

**WHAT EVERY SURVEYOR SHOULD KNOW
ABOUT MECHANIC’S LIENS AND BUSINESS CONTRACTS¹**

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INTRODUCTION

These materials are designed as a review of the basics of Minnesota law regarding mechanic’s liens and business contracts, with a special emphasis on issues of importance to surveyors.

I. MECHANIC’S LIENS

A. Introduction.

A mechanic’s lien is a statute-based remedy to secure payment for labor, skill, materials, or machinery performed or furnished in the improvement of real estate. Functionally, a mechanic’s lien entitles you to a lien which attaches to the real property on which you performed work. The statutes are found at Minn. Stat. §§ 514.01 to 514.17 and 514.73-514.76. (<https://www.revisor.mn.gov/statutes/?id=514>).

B. Surveyors are Entitled to Mechanic’s Liens.

Minn. Stat. § 514.01 describes who is entitled to a mechanic’s lien and expressly includes one who “performs engineering or land surveying services with respect to real estate...”

C. What Types of Real Estate are/are not Subject to Mechanic’s Liens.

1. Homestead property is generally subject to mechanic’s liens. Minn. Stat. § 510.10.
2. Public property held for and devoted to a public use is not subject to mechanic’s liens. However, public property held for and devoted to a private use is subject to mechanic’s liens. *Comstock & Davis, Inc. v. City of Eden Prairie*, 5557 N.W.2d 213 (Minn. Ct. App. 1997).
3. Size limitation per Minn. Stat. § 514.03, Subd. 3:

“The lien shall extend to all the interest and title of the owner in and to the premises improved, not exceeding 80 acres, except in the case of

¹ **NOTE: THESE MATERIALS ARE PROVIDED FOR EDUCATIONAL PURPOSES ONLY. THEY DO NOT CONSTITUTE LEGAL ADVICE. THEY ARE NOT A SUBSTITUTE FOR CONSULTING WITH AN ATTORNEY REGARDING PARTICULAR ISSUES OR SITUATIONS.**

homesteaded agricultural land as used in section 273.13, subdivision 23, where the lien shall be limited to 40 acres.”

4. Mechanic’s liens can also attach to interests in real property, such as a buyer or seller’s interest. They can also attach to a lessor’s interest for improvements, but not for repairs. Minn. Stat. § 514.06.
5. A property owner who has not authorized an improvement can avoid a mechanic’s lien by giving written notice that the improvement is not being made at the owner’s request. The notice must be served on the person making the improvement or post the notice on the property within 5 days of when the owner first knew about the improvements; otherwise, a mechanic’s line can attach. Minn. Stat. § 514.06.

D. Pre-Lien Notice.

The first step to ensure mechanic’s lien rights is to provide pre-lien notice. It’s a vitally important step, as a contractor or subcontractor who fails to give a pre-lien notice is not entitled to a mechanic’s lien unless the claim falls under one of the exceptions noted below.

The specific requirements for pre-lien notice depend on whether the person is a contractor or a sub-contractor.

1. Pre-Lien Notice by Contractor—Minn. Stat. § 514.011, Subd. 1.

If there is a written contract between the contractor and the owner, the written contract must contain a pre-lien notice and a copy of the contract must be provided to the owner. If there is no written contract, pre-lien notice must be delivered to the owner personally or sent via certified mail within 10 days after the work is agreed upon.

The statute, Minn. Stat. §514.011, Subd. 1, also prescribes the exact language for the pre-lien notice, which must be printed in 10-point bold type or typewritten in capital letters. The requirement is strictly enforced.

2. Pre-Lien Notice by Subcontractor—Minn. Stat. § 514.011, Subd. 2.

By definition, a subcontractor will not have a contract with an owner. But a subcontractor must still provide pre-lien notice to the owner either personally or by certified mail within 45 days after the subcontractor has first furnished labor, skill, or materials for the improvement.

The required language for the subcontractor pre-lien notice is found in Minn. Stat. § 514.011, Subd. 2, which must be printed in 10-point bold type or typewritten in capital letters.

3. Exceptions.

Pre-lien notice is not required if one of the following exceptions is met:

- a. Same Ownership: The contractor is also an owner of the property, or the owner acts as his own contractor (he enters into separate contracts with subcontractors for work, he supervises the work, and he applies for a permit which indicates he is the contractor). Minn. Stat. § 514.011, Subd. 1; Subd. 4a.
- b. Multiple Dwelling: The property consists of more than four family units and is wholly residential, i.e., apartment buildings, condominiums, and townhouses. Minn. Stat. § 514.011, Subd. 4b.
- c. Nonagricultural and Nonresidential: The property is not in agricultural use and is wholly or partially nonresidential and (a) the improvement provides or adds more than 5,000 square feet of usable floor space; (b) the improvement is to real property where the existing property contains more than 5,000 square feet of usable floor space; or (c) the improvement is to real property which contains more than 5,000 square feet and does not involve the construction of a new building or an addition to or improvement of an existing building. Minn. Stat. §514.011, Subd. 4c.
- d. Subcontractor's Good Faith Compliance: A subcontractor makes a good faith effort to comply with the pre-lien notice statute and there is no damage to the owner or another lien claimant. This exception does not apply to contractors. Minn. Stat. § 514.011, Subd. 2(b).

E. Mechanic's Lien Statement.

The next step for enforcement of a mechanic's lien is the filing and service of a mechanic's lien statement.

1. Filing: The mechanic's lien statement must be filed of record with the county recorder and/or registrar of titles within 120 days of the claimant's last item of contribution, otherwise the claimant is not entitled to a mechanic's lien.
2. Service: The mechanic's lien statement must be served (personally or sent by certified mail) upon the owner (or owner's agent or person who entered contract with the contractor) within 120 days of the claimant's last item of contribution, otherwise the claimant is not entitled to a mechanic's lien. Minn. Stat. § 514.08, Subd. 1. A contractor must serve a mechanic's lien statement within 120 days of its subcontractor's last item of contribution.

3. Contents of Mechanic's Lien Statement: The requirements of the mechanic's lien statement are provided in Minn. Stat. § 514.08, Subd. 2:

“Such statement shall be made by or at the instance of the lien claimant, be verified by the oath of some person shown by such verification to have knowledge of the facts stated, and shall set forth:

- (1) a notice of intention to claim and hold a lien, and the amount thereof;
- (2) that such amount is due and owing to the claimant for labor performed, or for skill, material, or machinery furnished, and for what improvement the same was done or supplied;
- (3) the names of the claimant, and of the person for or to whom performed or furnished;
- (4) the dates when the first and last items of the claimant's contribution to the improvement were made;
- (5) a description of the premises to be charged, identifying the same with reasonable certainty;
- (6) the name of the owner thereof at the time of making such statement, according to the best information then had;
- (7) the post office address of the claimant. (The failure to insert such post office address shall not invalidate the lien statement);
- (8) that claimant acknowledges that a copy of the statement must be served personally or by certified mail within the 120-day period provided in this section on the owner, the owner's authorized agent or the person who entered into the contract with the contractor as provided herein; and
- (9) that notice as required by section 514.011, subdivision 2, if any, was given.”

4. Don't Overstate Amount Due: Minn. Stat. § 514.74 provides a severe penalty for a claimant who knowingly demands in the statement more than is justly due—the lien is forfeited. There must be a showing of fraud or bad faith; mere honest mistake or careless bookkeeping is not enough to void the lien.

F. Payment Options.

Owners have the right to withhold payment from the contractor as much as necessary to pay the subcontractors. Owners can also pay subcontractors directly and subtract the amounts from the amount due the contractor. Minn. Stat. § 514.07.

Upon request, owners are entitled to an itemized accounting from any lien claimant within 15 days after completion of the contract. A claimant must wait at least 10 days after the statement is furnished before commencing enforcement of the lien. Minn. Stat. § 514.07.

A claimant can take a promissory note from the owner, but the mechanic's lien continues unless the note specifically provides that the lien is terminated or the term of the note is longer than the date fixed by law for enforcing the lien. Minn. Stat. § 514.75.

A claimant can waive a mechanic's lien with a lien waiver, but to be enforceable the waiver must be supported by valid consideration, i.e., actual payment of the debt.

G. Priority of Mechanic's Liens.

The priority of a mechanic's lien compared to fellow lien claimants (for example, a mortgage) will often make the difference between whether or not you get paid.

1. **General Rule:** The priority of a mechanic's relates back to the actual and visible beginning of the improvement on the ground. This is when a mechanic's lien attaches. Minn. Stat. § 514.05, Subd. 1.
 - a. **Improvement:** An improvement is a permanent addition or betterment to the property that increases its value and is intended to increase value, as opposed to a routine repair.
 - b. **Actual and Visible:** Actual and visible literally means that the improvement can be seen during a reasonably diligent inspection of the property.
 - c. **On the Ground:** On the ground means the property on which a mechanic's lien is being claimed. Improvements to an adjoining property is not "on the ground."
 - d. **"The" (not "Any") Improvement:** The labor or materials furnished must be part of the improvement to which the claimant contributed.

Note that visible staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground. Minn. Stat. § 514.05, Subd. 2. Over the years this rule has gone back and forth, but the status of the law now is that visible staking does not trigger the attachment of the mechanic's lien. The statute, in full:

"Visible staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground referred to in this section. This

subdivision does not affect the validity of the liens of a person or the notice provision provided in this chapter and affects only the determination of when the actual and visible beginning of the improvement on the ground, as the term is used in subdivision 1, has commenced.”

Minn. Stat. § 514.05, Subd. 2.

The implication for surveyors is that your work alone is generally not enough to establish priority vs. junior lienholders. You need to take an additional step to ensure priority, which is discussed below in the next section.

2. Exceptions: A mechanic’s lien can obtain priority over a mortgagee in any of the following ways:
 - a. The claimant files a memorandum of the contract with the county recorder/registrar of titles before the mortgage is filed. Minn. Stat. § 514.05, Subd. 1. (Note that other mechanic’s liens will not relate back to this filing; other claimants must file their own memorandum or otherwise their priority is based on the actual and visible beginning of the improvement on the ground.) For the reasons stated above, surveyors should take this step as a matter of practice.
 - b. The mechanic’s lien statement is filed before the mortgage is filed. Minn. Stat. § 514.05, Subd. 1.
 - c. The mortgagee has actual notice of the unrecorded mechanic’s lien before the mortgage is filed. Minn. Stat. § 514.05, Subd. 1.

3. Other Priority Issues:

If a mechanic’s lien claimant has actual notice of an unrecorded mortgage, and there is no actual and visible beginning of the improvement on the ground before the mortgage was executed, the mechanic’s lien will be subordinate to the unrecorded mortgage.

Mechanic’s liens are generally coordinate and without priority among themselves, unless notice is given prior to actual and visible beginning of work.

4. Case Study of Surveyor Priority: *Kirkwold Construction Co. v. M.G.A. Construction, Inc.*, 513 N.W.2d 241 (Minn. 1994). *Kirkwold* involved a priority disputed between a surveyor and two mortgagees. The case also includes a useful summary of the evolution of mechanic’s lien law as it affects surveyors. Timeline of events in *Kirkwold*, all in 1989:

February 2 – Survey work is done on the property

October 30 – Mortgage recorded
November 2 – Actual and visible improvements begin

The surveyor was not paid in full and filed a mechanic's lien. Key fact: the mortgagee had actual knowledge of the survey work and knew or should have known that surveyor had not been paid. Result: surveyor has priority over mortgagee. Key passages from *Kirkwold*:

“...the plain language of the statute indicates that only a bona fide purchaser or mortgagee *without actual notice* shall be given priority over mechanics liens...” (emphasis in original)

“..if a bona fide purchaser or mortgagee has notice of lienable work performed by engineers or surveyors, its interest is subordinated to these liens for the work completed by the engineers and surveyors up to the time of the actual and visible improvement on the ground.”

5. Case Study of Architect Priority: *Riverview Muir Doran, LLC v. Jadt Development Group, LLC*, 790 N.W.2d 167 (Minn. 2010). *Riverview* is yet another priority case between a mechanic's lien claimant and mortgagee. Notably, MSPS submitted an amicus curiae brief in support of the claimant, an architectural firm. The architect did not file notice of its mechanic's lien and did work without a written contract. Prior to recording \$20 million in mortgages, the title company paid almost \$100,000 to the architect for what it thought was the amount the architect was owed. There was no evidence that the mortgagees were aware of any other unpaid work performed by the architect. Over a year later the architect filed a mechanic's lien for almost \$350,000. The Court held that the mortgagees had priority over the architect because the mortgagees did not have actual notice of any existing lien at the time the mortgages were recorded.
6. Another fairly recent, though unpublished, surveyor mechanic's lien case is *Metro Land Surveying & Engineering Co., Inc. v. Matthews*, 2010 WL 1966369 (Minn. Ct. App. 2010). Here the Court of Appeals reversed the district court and held that the surveyor was entitled to a mechanic's lien because the owner had knowledge of the work being done on their property (though the work was ordered by a prospective buyer of the property) and did not serve notice disclaiming authorization.

H. Enforcement.

Enforcement of a mechanic's lien is done by bringing a foreclosure action in district court, just as a judgment is foreclosed. The usual foreclosure notice, publishing, and service rules apply. There are some specific rules for mechanic's lien actions—see Minn. Stat. §§ 514.10-15. Note in particular the 1-year rule in Minn. Stat. § 514.12, Subd. 3, which applies to other mechanic's lien claimants, not owners and

mortgagees, and § 514.10, which allows the prevailing party in a successful mechanic's lien action to recover attorneys' fees. The district court can order the sale of the property by the sheriff. The owner has 6 months to redeem from the sale. Junior lien creditors have successive 7-day periods to redeem in the order of the priority of their liens.

II. CONTRACTS

A. Contract Basics. I.e., how it is established that a contract exists.

1. Elements:

"The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Associates, P.A. v. Leffert, Jay & Polglaze, P.A.* 756 N.W.2d 907, 918 (Minn. Ct. App., 2008)

2. Offer and Acceptance Must Match Exactly:

"Minnesota follows the 'mirror image rule,' which requires that an acceptance be 'coextensive with the offer and may not introduce additional terms or conditions.'" *Id.*

3. Consideration. Consideration means giving something of value, or giving *up* something of value, in exchange for something from another party:

"Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party . . . As the Minnesota Supreme Court explained in *Baehr [v. Penn-O-Tex Oil Corp.]*, 104 N.W.2d 661, 665 (1960): 'Consideration thus insures that the promise enforced as a contract is not accidental, casual, or gratuitous, but has been uttered intentionally as the result of some deliberation, manifested by reciprocal bargaining or negotiation.'" *Id.*, at 919-20.

The purpose of consideration is to separate agreements *intended to be binding* from gifts, accidental implications, casual talk, and so forth.

4. Other Alternatives. Even if a contract cannot be shown to exist, other "quasi-contractual" remedies may be available, such as promissory estoppel:

"American courts adopted [a] cause of action based on good-faith reliance to enforce promises unsupported by consideration-not as a consideration substitute, but rather as a doctrine based on reliance that the courts could use to prevent injustice . . . Eventually, the American courts characterized this line of cases as 'promissory estoppel' . . . the 'application of promissory estoppel requires the analysis of three elements: (1) Was there a clear and definite promise? (2) Did the promisor intend to induce reliance, and did such reliance occur? (3) Must the promise be enforced to prevent injustice?' *Id. Olson v. Synergistic Technologies*

Business Systems, Inc. 628 N.W.2d 142, 151-52 (Minn., 2001) quoting *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 269, 372 (Minn., 1995).

B. Written Agreements.

1. Enforceability. Written contracts are more easily enforced because the terms are easier to prove.
2. Understanding. Reducing an agreement to a writing causes parties to come to a better understanding about each others' expectations. At times, that will prevent litigation.
3. Favorable Terms. Terms the parties consider to be advantageous which do not apply otherwise can be made part of a written contract.
4. The Statute of Frauds requires certain kinds of contracts to be in writing, or they will be unenforceable. Examples are:
 - a. Every agreement that by its terms is not to be performed within one year from the making thereof. Minn. Stat. § 513.01.
 - b. Every special promise to answer for the debt, default or doings of another. Minn. Stat. § 513.01.
 - c. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry. Minn. Stat. § 513.01.
 - d. Every agreement, promise or undertaking to pay a debt which has been discharged by bankruptcy or insolvency proceedings. Minn. Stat. § 513.01
 - e. Conveyance of any estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto. Minn. Stat. § 513.04
 - f. Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands. Minn. Stat. § 513.05.
 - g. Grants of trust. Minn. Stat. §513.03.
 - h. Credit agreements. Minn. Stat. § 513.33.
 - i. Commission agreements for real estate brokers. Minn. Stat. § 82.85 (this is actually a provision of the broker's licensing law, not the Statue of Frauds).

4. What if A Written Contract Is Not Used?
 - a. Memorializing an contract in another writing will at times help prove up the terms if some form of enforcement action is taken, including litigation.
 - b. E.g., confirming e-mail.

C. Frequently Used Contract Terms.

1. Date of the Contract, and Identification of the Parties to Contract.
2. Identification of Property.
 - a. Address.
 - b. When a legal description is obtained and used in a contract, it can expedite the preparation and filing of a mechanic's lien statement if that should become necessary.
3. Payment Terms.
 - a. Basis of fees: Hourly, flat fee, etc.
 - b. Should be consistent with client expectations. See MSPS publication, Engagement of Land Surveying Services, at the MSPS website: www.mnsurveyor.com/displaycommon.cfm?an=1&subarticlenbr=2
 - c. Reimbursement to Surveyor of any out-of-pocket costs
 - d. Billing specifics: Monthly invoices, bill at end of work, etc.
 - e. May provide for interest to accrue on all amounts not timely paid.
4. Scope of Work.
 - a. Most recent version of the most common standard industry standard is the "ALTA Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys 02/23/11" (hereinafter, "ALTA Standard"), www.alta.org.
 - b. The ALTA Standards provide "[t]he client shall request the survey or arrange for the survey to be requested, and shall provide a *written authorization* to proceed from the person or entity responsible for paying for the survey. . . . The request shall specify that an "ALTA/ACSM LAND TITLE SURVEY" is required and which of the optional items listed in Table A herein, if any, are to be incorporated. . . The scope of work related to such properties should be discussed with the client, lender and insurer, and *agreed upon in writing* prior

to requesting the survey. The client may need to secure permission for the surveyor to enter upon the property to be surveyed, adjoining properties, or offsite easements." [Emphasis added].

- c. The ALTA Standards are promulgated - that is, declared and circulated - by the American Land Title Association, American Congress on Surveying and Mapping, and the National Society of Professional Surveyors, Inc.
- d. The ALTA Standards provide industry standards for measurements, records research, field work, and other requirements such as what a survey must include, "deliverables"/mode of presentation, and mode of certification.
- e. Table A, of course, sets out "Optional Survey Responsibilities and Specifications." Table A provides "The items of Table A must be negotiated between the surveyor and client. "
- f. Lawyers will view these standards through the prism of a transaction. Typical purchase agreement language will read broadly: "Within 20 days after the Effective Date, Seller shall provide Purchaser with an ALTA/ACSM Land Title Survey of the Subject Premises, procured at Seller's expense, and prepared by a land surveyor licensed in Minnesota." But owners, lawyers and (most often) lenders may have more specific requirements.
- g. Of course, not all surveys must meet the ALTA standards.
- h. While the standards of care applicable to the surveying profession are outside the scope of this presentation, it is important to take note that statutes may cause other standards to apply in some situations. Two examples: Minn. Stat. § 508.47 lists requisites for registered land surveys. And, Minnesota Statutes Chapter 505 governs plats.

5. Mechanic's Lien Language.

As is referenced above, if there is a written contract between the surveyor/contractor and the owner, the written contract must contain a pre-lien notice and a copy of the contract must be provided to the owner.

6. Identification of Project Participants.

- a. Owner
- b. Contractor
- c. Subcontractor
- d. Sub-subcontractor /"Second-Tier" Subcontractor.
- e. Agreements may identify roles, addresses and (in case of entity), and officers or contact persons; important where the pre-lien notice requirements for mechanic's lien differ for contractors and subcontractors.

- f. May clarify that the surveyor is not responsible for the work of other parties and does not have authority to supervise them, or stop their work.

7. Date By Which Work is to Be Completed.

- a. "Best Efforts" language indicates that surveyor will use make best efforts to complete the work by a due date.
- b. Force Majeure (i.e., "superior force") / Acts of God language provides that the party who is to provide services will not be held responsible for certain events beyond its control.

E.g., "[Contractor] was not liable for delay caused by force majeure, which was defined by the agreement as any condition or occurrence 'not within the reasonable control' of the party claiming its existence, including but not limited to 'floods, storms, strikes, * * * acts of God, unavailability of materials, delays of common carriers, * * * failure of equipment, explosions, failure in obtaining permits, [and] delays by the Owner.'" *Johnson Bros. Corp. v. Rapidan Redevelopment Ltd. Partnership*, 423 N.W.2d 725, 727 (Minn.App.,1988)

8. Standard of Care.

- a. Will establish the standard to which the surveyor is to be held.
- b. The ALTA Standards provide one such standard.
- c. Alternative language is used at times, and may include disclaimers:

"Surveyor's Services shall be conducted with the same level and degree of skill ordinarily exercised by members of its profession operating in a similar locality, at a similar time and under similar conditions and circumstances. Except as provided in this Section, no other warranties, express or implied, are offered or intended by the Surveyor."

North Carolina Society of Surveyors, http://www.ncsurveyors.com/images/uploads/pdfs_docs/sample_copy_of_contract.pdf

9. Attorney's Fees.

- a. As a general rule "a party may not recover attorney fees unless a statute or contract provision expressly allows such recovery." *State Bank of Cokato v. Ziehwein*, 510 N.W.2d 268, 270 (Minn. Ct. App., 1994)

- b. Such statutes are rare. However, one is the mechanic's lien statute, which allows the prevailing party in a successful mechanic's lien action to recover attorneys' fees. Minn. Stat. § 514.10.
- c. Therefore, contacts often include provisions for attorney's fees in order to aid enforcement of the contract. E.g., "in the event of default hereunder, the defaulting party shall pay all reasonable attorneys' fees and court costs incurred by the non-defaulting party in connection with the enforcement of the rights and remedies of the non-defaulting party hereunder."

10. Right To Enter Upon Land.

- a. Contacts can include a provision providing for surveyor's right to enter upon the land to be surveyed.
- b. The Minnesota Statutes provide "[i]t is lawful for any surveyor to enter upon any land for the purpose of locating existing survey or reference monuments or landmarks, provided, however, such surveyor shall be responsible to the landowner for any and all damages as a result of such entry, and no surveyor may enter upon any land unless first notifying the owner or occupant of the intended entry for such purpose." Minn. Stat. § 505.31.
- c. Contract may provide a disclaimer that the land, plants or improvements may be disturbed, and may provide that the surveyor is not responsible to restore the property to its prior state.

11. Form and Use of Work Product.

- a. Can indicate number of copies and form of final product to be supplied to client.
- b. Can limit reliance on unsigned "draft" documents.
- c. Can require client to indemnify surveyor and hold it harmless for any liability arising from the client's assignment of the survey to a third party without Surveyor's prior written consent.

12. Termination. Termination provisions vary depending on the circumstances of termination.

- a. At Will. May provide for notice and partial compensation if surveyor is terminated without cause prior to completion of work. Or, could provide that there is to be no termination without cause. Can provide for what is to happen to work product in case of such termination.

- b. For Cause. May provide for notice of deficiency in performance, and opportunity to cure, with termination to occur if said deficiencies are not corrected. Should provide for what is to happen to work product in case of such termination.

13. Unforeseen Conditions. If such factors arise, may:

- a. Provide for a change order; or
- b. Termination, if alternate arrangements which are satisfactory to both parties cannot be made.

14. Insurance. Can provide for a surveyor to obtain the following insurance:

- a. Commercial General Liability Insurance, typically for a stated minimum amount;
- b. Professional liability insurance, typically for a stated minimum amount;
- c. Workers' compensation insurance, typically for a stated minimum amount.

Can also require:

- d. Proof of insurance to the party retaining surveyor's services, typically in the form of insurance certificates such as the ACORD 25 Certificate for liability insurance;
- e. Notice (e.g., of 10 or 30 days) prior to cancellation of same.

Consult with your insurance provider before finalizing contract terms to make sure required insurance is available and affordable.

15. Arbitration Clause.

- a. Can mandate arbitration; thus, the parties are compelled to go this route when presumably, at least one of them desires not to, otherwise they could agree to it at the later time.
- b. May provide for locale (e.g., Hennepin County, Minnesota).
- c. May provide for arbitrator (e.g., American Arbitration Association, headquartered in Dallas, TX).

16. Limitation on Liability.

- a. Can provide surveyor's liability is to be limited to some stated amount.
- b. Can seek to eliminate consequential damages.
- c. Could provide for specific consideration for such provisions.

17. Indemnification.

- a. Can provide for parties to indemnify each other in certain circumstances:

E.g: "To the fullest extent permitted by applicable law . . . the parties shall indemnify and hold harmless each other. . . .from and against any and all losses, liabilities, costs, and expenses of any kind, including reasonable attorneys' fees, which one party, its agents, employees, and subcontractors may incur, become legally responsible for, or pay out as a result of bodily injury, including death, to any person, damage to any property, any property, or both, to the extent caused by the other party's negligence or willful misconduct. Surveyor and Client shall not be liable to the other for any special, indirect, incidental or consequential loss or damages including, without limitation, lost profits and loss of use arising from or related to the Services provided by Surveyor pursuant to this Agreement." Source: North Carolina Society of Surveyors, http://www.ncsurveyors.com/images/uploads/pdfs_docs/sample_copy_of_contract.pdf

- b. But: such an agreement could create an uninsured obligation for the indemnifying party, due to the "contractually assumed liability" exclusion in many policies.

See, e.g., Acceptance Ins. Co. v. Ross Contractors, Inc., 2005 WL 1870688, 3 (Minn. Ct. App. 2005) (noting, "the contractually-assumed liability exclusion applies where the insured has contractually assumed the liability of a third party, as in an indemnification or hold harmless agreement," quoting from *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 81 (Wis.2004)).

- 18. Common Miscellaneous Terms. May include the following, in addition to other provisions.
 - a. Choice of Law: E.g., "This Agreement shall be governed by the laws of the State of Minnesota."
 - b. Choice of Forum: E.g., "Any dispute pertaining to this Agreement shall be adjudicated before the Hennepin County District Court in the State of Minnesota."
 - c. Integration: E.g., "This Agreement contains the entire agreement of the parties and this Agreement can be modified only in writing. The parties hereby acknowledge that there exist no agreements, promises or undertakings between them except as set forth in this Agreement."
 - d. Counterparts: "This Agreement may be executed in counterparts, which shall together constitute one and the same instrument."
 - e. Facsimile/PDF: E.g. "The parties agree that this Agreement may be signed in counterparts and that a signature by facsimile is the same as an original."

19. Time Limits / Statutes of Limitation and Repose.

- a. Minn. Stat. § 541.052 provides:

"Subdivision 1. Land surveys. Except where fraud is involved, no action to recover damages for an error in the survey of land, nor any action for contribution or indemnity for damages sustained on account of an error, may be brought against any person performing the survey more than two years *after the discovery of the error*, nor in any event more than *ten years after the date of the survey*.

Subdivision 2. Action allowed. Notwithstanding the provisions of subdivision 1, in the case of action which occurs *during the ninth or tenth year after the date of the survey*, an action to recover damages may be brought within two years after the date on which the action occurred, but in *no event may an action be brought more than 12 years after the date of the survey*."

[emphasis added].

- b. The two year limitation is a statute of limitation; the latter is a statute of repose:

"There is a meaningful distinction between a statute of limitations and a statute of repose. *See, e.g., Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 54–55 (Minn.2005) (discussing how a statute of limitations bars an action if a plaintiff does not file suit within a set period of time after a cause of action accrues while a statute of repose bars a suit a fixed number of years after the defendant has acted, regardless of the timing of a plaintiff's discovery of an injury). As a general rule, when a claim is barred by a statute of repose, subsequent repeal of that repose period cannot revive the claim. *See Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591 (Minn.App.1994)." *U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc.*, 749 N.W.2d 98, 102 (Minn. Ct. App., 2008)

- c. Though it is rare, statutes of limitation defenses can be waived by contract.
- d. Contracts can also establish shorter time limits.

E. Contract Form Examples.

1. AIA Document G601
- a. Drafted by American Institute of Architects.
- b. Addresses relevant contract terms.

- c. Takes form of proposal which is submitted to owner. If owner accepts, it becomes the agreement between the parties.
 - d. See <http://www.aia.org> for more information.
2. EJCDC E-560 Standard Form of Agreement between Engineer and Land Surveyor for Professional Services
- a. Prepared by the Engineers Joint Contract Documents Committee.
 - b. Applicability: "Standard Form of Agreement between Engineer and Land Surveyor for Professional Services is used when land survey services are provided to the engineer by specialists who are not necessarily engineers."
 - c. See <http://www.asce.org/Product.aspx?id=2147487569&productid=150007184>.
3. Agreement for Professional Surveying Services/ North Carolina Society of Surveyors.
- a. Form drafted by counsel for North Carolina surveyor organization.
 - b. May be significant differences in the law from state to state.
 - c. Can be viewed at:
http://www.ncsurveyors.com/images/uploads/pdfs_docs/sample_copy_of_contract.pdf