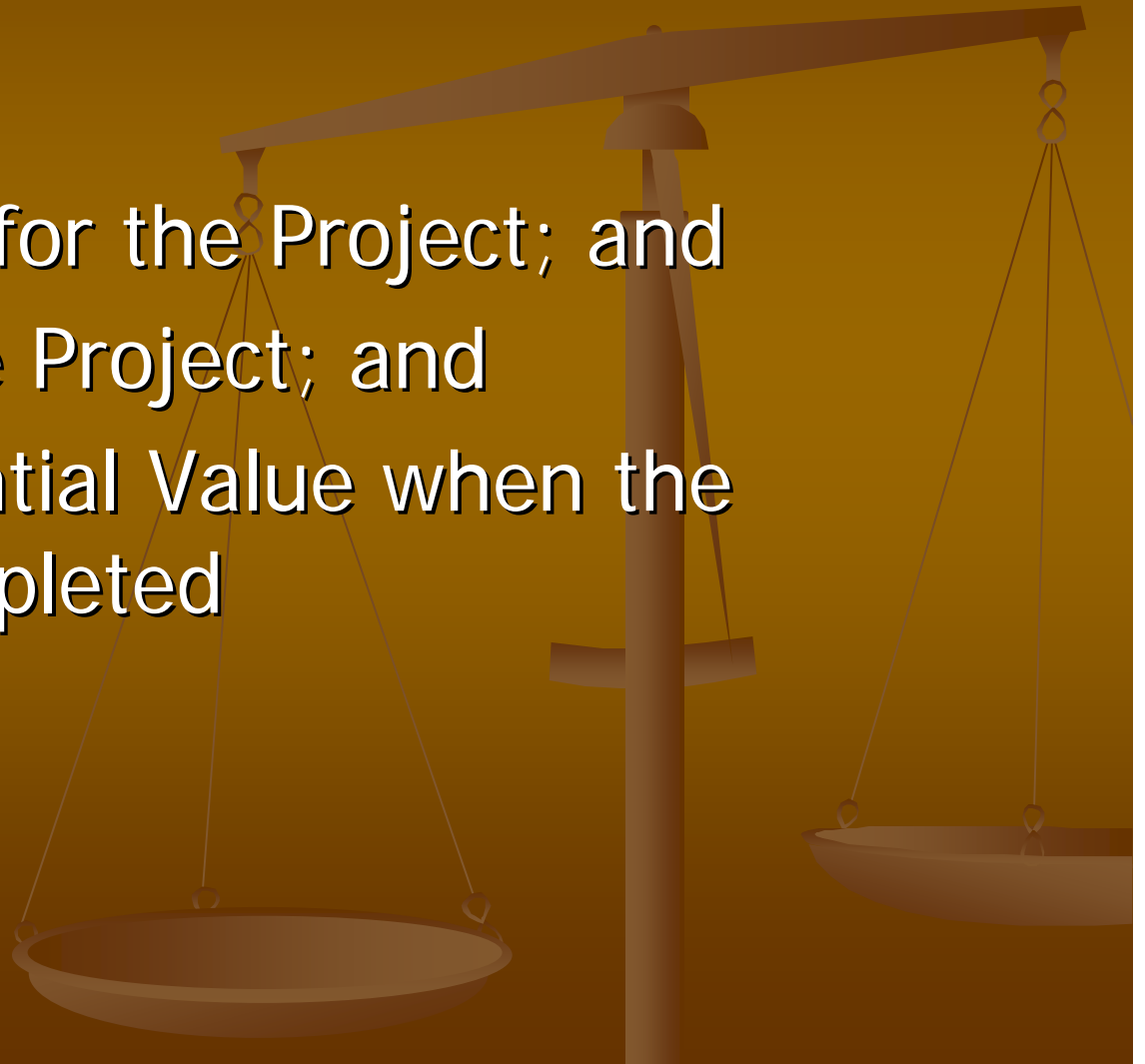
# Rented Equipment



- 1. Intent to be used in the project; and
- 2. In fact used
- Lien Amount is “reasonable rental value”
  - Period of Actual Use
  - “Reasonable Periods of Non-Use”

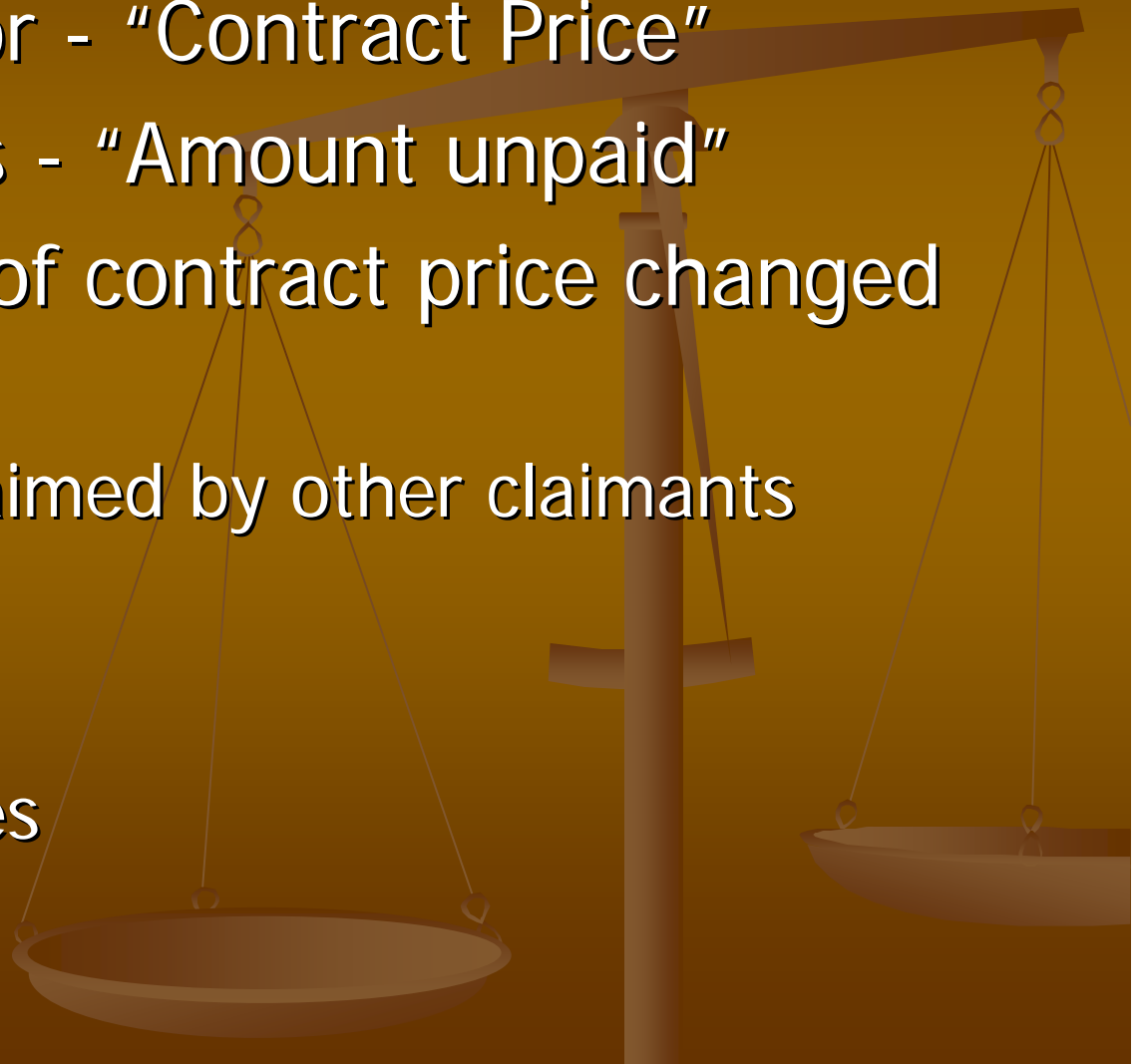
# Purchased Tools & Equipment

- 1. Purchased for the Project; and
- 2. Used in the Project; and
- 3. No Substantial Value when the Project is Completed



# Calculation of Lien Amounts

- Prime Contractor - "Contract Price"
- Other Claimants - "Amount unpaid"
- Unpaid portion of contract price changed by:
  - Sum of liens claimed by other claimants
  - Payments
  - Change Orders
  - Breach Damages



# Lien Amount

(where contract amount is specified and work is substantially complete)

Original Contract Price

± Changes, Altered Specs

± Breach of Contract


- Claims of Lien Holders Claiming Through You

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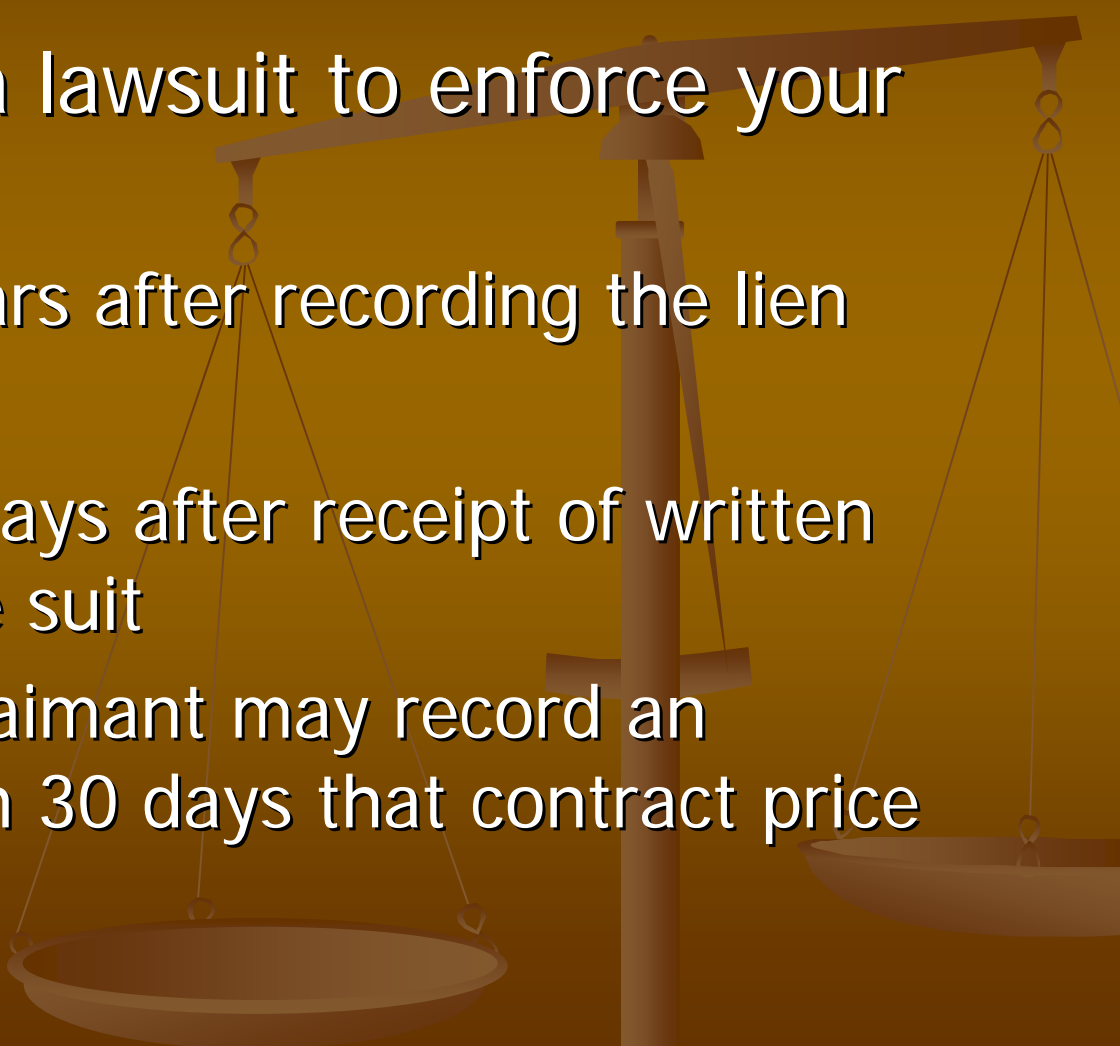
= Lien Amount



## Time Limitation for Recording a Lien

- A Lien may be recorded any time after entering into a real estate improvement contract
  - A Lien must be filed within 120 days after final furnishing of labor or materials
- 

# Duration of a Lien

- You must file a lawsuit to enforce your lien!
    - within two years after recording the lien
  - OR
  - Within thirty days after receipt of written demand to file suit
  - Exception : Claimant may record an affidavit within 30 days that contract price is not yet due
- 

# Preparing and Recording Liens



- Statute Specifies Content
  - 1. Claimant - Name and Address
  - 2. Contracting Owner - Name and Address
  - 3. Real Estate Improved (Legal Definition)
  - 4. Name and Address of who you contracted with
  - 5. Date last labor or material was furnished
  - 6. Lien Amount (or Good Faith Estimate)
- Acknowledged, Signed and Recorded



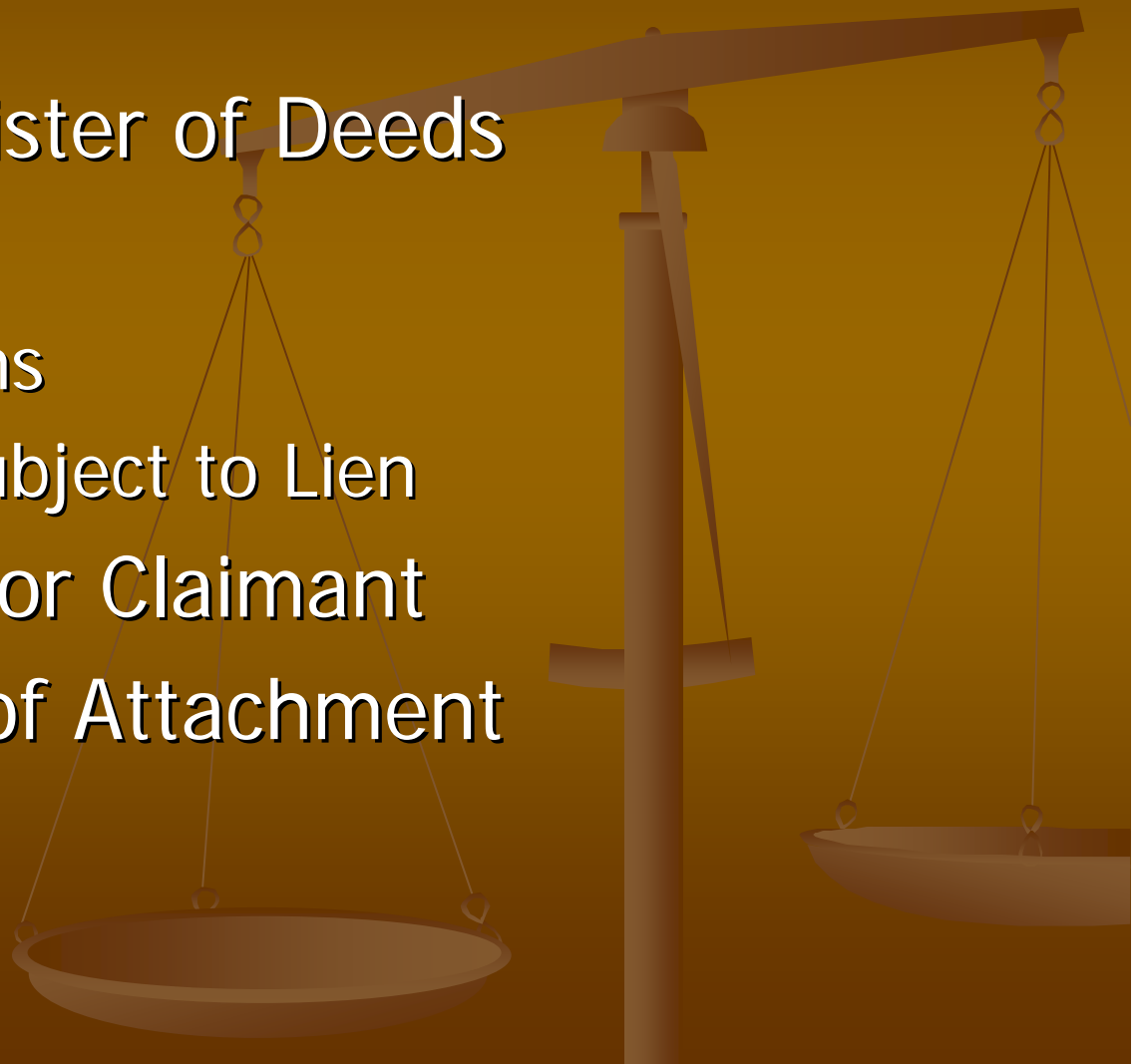
# Determining Lien Priority



- Liens attaching at the same time
  - Equal priority
  - Share in proceeds pro rata based on each liens ratio to total
- Liens attaching at different times
  - Priority determined by order of attachment

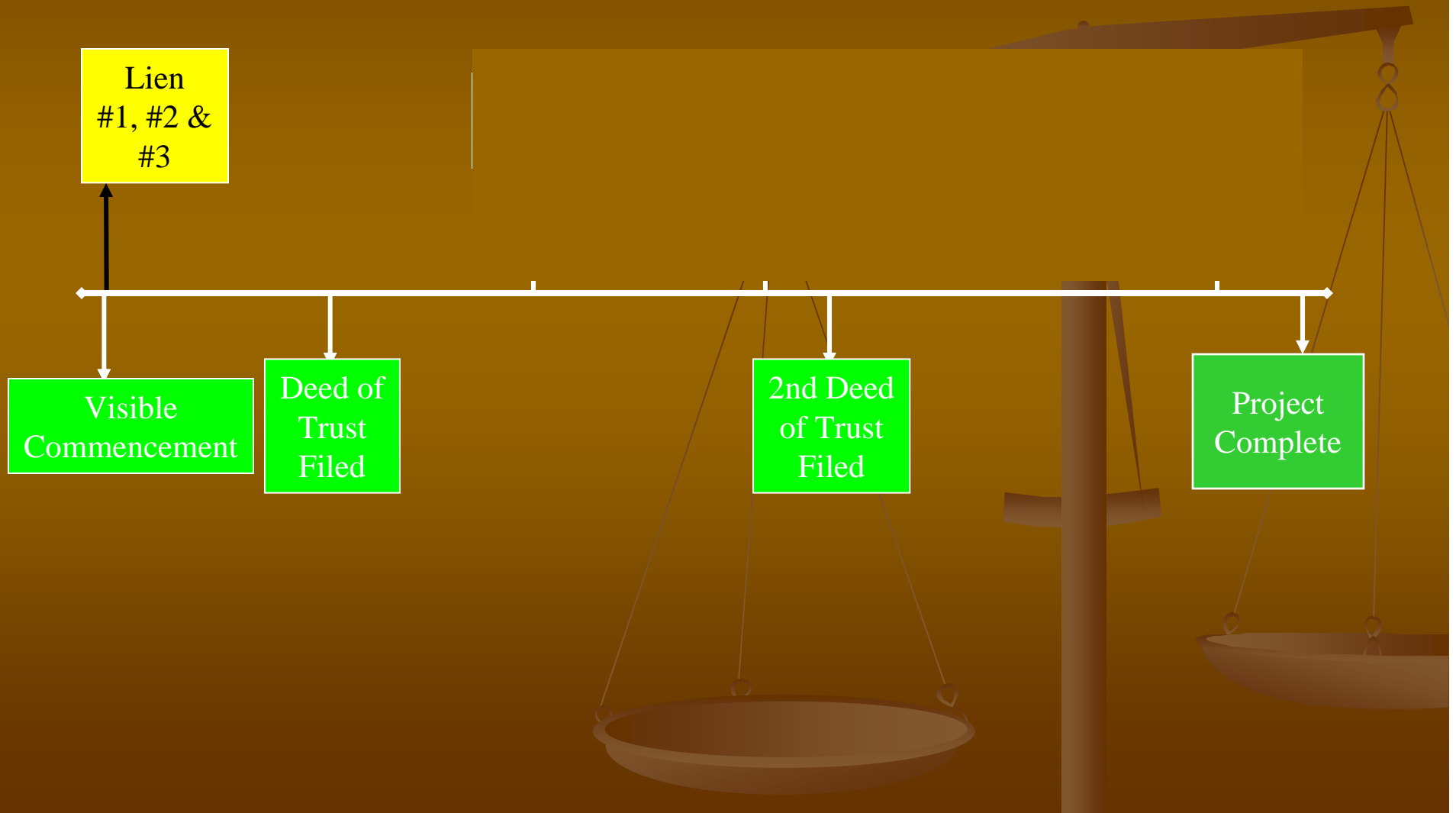
# Notice of Commencement

- Filed with Register of Deeds
- Controls
  - Priority of Liens
  - Real Estate Subject to Lien
- File by Owner or Claimant
- Cuts off Date of Attachment



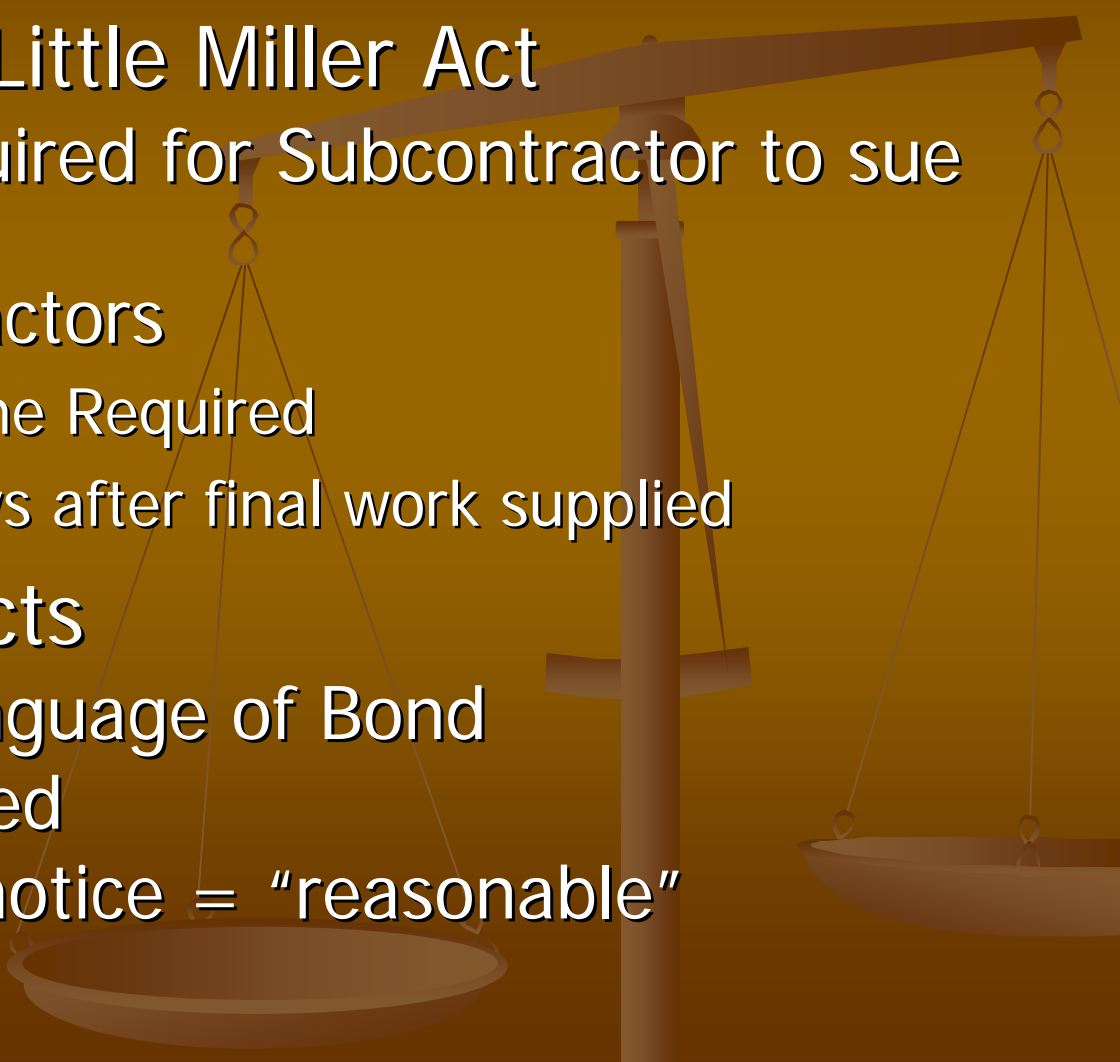
# No Notice of Commencement

## Priorities for Commercial Real Estate



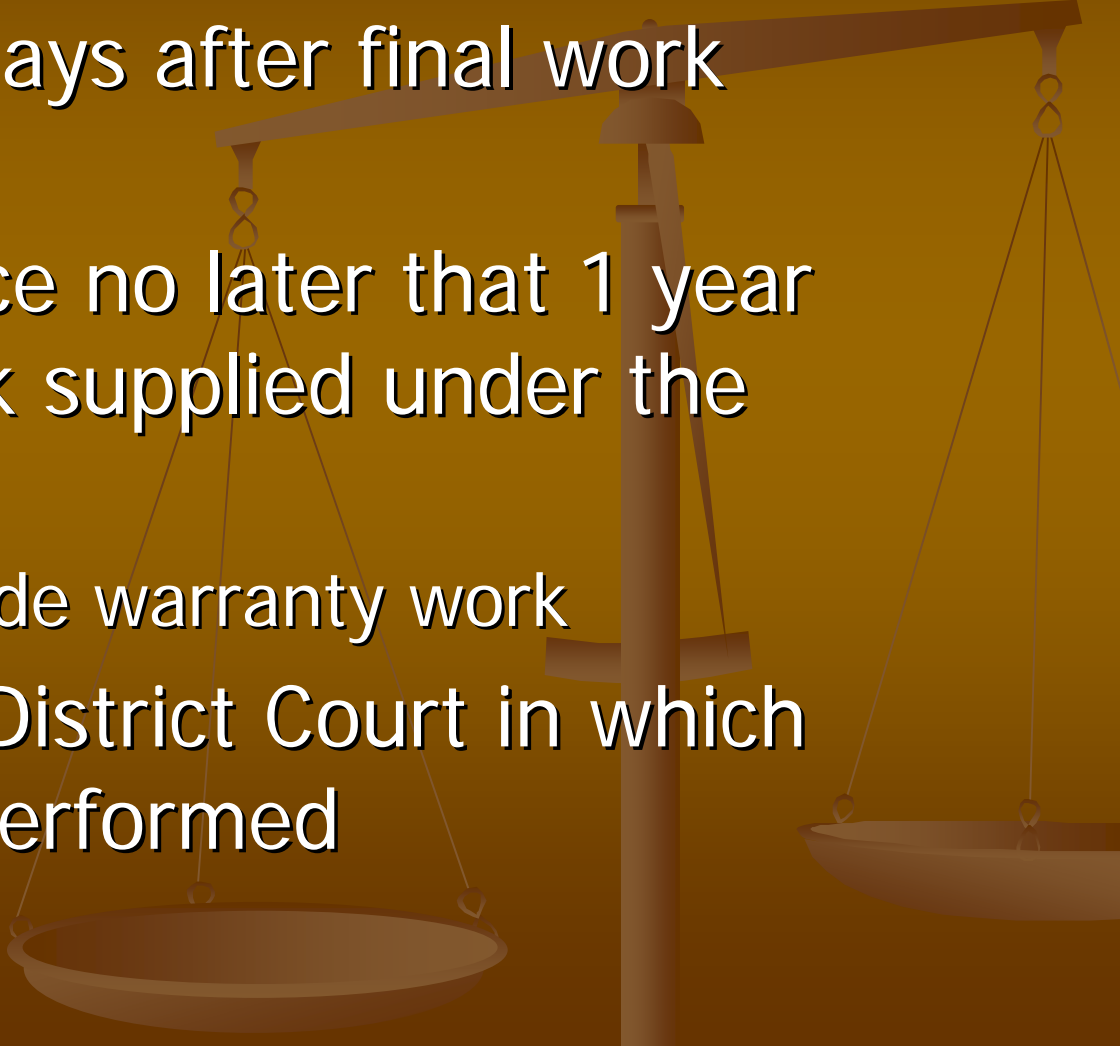
# Bond Basics

## Notice Requirements

- Miller Act and Little Miller Act
    - No notice required for Subcontractor to sue Surety
    - Sub-subcontractors
      - Notice to Prime Required
      - Within 90 days after final work supplied
  - Private Contracts
    - Defined by language of Bond
    - Strictly enforced
    - "Immediate" notice = "reasonable"
- 

# Bond Basics

## Filing Suits on Bonds Under Miller Act

- Must wait 90 days after final work supplied
  - Must commence no later than 1 year after final work supplied under the contract
    - does not include warranty work
  - United States District Court in which contract was performed
- 

# Bond Basics

## Filing Suits on Bonds Under Nebraska's Little Miller Act

- Must wait 90 days after final work supplied
  - Must commence no later than 1 year after final settlement of principal contract
  - Venue
    - County where defendant resides
    - County where action arose
    - County where any transaction occurred
    - If all nonresidents - in any county
- 